DECISION

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

FILE: B-210998 **DATE:** June 22, 1983

MATTER OF: Economic Development Administration - Compromise Authority

DIGEST: The Economic Development Administration (EDA) has the authority to sell defaulted loans to borrowers for less than the unpaid indebtedness. EDA's authority under 42 U.S.C. § 3211(4) and 19 U.S.C. § 2347(b)(2) to compromise loans allows it to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, if EDA determines it is in the Government's interest to do so because of some doubt as to the borrower's liability or the collectibility of the full amount of the loan. However, it is not required to do so if it determines that allowing borrowers to bid on their own obligations would interfere with the integrity of the loan collection process or for other valid reasons.

This decision is in response to a request from the General Counsel of the Department of Commerce for our legal opinion as to whether the Economic Development Administration (EDA) has the statutory authority to sell defaulted loans at a discount to the borrower or someone acting on the borrower's behalf. For the reasons set forth hereafter, it is our view that EDA does have the authority to sell these obligations to the borrowers for less than the unpaid indebtedness. However, EDA is not legally required to do so if it determines that allowing borrowers to bid on their own obligations would interfere with "the integrity of the loan collection process," or would otherwise be undesirable.

Under the authority of the Public Works and Economic Development Act of 1965, as amended (PWEDA), 42 U.S.C. §§ 3121-3246, and Title II of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2341-2374, EDA makes or guarantees loans to eligible borrowers. When a borrower has defaulted on one of these loans, one of the options that EDA has sometimes used in attempting to collect is a private sale or transfer of its interest in the defaulted loan to a third

party having no connection or relationship with the borrower. In September 1982, EDA offered, for the first time, a number of its defaulted loans for public sale. Paragraph 11 of the Offering Circular prohibited borrowers or anyone connected with them from bidding on their own loans as follows:

> "Bids from borrowers, guarantors, pledgors or affiliates will not be accepted. No person may bid who is acting directly or indirectly on behalf of any person who is absolutely or contingently liable on the indebtedness bid on, or any person who directly or indirectly controls, is controlled by, or is under common control with any such person. The Bid Form contains a representation by the bidder that the bid is not made on behalf of any such person."[1]

The Commerce letter points out that EDA received numerous complaints from borrowers and others concerning this prohibition against a borrower bidding on his own loan. Also, in hearings on December 14 and 16, 1982, before the Subcommittee on Economic Development of the House Committee on Public Works, subcommittee members expressed

---

[1] The exclusion of the borrower from the sale was in accordance with EDA's long-standing position, based on a 1976 opinion by its then Chief Counsel, that it did not have the authority "to waive or cancel any amount of debt." EDA views allowing a borrower to acquire its own loan at a discount as equivalent to waiving or cancelling part of the debt.

concern about the prohibition.[2] In light of the public and congressional concern about this matter, the General Counsel requests us to answer the following questions:[3]

"1. May EDA * * * sell an obligation at a discount (i.e., for less than the unpaid indebtedness) to a person who is directly or indirectly liable on the obligation ('obligor')?

"2. Where the answer to the first question is 'yes', may EDA in the exercise of its discretion, determine that to preserve the integrity of its loan collection process, it will refuse to offer obligations for sale to obligors which it will offer for sale to non-obligors?

"3. If the answer to the first question is 'no', are there special circumstances in which such a sale would be permissible? For example, would such a sale be permissible when EDA has publicly solicited competitive bids on the obligation, and has received no offer as high as an offer made by an obligor?"

In order for us to answer the first question, we must consider the legal basis for EDA's position in this matter. EDA maintains, both in its 1976 opinion and in the current letter from Commerce, that there are two factors which

---

[2] Shortly thereafter, EDA's authority to sell these loans without the consent of the borrower was restricted by the enactment of the following provision in the Joint Resolution of December 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1870:

> "No funds in this title shall be used to sell to private interests, except with the consent of the borrower, or contract with private interests to sell or administer, any loans made under the Public Works and Economic Development Act of 1965 or any loans made under section 254 of the Trade Act of 1974."

