



FILE: B-207627

DATE: March 7, 1983

MATTER OF: GSA—Acquisition of Strategic and Critical Materials by Barter Exchange Under 50 U.S.C. § 98e(c).

- DIGEST: 1. Proposal by GSA to sell, on behalf of contractor, excess Stockpile materials under the Strategic and Critical Stock Piling Act, 50 U.S.C. § 98e(c), where title has been transferred to the contractors in exchange for other needed Stockpile materials, is legally within the parameters of GSA's existing barter authority. Where a statute confers duties in general terms, all powers and duties incidental and necessary to make such authority effective are included by implication. Congress has encouraged barter transactions and the proposed plan helps accomplish the purposes of the Act. However, since it may have a significant effect on congressional control over the Stockpile transaction, GSA should discuss the proposal with its congressional oversight and appropriations committees before implementation.
2. Where United States is acting as agent in sale of excess Stockpile material on behalf of contractors to whom title of materials has been transferred, GSA may pay proceeds from the sale directly to the contractor rather than deposit it to the credit of the National Defense Stockpile Fund, 50 U.S.C. § 98h, since the proceeds are for the benefit of the contractor rather than the United States.

This decision is in response to a submission from the General Counsel of the General Services Administration (GSA) asking:

(1) whether it may sell, on behalf of contractors, excess Stockpile materials in the custody of the Government but for which title has been transferred to the contractors in exchange for other needed Stockpile materials; and,

(2) whether it may pay the proceeds of the sale directly to the contractor rather than deposit it to the credit of the National Defense Stockpile Fund.

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For the reasons stated below, we answer both of these questions in the affirmative. However, while we find that these proposals are legally within the parameters of GSA's existing authorities, they represent a new use of these authorities which may have a significant effect on the extent of congressional control over Stockpile transactions. We therefore recommend that GSA's new approach be discussed with its congressional oversight committees and appropriations committees before it attempts to implement it.

These questions arose in connection with a proposed agreement for the acquisition of 1.2 million long dry tons of bauxite by the Government of the United States (represented by the GSA) from the Government of Jamaica. Under the proposed agreement, part (\$18.84 million) of the total purchase price (\$50.688 million) will be paid by using the barter authority set forth in section 6 of the Strategic and Critical Materials Stock Piling Act (Act),<sup>1/</sup> as amended, 50 U.S.C. § 98e(c).

Although GSA was authorized to use excess Stockpile materials in payment for needed Stockpile material prior to 1979 by language contained in the annual "Operating Expenses" appropriations for the Federal Supply Service (see, for example, the Treasury, Postal Service, and General Government Appropriations Act, 1979, October 10, 1978, 92 Stat. 1010), and was also authorized by various provisions of law to barter other surplus Government property for various Stockpile materials, GSA apparently made only limited use of these authorities. However, now that GSA is embarking on a new program to restructure the Stockpile, it is exploring a wider use of this authority to acquire a substantial portion of needed materials.

GSA has indicated that its planning under 50 U.S.C. § 98e(c) originally focused on a commodity-for-commodity exchange and contemplated that solicitations for needed commodities would state that

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<sup>1/</sup> The National Defense Stockpile (Stockpile) was created in 1979 (when the Act was totally rewritten) by section 3 of the Act, as amended. 50 U.S.C. § 98b transferred materials maintained by the Government under a number of other provisions of law to the Stockpile. Management and operational control of the Stockpile were vested in the President who delegated this authority to the Administrator of General Services. Executive Order No. 12,155, 3 C.F.R. 426 (1979).

payment would be made with excess materials, and included a list of these materials. Offerors would use a dollar figure to establish the price of the needed commodity; however, the successful offeror would not be paid in cash, but rather in excess materials of equivalent value to the dollar amount of the offer. However, GSA identified a number of problems with this approach which lessened its appeal and caused it to seek alternatives to this approach.

GSA described these problems as follows:

"1. Valuation of excess materials. The materials which are excess to stockpile requirements frequently do not have an established market price. For example, certain commodities in the stockpile vary substantially from current industry specifications; others may have deteriorated due to long-term storage. Without a reliable price standard, it is difficult to determine the value of the excess materials relative to the value of the needed commodities.

