

UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-211307

August 26, 1983

Ms. Pamela J. Scherer  
Supervisor of Government Credit  
North American Van Lines  
P.O. Box 988  
Fort Wayne, Indiana 46801

Dear Ms. Scherer:

This will refer to questions raised in your letters of March 25, June 9, and August 5, 1983, concerning the Prompt Payment Act, Public Law 97-177, 96 Stat. 85 (1982), recodified by Public Law 97-452, § 1(18)(A), 96 Stat. 2474 (1983), 31 U.S.C.A. §§ 3901-06 (1983). All of the questions raised are discussed under applicable categories, below.

At the outset, please understand that we cannot formally resolve a dispute involving any other agency under the Prompt Payment Act. This is because section 4 of the Prompt Payment Act provides for resolution of claims and disputes in accordance with the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613 (Supp. IV 1980)), a copy of which is enclosed for your reference. Thus, to obtain a formal and binding resolution of a specific claim, you would have to submit a claim in writing to the contracting officer of the agency you are dealing with. However, we have reviewed the Prompt Payment Act and its legislative history, and offer the following information.

#### I. Applicability of Prompt Payment Act to Specific Agencies

You asked whether 4 specific agencies are exempt from the Act, and for information on other agencies exempt from this law. Each of the four has advised you that it considers itself exempt.

##### A. Government Printing Office (GPO)

We agree with GPO's conclusion that it is exempt from the Prompt Payment Act. The Act applies only to a "Federal agency." Section 6(1) of the Act defines "Federal agency" by using the same definition as is provided in 5 U.S.C. § 551(1) (1976), except that it adds to the definition any organization which operates exclusively "as an instrumentality of such an agency for the purpose of administering one or more programs of that agency" and which has been so identified by its head. 5 U.S.C. § 551(1) defines an agency as being:

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"each authority of the Government of the United States, whether or not it is within or subject to review by another agency but does not include--

- "(A) the Congress;
- "(B) the courts of the United States;
- "(C) the governments of the territories or possessions of the United States;
- "(D) the Government of the District of Columbia \* \* \*."

5 U.S.C. §551(1) also lists several other exclusions which are not relevant to your inquiry. This definition limits the scope of the Act essentially to executive branch agencies.

Although the Public Printer, who is the head of GPO, is appointed by the President with the advice and consent of the Senate, the GPO was originally part of the Senate and when later removed from the Senate continued as a part of the legislative branch accountable to the Joint Committee on Printing of the Congress. See generally, 44 U.S.C. §§301-317 (1976). Supreme Court decisions and an Opinion of the Attorney General, which have not been modified by subsequent revisions of the law, have defined the agency as being "not under the control of any one of the executive departments" but as part of the legislative branch. See United States v. Allison, 91 U.S. 303, 307 (1875); 26 Op. Atty. Gen. 4209 (1907). Thus, the GPO is not an executive agency, and we think it is included in the exemption for "the Congress." Therefore, it is not subject to the Prompt Payment Act.

#### B. Smithsonian Institution

The Smithsonian Institution is chartered by Congress as a corporation and defined as "an establishment \* \* \* for the increase and diffusion of knowledge among men." 20 U.S.C. § 41 (1976). It was created to administer a bequest by James Smithson. Its precise status is somewhat complex. This agency has never ruled on the question of whether the Smithsonian Institution is an "Executive agency," although in one case we accepted the conclusion of the General Services Administration's General Counsel that it is "an independent establishment in the executive branch of the Government, and an 'Executive agency' \* \* \*" for the limited purposes of the Federal Property and Administrative Services Act of 1949. 45 Comp. Gen. 685, 686 (1966).

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The Smithsonian operates in part with trust funds derived from the original Smithsonian bequest, but also receives direct appropriations from the general treasury. We have occasionally recognized this distinction in determining whether various Federal laws apply to the Smithsonian. E.g., 45 Comp. Gen. ¶685, *supra*; 41 Comp. Gen. ¶177 (1961). We think an argument can be made that the Smithsonian should adhere to the Prompt Payment Act, at least to the extent it is operating under direct appropriations rather than trust funds. However, we cannot readily determine which funds are used for your company's services. Also, to the extent the Smithsonian has taken the position that it is exempt, as we explained earlier, we have no authority to "overrule" that determination.

#### C. United States Postal Service

We would also agree with the Postal Service's conclusion that it is not covered by the Act. Although the Postal Service is "an independent establishment of the executive branch," the Postal Reorganization Act provides that, except for that Act and laws specifically enumerated in it:

"no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds \* \* \* shall apply to the exercise of the powers of the Postal Service."

X39 U.S.C. § 410 (1976).

Since the Prompt Payment Act was not added to the list, enumerated in 39 U.S.C. §X410, it does not apply to the Postal Service.