[3] For the purpose of answering these questions, Commerce asks us to assume that in each case EDA would make a determination that the proposed sale price was reasonable in light of the available "evidence" as to the amount EDA would expect to realize as a result of a conventional liquidation proceeding.

prohibit it from selling a loan to the borrower for less than the outstanding balance, resulting in what EDA would consider to be an unauthorized "cancellation or forgiveness of debt." First, EDA argues that without express statutory authority, which it says it does not have, it cannot approve such a waiver or cancellation of any part of a borrower's debt. Second, it relies on the long-standing position of this Office that no officer or agent of the Government has the authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the Government without adequate legal consideration or a compensatory benefit. See 45 Comp. Gen. 224, 227 (1965); 44 Comp. Gen. 746, 749 (1965); and 41 Comp. Gen. 169, 172 (1961). Also, see Union National Bank of Chicago v. Weaver, 604 F. 2d 543 (7th Cir. 1979) which endorsed our unpublished decision, B-181432, March 13, 1975.

While, as recognized by EDA, the general rule is that the surrender or waiver of contract rights that have vested in the Government without compensation is prohibited, the rule is premised on the absence of any specific statutory authority that would allow such a surrender or waiver 4/. See 22 Comp. Gen. 260, 261 (1942). Thus, the only legal issue here is whether or not the statutory language governing these loan programs grants EDA the authority to accept from the debtor an amount less than the unpaid balance in complete satisfaction of the Government's claim.

The authority of the Secretary of Commerce, and by delegation the Administrator of EDA, to administer the loan programs established under PWEDA and the Trade Act is quite broad. Under 42 U.S.C. § 3211(4) the Secretary has the following authority with respect to PWEDA loans:

> "* * * under regulations prescribed by him [the Secretary is authorized to] assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as he shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in

4/ The rule as stated in the Commerce letter to us recognizes that the Government's contract rights can be surrendered if a statute so authorizes.

> connection with loans made or evidences of indebtedness purchased under this chapter, and collect or compromise all obligations assigned to or held by him in connection with such loans or evidences of indebtedness until such time as such obligations may be referred to the Attorney General for suit or collection;" (Emphasis added). Also see 42 U.S.C. § 3211(9).

The authority of the Secretary under 19 U.S.C. § 2347(a)(2), which governs Trade Act loans, is set forth in virtually identical terms and includes the authority to "collect, compromise, and obtain deficiency judgments with respect to all obligations assigned to or held by him in connection with such guarantees or loans * * *."

(As noted above, EDA's broad authority to sell both types of loans was restricted by the provision in Public Law 97-377 which prohibits such sales for the remainder of the 1983 fiscal year without the consent of the borrower.)

Recognizing that both 42 U.S.C. § 3211(4) and 19 U.S.C. § 2347(a)(2) give EDA authority to compromise loans, the General Counsel states that there is a distinction between authority to compromise a debt on the one hand and authority to forgive or cancel a debt on the other.5/ In this respect the Commerce letter reads as follows:

> "A compromise requires that there be a real dispute between the parties, or some uncertainty as to the facts. In the absence of such a good faith dispute or uncertainty, the acceptance of less than the full amount

5/ The primary focus of this decision, and the basis for our conclusion that EDA can sell loans to borrowers at a discount, is the compromise authority granted EDA in these statutes. However, we note that an argument could be made that the language in 42 U.S.C. § 3211(4) and in 19 U.S.C. § 2347(a)(2) authorizing EDA to sell loans at public or private sale upon such terms and conditions as it determines to be reasonable, standing alone, would give EDA the discretion to sell loans to borrowers at a discount. This decision does not specifically address this issue because Commerce's letter does not do so, and we were able to resolve the matter solely on the basis of EDA's compromise authority.

> owing to the government in satisfaction of its claim would result in the forgiveness or cancellation of part of the obligation owing to it. Some government agencies are explicitly authorized by law to release claims and cancel obligations, e.g., the Small Business Administration. There is no explicit authorization for this in PWEDA or the Trade Act." (Citations omitted.)

We do not agree with the General Counsel's position concerning the meaning of EDA's statutory authority to compromise obligations. Consideration of the statutory context in which the word appears--authorizing EDA to "collect or compromise" all of the obligations it holds prior to their referral to the Attorney General for suit or collection--suggests that the Congress intended to grant EDA the discretion either to insist on payment in full or to allow the borrower to discharge the debt by paying less than the outstanding balance. There is nothing in the legislative history of either statute that suggests "compromise" was intended to have a more limited meaning.