"2. Fluctuation in the price of exchange materials. Even when the value of the exchange materials can readily be determined by published market prices or commodity exchange prices, rapidly changing market conditions can make exchange materials an unattractive form of payment. The markets for excess materials may be volatile. Within an eight-month period, tin, an excess material which comprises a substantial portion of GSA's stockpile disposals, climbed from a price of about \$6.00 per pound to a price of \$7.45, then fell back to the \$6.00 range. Faced with such drastic market fluctuations, combined with long delivery periods for the excess materials, potential suppliers are likely to raise their prices for the needed commodities to cover market contingencies.

"3. Use of commodity brokers. The firms supplying the Government with stockpile materials frequently have no need for the materials which would be offered in exchange. In these cases, interested firms may have to employ a commodity broker to dispose of the payment commodity. Brokerage fees could range from 2 percent up to 7 percent of the market price of the exchange material. These expenses may result in increased prices to the Government for the commodity being acquired.

"4. Potential for market disruption. Section 6(b) of the Stock Piling Act provides:

. . . To the maximum extent feasible -

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"(2) efforts shall be made in the acquisition and disposal of such materials to avoid undue disruption of the usual markets of producers, processors, and consumers of such materials and to protect the United States against avoidable loss . . .

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"To avoid market disruption in the disposal of excess stockpile materials, GSA closely monitors commodity markets to determine the proper quantities of materials to be sold and to establish the proper schedule for the sales. Once excess materials are designated for exchange and a delivery schedule is established, GSA could lose the control over the exchange commodities in the market. This problem could be exacerbated if the contractor did not use the material, but rather hired a commodity broker to dispose of it. Given a substantial amount of excess material, a broker possibly would have the opportunity to influence the market for that material."

Consequently, rather than use of a direct commodity-for-commodity exchange, GSA has proposed that the following method be employed under the proposed agreement with Jamaica.

After receipt and acceptance of a shipment of needed Stockpile material by the Government, GSA would designate as an exchange material one of its excess commodities which is available for sale. The value of the designated material would be calculated on the basis of the highest acceptable bid received. Title to an amount of exchange material equal in value to the quantity of needed material accepted by GSA would be transferred to the contractor. However, the contractor would never take physical possession of the payment material. Instead, GSA would sell the material on behalf of the contractor, with the contractor signing the sales documents. The purchaser would make payment directly to the contractor. Upon notification by the contractor that payment had been received, GSA would release the material for shipment to the purchaser.

GSA believes that under this alternative, the problems identified with direct commodity-for-commodity exchange would be lessened. The value of the exchange materials would be determined by the amounts of the bids received, and, according to GSA, this is a more accurate indicator of value than a negotiated price or a market index. The risk of drastic market fluctuations which can have an effect on commodity-for-commodity exchanges would be removed. Under the exchange transactions proposed by GSA, it would not be bound either to deliver a specific commodity for exchange or to a predetermined delivery date. If market conditions require that sales of one commodity be suspended or curtailed to avoid market disruptions, GSA could designate for exchange any other excess material which is available for sale in the GSA disposal program.

- GSA SALE ON BEHALF OF CONTRACTORS -

The barter provision as set forth in 50 U.S.C. § 98e(c) provides:

"(c)(1) The President shall encourage the use of barter in the acquisition of strategic and critical materials for, and the disposal of materials from, the stockpile when acquisition or disposal by barter is authorized by law and is practical and in the best interest of the United States.

"(2) Materials in the stockpile, the disposition of which is authorized by law, shall be available for transfer at fair market value as payment for expenses (including transportation and other incidental expenses) of acquisition of materials, or of refining, processing, or rotating materials, under this subchapter.

"(3) To the extent otherwise authorized by law, property owned by the United States may be bartered for materials needed for the stockpile." (Emphasis supplied.)

