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

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APR 14 1983

The Honorable Richard L. Ottinger
Chairman, Subcommittee on Energy Conservation
and Power
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

This responds to your January 21, 1983, request for our opinion on the legality of the Department of Energy's (DOE) grant to the Scientists and Engineers for Secure Energy (SE-2) to conduct college campus forums on nuclear energy.

Specifically, you ask whether the grant was within the scope of the agency's authority and whether the agency's grant regulations were complied with. You also inquire about the applicability of the statute on organizational conflicts of interest, 15 U.S.C. § 789, to grants; and whether DOE has legal rights if SE-2 fails to perform 24 forums.

We conclude, based on the authority cited in DOE's grant document and DOE's description of its purpose in making an award to SE-2, that DOE did not have authority to use a grant instrument in the described circumstances; that 15 U.S.C. 789, by its terms, does not apply to grant awards; and that the award to SE-2 requires only proportionate funding by DOE of campus forums actually conducted by SE-2. Because we did not have sufficient time to obtain the official views of DOE on this question, our conclusion that DOE did not have authority to use a grant instrument in this case is subject to change if DOE presents other valid arguments or authorities which we have not considered.

Background

In September 1981, DOE was considering staff proposals to institute a public relations campaign to promote nuclear power. In December 1981, your subcommittee held hearings on the matter and learned that the proposals anticipated a contractual arrangement with a group of professionals known as Scientists and Engineers for Secure Energy (SE-2), a national non-profit educational organization that is pro-nuclear energy.

A procurement request was prepared and signed by appropriate DOE officials. However, it was withdrawn and a grant was awarded instead through the Office of Nuclear Energy to SE-2, on December 10, 1982, in the amount of $100,000. Its stated purpose was to assist SE-2 in conducting campus forums on energy-related issues for the period December 1982 through the end of fiscal year 1983. To date, SE-2 has conducted

only one forum, on March 22, 1983. It plans to conduct eight others, although its plan at the time of the grant award was to conduct 24.

Analysis

We are unable to find clear statutory authorization for the grant which DOE awarded SE-2. The statutory provisions that DOE cites on the face of the grant award for its authority to enter into the grant are: "[Pub. L. No.] 95-91, 42 U.S.C. 7101; [Pub. L. No.] 93-438, 88 Stat. 1240."

The first provision is the first section of the Department of Energy Organization Act and apparently is intended to refer to that entire act. This act elsewhere provides:

> "* * * [One of the Act's purposes is] disseminating information resulting from such programs, including disseminating information on the commercial feasibility and use of energy from fossil, nuclear, solar, geothermal, and other energy technologies * * *." 42 U.S.C. § 7112(5)(D) (Supp. III, 1979).

The second provision cited is from the Energy Reorganization Act of 1974, 42 U.S.C. § 5817 (Supp. III, 1979). Subsection (e) of this section (this subsection is found at 88 Stat. 1241 not 1240 as cited) provides as follows:

> "(e) Subject to the provisions of chapter 12 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2161-2166), and other applicable law, the Administrator [of the Energy Research and Development Administration] shall disseminate scientific, technical, and practical information acquired pursuant to this title through information programs and other appropriate means, and shall encourage the dissemination of scientific, technical, and practical information relating to energy so as to enlarge the fund of such information and to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding."

The authorities of the quoted section were transferred to the Secretary of Energy by 42 U.S.C. § 7151 (Supp. III, 1979). The grant file confirms that the award was made under the dissemination authority of the Energy Reorganization Act of 1974 and the purposes statement in the Energy Organization Act, supra.

On its face, the quoted provision of the Energy Reorganization Act of 1974 provides very broad authority for the Administrator (and the Secretary through the transfer provision of 42 U.S.C. § 7151) to disseminate information of a scientific, technical and practical nature. The provision stresses that the Administrator encourage the dissemination of such information so as to provide for "that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding." Read in conjunction with the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. § 504, under which a grant instrument may be used if the agency's authority fits the Act's definition of an assistance relationship, despite the fact that the specific word, "grant", is not actually used in its legislation, an argument could be made that § 5817(e) confers sufficient authority upon the Secretary to award a grant for the conducting of public information forums.