We recognize that the word "compromise" implies that both of the parties to a dispute make concessions in order to terminate the controversy by mutual agreement. See, Black's Law Dictionary 260 (5th ed. 1979). Thus, as a general matter, we would not disagree with EDA's view that a compromise requires the existence of a real dispute between the parties or some uncertainty as to the facts. However, the underlying dispute or uncertainty needed to justify a compromise can be based on some genuine doubt as to the collectibility of the entire amount of an undisputed debt. For example, see the following explanation of the Government's compromise authority as set forth in 38 Op. Att'y Gen. 98, 99 (1934):

> "There appears to be no statutory authority to compromise solely upon the ground that a hard case is presented which excites sympathy or is merely appealing from the standpoint of equity, but the power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection."

That doubt as to the collectibility of a liquidated debt can form the basis of a "compromise" is especially clear in this situation, since the claims that 42 U.S.C. § 3211(4) and

19 U.S.C. § 2347(a)(2) authorize EDA to compromise are based on written debt obligations--the type of claim about which there is ordinarily little or no question as to liability or amount.

Strong support for this position can be found in the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966), recodified at 31 U.S.C. § 3711, and its legislative history. That Act authorizes agencies to consider and compromise claims, not exceeding $20,000, that arise out of their activities. In this respect 31 U.S.C. § 3711(a) provides:

> "(a) The head of an executive or legislative agency--
>
> * * * * *
>
> (2) may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; * * *"

The following statement from one of the committee reports on the legislation when it was enacted in 1966, explaining the need for granting compromise authority to Federal agencies, is especially relevant:

> "The committee is familiar with many of the problems which prompted the Department of Justice to recommend the legislation, and the committee feels that this bill embodies a practical and well drafted means to deal with those problems. Much of the difficulty derives from the fact that existing law, with a few exceptions, restricts the authority of the agencies to deal adequately and realistically with claims of the United States arising out of their respective activities. * * * Very few of the agencies can compromise such claims; that is, accept a lesser amount in full settlement even if such a settlement would be in the interest of the Government and justified by normal practice in business in the light of the debtor's ability to pay and the risks and costs inherent in litigation. * * *"

> "As has been noted, present law does in some instances permit compromise of claims on the agency level. However, those agencies which do have some compromise authority usually have it only with respect to limited types of claims or in a rather small amount. * * * Only a few agencies like the Small Business Administration have unrestricted prelitigation collection and compromise authority (15 U.S.C. 634(b)(2))." (Emphasis added.) S. Rep. No. 1331, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. and Ad. News 2532, 2533.

In our view, the foregoing explanation makes it clear that our conclusion in this case is correct. First, it clearly sets forth the view of the Congress that consideration "of the debtor's ability to pay" can justify a compromise by a Federal agency. Second, it defines "compromise" merely as acceptance of "a lesser amount in full settlement" of the Government's claim. Third, it demonstrates that the word "compromise" was not being used in a different sense in the Claims Collection Act and the two EDA statutes. It does this by referring to the Small Business Administration (SBA) as one of the agencies that had "unrestricted prelitigation collection and compromise authority" prior to enactment of the Claims Collection Act. Examination of the cited provision in SBA's enabling legislation--15 U.S.C. § 634(b)(2)--reveals that the authority of the Administrator of SBA "to collect or compromise all obligations assigned to or held by him" is set forth in language that is virtually identical to that used to grant EDA its compromise authority. This indicates that the compromise provisions contained in both EDA's statutes also were intended to grant EDA "unrestricted prelitigation collection and compromise authority" that would allow EDA to forgive a portion of a claim when it determines the debtor is unable to pay the full amount.

Finally, consistent with the clearly expressed legislative intent, the Comptroller General and the Attorney General have prescribed regulations implementing the Claims Collection Act which further support our position. These regulations specifically provide that claims may be compromised "if the Government cannot collect the full amount because of (a) the debtor's inability to pay the full amount within a reasonable time, or (b) the refusal of the debtor to pay the claim in full and the Government's inability to enforce collection in full within a reasonable time by informal collection proceedings."

For the foregoing reasons we believe the word "compromise" as used in 42 U.S.C. § 3211(4) and in 19 U.S.C. § 2347(a)(2) must be interpreted as granting EDA the statutory authority to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, where EDA determines it is in the Government's interest to do so because of some doubt either with respect to the borrower's liability or the collectibility of the full amount of the loan. Accordingly, since EDA may compromise directly with borrowers when there is legitimate doubt as to the collectibility of the full amount of a defaulted loan, there would appear to be no statutory bar to allowing such borrowers to bid on their loans in similar circumstances.