While nothing in this subsection specifically authorizes disposal in the manner proposed, nothing in this subsection or any other provision of the Act specifically precludes it. While a commodity-for-commodity exchange between the Government and a supplier of a needed Stockpile material may be the most obvious method of "barter" or "transfer" to pay for an acquired material, it does not mean that this is the only method authorized by the provision. We note that as a general rule of statutory construction, where a statute confers duties in general terms, all powers and duties

incidental and necessary to make such authority effective are included by implication. See United States v. Bailey, 34 U.S. 238 (1835); Daly v. Stratton, 326 F.2d 340 (7th Cir. 1964); United States v. State of Louisiana, 265 F. Supp. 703 (E.D. La. 1966), aff'd 386 U.S. 270 (1967); Sutherland Statutory Construction, 4th ed., §§ 55.02, 55.04. Additionally, we have previously approved liberal application of an agency's barter authority when necessary to accomplish legislative purposes. See 52 Comp. Gen. 436 (1973).

In providing permanent barter authority to the President for use in acquiring Stockpile materials, the Congress intended to encourage both its use for acquiring needed materials and to reduce the need for resort to the Treasury for funds for this purpose. See H.R. Rep. No. 96-46 accompanying H.R. 2154 (the bill which became the 1979 revision to the Act) p. 6 (1979). By encouraging the use of barter for the acquisition of needed goods, it helped to assure accomplishment of the Act's overall purpose, that is, reduction of the dangerous and costly dependence of the United States upon foreign sources of supplies of strategic and critical materials in times of national emergency. 50 U.S.C. § 98a(b). Thus to the extent the proposed plan facilitates the use of excess Stockpile materials to pay for the acquisition of needed materials, it helps accomplish the purposes of the Act and helps reduce the need for resort to the Treasury for payment.

Furthermore, Congress had been made aware of the need to adjust barter transactions to the realities of the worldwide laws of supply and demand and that direct commodity-for-commodity exchanges between the Government and a national supplier were not the only transactions undertaken under previously existing barter authority. For example, during hearings held on H.R. 4895, 95th Congress,<sup>2/</sup> before the House Armed Services Committee, the Department of Agriculture provided testimony describing the operation of barter programs for the acquisition of Stockpile materials, as follows:

#### "HOW BARTER CONTRACTS WORKED

"From its inception, barter activities were accomplished under contracts signed by CCC and private U.S.

<sup>2/</sup> H.R. 4895, 95th Congress, was the predecessor of H.R. 2154, 96th Congress, which totally revised the Strategic and Critical Stock Piling Act. H.R. 4895 passed the House and many of its provisions, including barter authority, were incorporated in H.R. 2154. See Hearings on H.R. 2154 before the Seapower and Strategic and Critical Materials Subcommittee of the House Armed Services Committee, 96th Cong., 1st Sess., p. 1 (1979).

firms. Based on stockpile needs, invitations were issued to U.S. companies to submit offers to deliver strategic materials and export agricultural commodities. These offers were reviewed by specialists in GSA (the custodian of Government stockpiles) and other Government agencies with respect to the offered price of the material, specifications and related matters. Usually, there was considerable negotiation between CCC and an offeror before a contract was signed.

"Materials were delivered by contractors to U.S. ports and transported by GSA to stockpile locations. Contractors received agricultural commodities from CCC inventories and shipped them abroad in accordance with their contracts. Most contracts ran from 1 to 3 years and were valued at between \$1 and \$5 million.

#### "TYPES OF CONTRACTS

"Bilateral.--The first barter transactions required the sale of the agricultural commodities to the country which furnished the strategic materials. It soon became apparent that many of the countries furnishing materials were unable to absorb an equivalent value of wheat, corn, or other commodities. Therefore, a second type of barter contract was developed--the multilateral.

"Multilateral.--Under this kind of contract, material would originate in one country and counterpart agricultural commodities would be sold to one or more different countries. Contractors were obligated to move an equivalent value of needed materials, goods or equipment produced in the recipient countries to the country supplying the strategic materials. Multilateral contracts were difficult to negotiate and complex to administer. Ultimately, they gave way to a third type of contract--open-end.