It should be noted that the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. § 504, states conditions under which an agency is required to use a grant rather than a contract or cooperative agreement. A grant is proper when the principal purpose of the relationship between the Government and the recipient is the "transfer of money, property, services, or anything of value * * *" to accomplish "a public purpose of support or stimulation authorized by Federal statute * * *," rather than to acquire property or services for the direct benefit or use of the Government. Further, a grant rather than a cooperative agreement is required where there is no substantial involvement anticipated between the agency and the recipient. However, the Federal Grant and Cooperative Agreement Act, supra, does not by itself expand an agency's authority to make grants. In order to provide assistance through a grant there must be some affirmative legislative authorization. While the Act provides a basis for examining whether an arrangement should be a contract, grant, or cooperative agreement, determinations of whether an agency has authority to enter into one of these types of relationships must be found in the agency's authorizing legislation.

The nature of the authority provided is not clear on its face. The authorities cited state that the Administrator shall disseminate scientific, technical, and practical information "through information programs and other appropriate means." It does not define which other means are appropriate for use in conducting the dissemination. The language concerning the encouragement of information dissemination is similarly unclear as to the means by which dissemination should be encouraged. While every agency has inherent power to enter into contracts to achieve its purposes, we hesitate to imply the power to donate Government funds to assist non-Government entities to accomplish their own purposes, however meritorious, without clear evidence that the Congress intended to authorize such an assistance relationship.

Although not cited by DOE, in order to explore all possible sources of grant authority, we next examined the general administrative provisions of the Energy Organization Act, 42 U.S.C. § 7152 et. seq. Section 7256(a) of Title 42, the Energy Organization Act, (which applies to the dissemination of knowledge authority, discussed supra, through the transfer authority found in § 7151) generally sets forth the Secretary's powers and authorities in carrying out his duties as follows:

> "(a) The Secretary is authorized to enter into and perform such contracts, leases, cooperative agreements, or other similar transactions with public agencies and private organizations and persons, and to make such payments (in lump sum or installments, and by way of advance or reimbursement) as he may deem to be necessary or appropriate to carry out functions now or hereafter vested in the Secretary."

One could argue, with dubious validity, that a grant is a transaction "similar" to a contract, lease, or cooperative agreement. We need not resolve that contention now because the legislative history shows that the term "grants," which was initially included in the Senate version of the section which eventually became section 7256, was deleted in final action on the legislation. See Senate Report No. 95-164, 95th Cong., 1st Sess. (1977). See also House Report No. 95-346, Part 1, 95th Cong., 1st Sess. (1977). The House bill did not include grants among the Secretary's authorities. The Conference Report No. 95-539, 95th Cong., 1st Sess. (1977), makes it clear that the deletion of grant authority was intentional. It states:

> "Section 646--Contracts
>
> "The Senate bill authorizes the Secretary of Energy to enter into and perform contracts, leases, grants, cooperative agreements, or other similar transactions with public agencies, private organizations and persons. Such authority is effective only to the extent provided in appropriations acts.
>
> "The House bill authorizes the Secretary of Energy to enter into and perform contracts, leases, cooperative agreements, or other similar transactions with public agencies, private organizations and persons, but does not authorize the Secretary to enter into grants. No authority to enter into contracts or to make payments under this title shall be effective except to the extent or in such amounts as are provided for in advance in appropriation acts.

> "The conference substitute adopts the House provisions with an understanding among the conferees that the restricting of contracting and related authority to those funded in advance by appropriations is not intended to apply to existing programs, nor to existing contract authorities under prior law. Laws granting specific contract authority also will continue to apply." (Emphasis added.)

We therefore believe that the legislative history of 42 U.S.C. § 7256 demonstrates that a grant award is not one of the means intended by the Congress to be used in disseminating energy-related information.