Having reached this conclusion, however, we should point out that, to our knowledge, EDA has not adopted regulations establishing any specific standards governing its authority to sell defaulted loans or setting forth the circumstances in which such sales will be carried out instead of taking other actions to collect on defaulted loans, such as a conventional liquidation of collateral. Nor has EDA, as far as we know, published regulations establishing specific standards for collecting or compromising loans. Instead the applicable regulations merely restate the broad language set forth in the statutes. For example see 13 C.F.R. §§ 305.100 and 306.33. While we acknowledge that the Federal Claims Collection Act of 1966 did not diminish the existing authority of the head of an agency under statutes such as 42 U.S.C. § 3211(4) or 19 U.S.C. § 2347(a)(2) "to settle, compromise, or close claims", the following provision from the Claims Collection Act standards is relevant in this respect:

> "Nothing contained in this chapter is intended to preclude agency disposition of any claim under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, providing for the compromise, termination of collection action, or waiver in whole or in part of such a claim. * * *. The standards set forth in this chapter should be followed in the disposition of civil claims by the Federal Government by compromise or termination of collection action (other than by waiver pursuant to statutory authority) under statutes other than the

Federal Claims Collection Act of 1966, 80 Stat. 308, to the extent such other statutes or authorized regulations issued pursuant thereto do not establish standards governing such matters."

Accordingly, unless and until EDA adopts regulations establishing definitive standards governing the compromise of claims it should follow the applicable standards and guidelines set forth in the Claims Collection Act regulations. These standards are currently being revised by our Office and the Department of Justice in light of the increased claims collection authority granted agencies by the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749, approved October 25, 1982.

The General Counsel's second question is whether EDA has the discretion not to "compromise" with borrowers by refusing to sell them their own obligations. Considering the statutory language involved, as well as the basic meaning of the word "compromise", it is clear that EDA has such discretion. Both statutes, 42 U.S.C. § 3211(4) and 19 U.S.C. 2347(a)(2)--grant the Secretary broad discretion to sell obligations "at public or private sale *** upon such terms and conditions and for such consideration as he shall determine to be reasonable."

Moreover, both statutes are written in permissive terms giving the Secretary discretion as to whether to compromise any obligation. It would be contrary to the very concept of compromise to conclude that the Secretary could be compelled to accept less than the full amount from a borrower. Accordingly, EDA may decide to refuse to offer obligations for sale to borrowers which it offers for sale to others if it determines that is necessary to preserve the integrity of its loan collection process or for any other valid reasons.

Having concluded that the decision of whether or not to permit borrowers to purchase their own obligations at a discount is within EDA's administrative discretion, we should point out that we have serious reservations about the advisability of allowing borrowers to submit bids on and ultimately to purchase their own loans. For example, while Commerce's submission sets forth various policy considerations that might support an administrative decision either to allow or to prohibit sales to borrowers the concerns expressed as to the negative impact of such sales on the integrity of EDA's loan collection process seem especially persuasive. That is, if borrowers knew that, in effect, they could have a portion of their debt cancelled if the

loan went into default, they would have a strong incentive not to make the payments required to keep their loans current. Also, based on the information furnished in Commerce's submission, as well as in informal discussions with EDA officials, we understand that it might be very difficult for EDA to differentiate between those debtors that genuinely are unable to pay the entire amount of the debt and those that merely claim such inability in order to avoid repayment of the loan in full. This problem and the related one of establishing a fair and reasonable "upset" or lowest acceptable price for each defaulted loan to be sold, would be exacerbated if numerous loans are sold in a mass public sale rather than on an individual basis. It was precisely this type of "portfolio" sale that precipitated EDA's request to us for a legal opinion.

Moreover, as indicated above, the authority of Federal agencies generally in the area of debt collection was significantly increased by the enactment of the Debt Collection Act of 1982. For example, under section 13 of the Act, 31 U.S.C. § 3718, executive agencies can now enter into contracts with private collection agencies to recover indebtedness owed the United States Government. In light of this increased authority and the new collection mechanisms that are now available to Federal agencies, EDA might wish to consider whether any other method of debt collection would enable it to increase the amounts recovered on defaulted loans compared to the results obtained when defaulted loans are sold, whether or not borrowers are allowed to bid on their own loans.

In any event, the question of whether EDA should adopt a "non-compromise" policy of never selling loans to borrowers at less than full value or a policy of considering each loan individually to determine whether such a compromise would be in the best interests of the Government in a particular case should be left to EDA in the reasonable exercise of its discretion.

It is not necessary for us to answer the third question, in light of our affirmative answer to the first one.

Milton J. Socolar

Acting Comptroller General
of the United States