"Open-end.--These contracts permitted the delivery of materials from one country and the export of commodities to one or more different countries--countries which were not good U.S. commercial markets for the commodity. This proved to be the easiest method to negotiate and

administer and eventually replaced the other two methods."<sup>3/</sup>

In further elaboration of the problems encountered in operating barter programs, Francis A. Woodling, Deputy Assistant Sales Manager, Commercial Export Programs, Department of Agriculture testified:

"Since I am here representing the Department of Agriculture, permit me to mention a few of the problems we encountered in working out barter or exchanges of our agricultural surpluses for strategic materials. Very quickly, we discovered that those countries which had strategic materials were sometimes those least interested in exchanging them for U.S. grains.

"Take the last strategic materials barter contract we entered into, the one for rutile originating in Australia. Australia is one of the world's larger grain producers. It was not interested in accepting U.S. wheat for its rutile. Or consider those less developed countries which had strategic materials of considerable value but had neither the desire nor the capacity to absorb agricultural commodities in the vast quantities which would represent the value of the industrial diamonds or the quality manganese [sic] ore they were able to deliver to us.

"These kinds of situations led us to adopt mechanisms which tended to distort the popular concept of a barter. Most people think of barter as a swap, a pair of my shoes for a pair of your gloves. But if you don't want my shoes, but I want your gloves, then I offer you a choice. You give me your gloves and I will let you have either three pairs of my socks or two of my neckties or one of my dress shirts, as you select.

"Thus, we began to write contracts which called for delivery to CCC of iodine in exchange for wheat, feed-grains, cotton, tobacco, soybeans, or butter from CCC inventories, either one or more up to the value of the iodine.

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<sup>3/</sup> Hearings on H.R. 4895, before the Seapower and Strategic and Critical Materials Subcommittee of the House Armed Services Committee, 95th Cong., 1st Sess., pp. 20-21 (1977).



"Of course, this worked fairly well for mineral rich countries which had a real need for one or another of the agricultural products CCC had to offer. However, it did not take care of the country with chrome ore and no pressing need for our wheat, cotton, or tobacco. For such cases, we further modified barter contracts so that the farm products with which we paid for strategic materials could be exported and sold in named foreign countries in addition to those countries which supplied the minerals and metals."<sup>4/</sup>

The Congress was thus aware of the need to broadly construe existing barter authority in order to carry out commodity exchanges to acquire needed critical and strategic materials, and it expressed no objection to the practice nor did it attempt to legislatively curtail it. Instead, the barter authority was made permanent and the President was encouraged to use it in acquiring needed Stockpile materials.

- DISPOSITION OF PROCEEDS FROM SALE -

Section 9 of the Act, as amended, 50 U.S.C. § 98h, provides:

"(a) There is established in the Treasury of the United States a separate fund to be known as the National Defense Stockpile Transaction Fund (hereinafter in this section referred to as the 'fund').

Fund operations

"(b)(1) All moneys received from the sale of materials in the stockpile under paragraphs (5) and (6) of section 98e(a) of this title shall be covered into the fund. Such moneys shall remain in the fund until appropriated.

"(2) Moneys covered into the fund under paragraph (1) shall be available, when appropriated therefor, only for the acquisition of strategic and critical materials under section 98e(a)(1) of this title (and for transportation related to such acquisition).

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<sup>4/</sup> Id. 25.

"(3) Moneys in the fund, when appropriated, shall remain available until expended, unless otherwise provided in appropriation Acts.

Moneys received from sale of materials being rotated or disposed of

"(c) All moneys received from the sale of materials being rotated under the provisions of section 98e(a)(4) of this title or disposed of under section 98f(a) of this title shall be covered into the fund and shall be available only for the acquisition of replacement materials."

Thus under subsection (b), the proceeds from certain disposals are required to be deposited to the credit of the Stockpile Fund rather than to the credit of miscellaneous receipts in the Treasury, as otherwise would have been the case. Once in the Stockpile Fund, they are available only for appropriation for acquisition of Stockpile materials. Once appropriated they remain available until expended.