This also applies to the purpose language of the DOE Organization Act, 42 U.S.C. § 7112(5)(D), which DOE cited as additional authority for making this grant. Although we do not believe the language in that section could independently be construed as grant authority in any event, it is clearly limited by the authority provision of section 7256, discussed above, which does not include the authority to award grants.

We must also point out that when the Congress wished to enable the Secretary to give grant assistance as a means of carrying out one of his functions, it provided this authority in very specific terms. See, for example, the Solar Heating and Cooling Demonstration Act of 1974, 42 U.S.C. §§ 5503(c), 5504(d); the Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U.S.C. § 5585.

In addition to our concerns over whether the authority relied on by DOE to support a grant in these circumstances is adequate, it is also not clear on the basis of the information with which we have been provided that the agreement with SE-2 would qualify as a "grant" under the Federal Grant and Cooperative Agreement Act, supra, even if DOE's authority to award a grant were undisputed. As discussed earlier, that Act provides that a grant relationship is proper when the Government is providing assistance to a non-governmental entity in order to support its own efforts in accomplishing a public purpose. When the Government is acquiring goods or services in order to carry out a governmental function, a procurement relationship is proper.

In the case at hand, DOE initially proposed a procurement relationship with SE-2. The discussions at the 1981 hearings before your subcommittee were in the context of a proposed, although at that time unapproved, procurement. A Procurement Request Authorization form forwarded with DOE's letter to you, dated December 2, 1982, specified that a procurement rather than an assistance relationship was proposed.

In addition, DOE's letter strongly argues DOE's "legislative mandate" to provide information to the public in terms that describe the

accomplishment of a governmental function rather than the provision of assistance to an outside group to carry out its own program. The relevant passage from the February 7 letter is set out below:

> "Once again, I would like to bring your attention to the legislative mandate contained in both the Energy Reorganization Act of 1974 and the DOE Organization Act of 1977, to provide the public with information on the Federal role in nuclear energy. Our primary goal is to provide the public more and better quality information about vital Federal programs dealing with nuclear safety, waste management, and long-range, high-risk R&D. Our objectives are: (1) to increase public understanding of overall policy, (2) to correct public misconceptions about certain aspects of nuclear energy, and (3) to enable the public to make sound, free-market decisions about nuclear energy. This kind of information must be provided by the Government because industry is not the appropriate spokesman of Federal energy policy." (Emphasis in the original.)

It thus appears that a procurement, rather than a grant, was the appropriate vehicle for the agreement with SE-2. Use of the grant mechanism, however, avoided the need for application of organizational conflict of interest rules, as discussed below, as well as the competition requirements of the procurement statutes.

On the question of the applicability of organizational conflict of interest prohibitions, DOE stated in a letter to you dated February 7, 1983, that "DOE organizational conflict of interest forms, HQF-2302, are not required for grants, but are filed for all sole-source and support contracts." 15 U.S.C. § 789, Organizational Conflicts, which DOE's forms apparently implement, contains language similar to the DOE Organization Act language, cited in our discussion of DOE's lack of grant authority. Section 789(a) requires organizational conflict information of "any person proposing to enter into a contract, agreement, or other arrangement * * *" with DOE but does not specify grants. In addition, it is clear from reading section 789 as a whole that it refers to procurement rather than assistance relationships. Accordingly, we agree with DOE that the organizational conflict provisions would not normally apply to grant awards.

With respect to the number of forums which the agreement requires SE-2 to hold, we note that the face page of the agreement copy informally provided by your staff shows a total approved budget of $236,900.00, of which $136,900.00 is to be provided by SE-2 and $100,000 by DOE. This amount is elsewhere described as sufficient to support 24 forums. The per forum cost is described as $8,583.34 and payment is to be by monthly

reimbursement. It thus appears that there is no requirement to expend the entire budget by conducting 24 forums, and that reimbursement should be on a per forum basis in an amount which bears a proportional relationship to the budget amount proposed by SE-2 for 24 forums.

Sincerely yours,

Harry R. Van Cleve

for the Comptroller General
of the United States