#### D. Administrative Office of U.S. Courts and other agencies

You also asked if there was any general way to determine if a given agency is covered by the Prompt Payment Act. The only way that you can tell to whom the Prompt Payment Act applies is to determine whether the governmental entity you are billing is part of the executive branch of the Federal Government. If it is part of the legislative or judicial branches, it is not covered. Therefore, we would agree with the memorandum from the Administrative Office of the United States Courts, dated June 11, 1982, sent with your letter of August 5, that it, as part of the judicial branch, is not covered by the Act. However, some agencies not covered by the

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terms of the Act, such as the General Accounting Office, have incorporated its provisions into their regulations as a matter of policy. Therefore, where there is doubt, you may want to address the question to the individual agency or to the Office of Management and Budget, (OMB) which is responsible for issuing Government-wide regulations under the Prompt Payment Act.

## II. Effect of Incorrect Address on Bill of Lading

In recent telephone conversations with this Office, you clarified the question in your letters concerning responsibility for late payments when a bill is sent to an incorrect address on a Government Bill of Lading. We understand your question to be the effect of a wrong address being listed by the transportation office of an agency on the bill of lading. You indicated that you have had experience with bills, which you sent to the address listed on the bill of lading, being returned to you or forwarded to another office within the same agency for payment, often with considerable delay resulting. You ask whether this would change the due date for payment.

While we do not have all the relevant facts and in any event could not rule on any particular dispute, it would appear that if a company sends an invoice to the address which the agency listed in the bill of lading or in the contract, the Government cannot delay the due date if it has listed the wrong address on that contract. Section 4e of OMB Circular No. A-125, 47 Fed. Reg. 37321 (August 25, 1982), a copy of which is enclosed, defines "designated payment office" as "the place named in the contract for forwarding of invoices for payment \* \* \*." An invoice is generally regarded as having been received on the date "a proper invoice is actually received in the designated payment office." OMB Circular No. A-125, § 4j. The agency purchasing the services covered by the contract is still responsible for making payment within 30 days of receipt of a proper invoice unless a different date is provided in the contract, and the invoice would be deemed received when received by the designated payment office. Prompt Payment Act, supra, § 2(a)(2)(ii). If a mistake has been made by the Government, or if an agency changes its payment office and fails to notify the contractor, the contractor providing the services should not bear the loss. In brief, if you send your invoice to the place where the agency told you to send it, and it turns out to be the wrong place, it is not your fault and should not affect your entitlement to interest.

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Similar considerations affect answers to questions raised in your June 9th letter with regard to payment and receipt dates. OMB regulations define the date on which an invoice is deemed to have been received as being "[t]he date a proper invoice is actually received in the designated payment office" or the date on which acceptance is made of the property or services involved, whichever is later. OMB Circular No. A-125, § 4j. As noted above, the payment office is the place named in the contract. The mail room is part of that place and its employees are, in effect, agents of the designated payment office for receiving mail. So long as the invoice is directed to the office designated in the contract or bill of lading, any delays in forwarding it to the officer who is to make payment, once it has reached the facility housing the designated office, should be the responsibility of the agency.

You also indicate that some agencies are using the date the invoice is approved for payment as the "payment date" for interest computation purposes rather than the actual check date. This is clearly incorrect. The OMB regulations define "payment date" as "the date on which a check for payment is dated or a wire transfer is made." OMB Circular No. A-125, § 4h.

### III. Whether Transportation Payments Are Exempt from Prompt Payment Act

With your letter of August 5, 1983, you enclosed a "Voucher Difference Statement" from the Department of Agriculture, rejecting payment of interest on an overdue payment requested by your company because, "The Department of Agriculture does not include the Transportation Payment System under the Prompt Payment Act."

We can find no basis for this exemption. Section 2(a)(1) of the Prompt Payment Act requires:

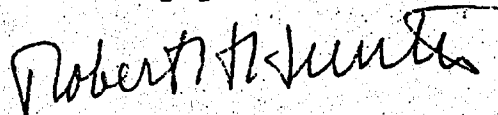
"\* \* \* each Federal agency which acquires property or services from a business concern but which does not make payment for each such complete delivered item of property or service by the required payment date \* \* \* [to] pay an interest penalty to such business concern \* \* \*." (emphasis added)

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A "business concern" is simply "any person engaged in a trade or business." §6(2). Transportation of goods is a service and, since there is no language exempting such services from coverage by the Act, nor is there anything in the legislative history to support such an exemption, it would appear to be subject to interest penalties for late payment. We know of no other agency that has claimed transportation services are exempt from the Act. If the finance office you are dealing with persists in its position, you might want to suggest that they contact the Department's legal staff for advice. Failing this, you could then file a claim with the transportation officer under section 6(a) of the Contract Disputes Act, 41 U.S.C. § 605(a).

We hope this information will be helpful to you.

Sincerely yours,



Robert H. Hunter  
Assistant General Counsel

Enclosures