Subsection (c) establishes a permanent indefinite appropriation of receipts from rotation transactions or special disposals, to be used for acquiring replacement materials for the Stockpile. B-197118, January 14, 1980. Under both subsections, it was contemplated that the receipts deposited would be those received from the sale of Stockpile materials, that is, materials owned by the Government. However, under GSA's proposal the receipts will not be received from the sale of Government-owned material since title to the materials will have been transferred to the Government of Jamaica before the sales are made. Thus any proceeds received by the GSA as a result of the sale of excess strategic and critical material to which title has been transferred to Jamaica would be on behalf of, or as agent of, the Government of Jamaica and not for the benefit of the United States. In circumstances such as these, the Government could not retain the proceeds. See United States v. Sinnot and others, 26 F.84 at 86 (C.C. Oregon, 1886); 60 Comp. Gen. 15, 26 (1980) and cases cited therein; B-205901, May 17, 1982.

- AREAS OF CONCERN -

Notwithstanding the foregoing, this authority is not totally without limits, and it should not be used to circumvent other valid limitations or controls upon GSA's Stockpile activities.

It is clear that but for the transfer of title to the excess strategic and critical materials to Jamaica, GSA would be required to deposit the proceeds from any sale of excess critical or strategic materials to the credit of the Fund. Once deposited to the

credit of the Fund, they could not then be expended (except in certain specified situations unimportant to our discussion here) without further appropriation by the Congress. Thus the proposed transaction serves to lessen the Congress' ability to control Stockpile acquisitions through the appropriations process.

However, the adverse effect that the proposed agreement might have on congressional authority is mitigated somewhat by the fact that under section 5(b) of the Act, as amended, 50 U.S.C. § 98d(b), congressional approval is required before any material may be disposed of (except in certain situations expressly provided for by the Act) by any means, including barter. Also, section 11(a)(2) of the Act, as amended, 50 U.S.C. § 98h-2(a)(2) requires the President to submit to the Congress every 6 months a written report providing information with respect to the acquisition and disposal of materials by barter during that 6-month period. Finally, any revisions upward or downward in the amounts of material to be stockpiled, must be reported to the Armed Services Committees of the House and Senate 30 days before they may become effective. See section 3 of the Act, as amended, 50 U.S.C. § 98b. Thus the Congress will be afforded notice of any increases necessitating further acquisitions or decreases necessitating disposals.

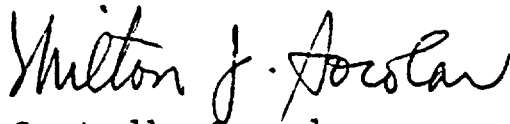
On balance, this Office sees no reason to object to the GSA's Stockpile proposals. As indicated earlier, the Act's exchange authority does not literally require a commodity-for-commodity exchange and the requirement to deposit proceeds of the sale of excess commodities in the Fund is not applicable when title to the excess commodities is transferred prior to the time that the sale takes place. Although congressional oversight may still be exercised because of the necessity to secure advance congressional approval of planned disposals, and as a result of the reporting requirements, discussed above, the proposed agreement with Jamaica represents a significant departure from existing Stockpile acquisition practices. We therefore recommend that GSA obtain the views of the appropriate committees of the Congress before attempting to implement the new procedures.

There are a few other areas of concern to this Office under the proposed method of exchange which also should be addressed prior to entering into the agreement with Jamaica.

The proposed agreement fails to specify which country assumes the risk of loss for damage or loss of materials. For example, who assumes the risk of loss if the exchange material is lost or destroyed after the transfer of title, but prior to sale on behalf of Jamaica; in other words while still in the custody of the Government. If the Government is held liable, where will the funds to pay

Jamaica come from? Furthermore, how will situations be handled where the United States accepts bauxite and transfers title of a commodity to Jamaica but cannot sell the designated exchange material and no other surplus critical material is available for transfer. GSA should ascertain whether these or any other potential occurrences could require a monetary payment in Jamaica and satisfy itself that a source of funds would be available should they occur. Alternatively, ways of limiting the Government's liability should also be explored.

With these caveats, we have no objection to the proposed new procedures for obtaining Stockpile materials.

for   
Comptroller General  
of the United States