

DECISION

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

FILE: B-163084 & B-186675

DATE:

JUL 15 1976

MATTER OF:

Exchange or Sale of Similar Items
Under Federal Property Act

DIGEST:

General Services Administration acted reasonably under section 201(c) of Federal Property and Administrative Services Act of 1949, as amended, and its implementing Federal Property Management Regulations, in disapproving proposed exchange of certain quantities of silver for an equivalent dollar amount of gold. Since it appears that gold to be acquired would not serve the same specific purpose as the replaced silver, as required by regulations, proposed exchange is not of "similar" items as required by section 201(c). 41 Comp. Gen. 227 (1961) distinguished.

This decision concerns section 201(c) of the Federal Property and Administrative Services Act of 1949, as amended, and implementing regulations by the General Services Administration (GSA), intra, which authorize executive agencies to exchange or sell similar items of personal property. The question is whether a proposed exchange of certain quantities of silver for equivalent dollar amounts of gold is proper under the above authorities.

By letter dated June 7, 1976, the Acting Deputy Director of the Defense Supply Agency (DSA) advised us that DSA had proposed to commercially exchange on a competitive basis one million troy ounces of refined silver, recovered from excess and surplus end items and other sources under the Defense Department's "Precious Metals Recovery Program," for an equivalent dollar amount of refined gold, to supplement Defense Department generated gold and to satisfy existing and projected gold requirements of the Defense Department and other Federal agencies.

DSA desired to effect the proposed exchange under the authority of section 201(c) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 481(c) (Supp. IV, 1974), and as implemented by the Administrator of General Services in Federal Property Management Regulations (FPMR), 41 C.F.R., Subpart 101-46.2 (1975).

PUBLISHED DECISION
55 Comp. Gen.

Section 201(c) grants any executive agency the authority to exchange or sell "similar" items pursuant to regulations prescribed by the Administrator of General Services, as follows:

"In acquiring personal property, any executive agency, under regulations to be prescribed by the Administrator /of General Services/, subject to regulations prescribed by the Administrator for Federal Procurement Policy pursuant to the Office of Procurement Policy Act, may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment of the property acquired: Provided, That any transaction carried out under the authority of this subsection shall be evidenced in writing."

The Administrator's implementing regulations state, for purposes here relevant, items shall be deemed similar when (1) both the item to be exchanged or sold and the item to be acquired fall within any one of the categories of property listed in FPMR § 101-46.4902; or (2) if the items are not so listed, when "the item to be acquired is designed and constructed for the same specific purpose as the item to be replaced * * *." FPMR § 101-46.202(b)(2).

Since the Administrator has no category of "precious metals" listed under 101-46.4902, in order for the proposed exchange to qualify under the regulations as an exchange of similar items it was necessary to show that the gold had "the same specific purpose" as the silver it would replace. However, GSA determined that the instant proposed transaction did not meet the statutory and regulatory criteria in this regard, and advised DSA as follows:

"The exchange/sale authority was intended to be limited in scope. The Congress has, on several occasions, expressed its interest in this area and has indicated the desire that the exchange/sale authority be monitored closely to avoid any misuse. With regard to the subject proposal, we have closely examined this case and have concluded that we cannot approve the proposal without contravening the Congressional intent in the law. In our opinion, this case would involve an augmentation of appropriations rather than the exchange of similar items. We do not feel that gold and silver can be considered similar for the purposes of the exchange/sale authority.

"If you disagree with our opinion and wish to pursue this further, we encourage you to submit this matter to the General Accounting Office. If you receive an opinion from the Comptroller General that differs from ours, we will reconsider the matter at that time."

In accordance with the suggestion in GSA's letter, DSA now requests our views on the matter. The National Aeronautics and Space Administration (NASA), which would apparently be a substantial beneficiary of the silver-gold exchange in connection with its Space Shuttle needs, has also challenged the validity of GSA's position in a separate letter to our Office.

DSA contends that gold and silver are similar for purposes of exchange under the statute and the implementing regulations. It cites examples based on the similarity of the metals with respect to their malleability, conductivity and resistance to temperatures that make them interchangeable for use in such things as dental items, brazing alloys and electronic circuits. DSA also refers to our decision at 41 Comp. Gen. 227 (1961) in support of the position that gold and silver are similar items. In that decision we construed section 201(c) to authorize the Administrator of General Services to exchange used regular-type ambulances for station wagons adapted for use as ambulances. Our decision observed that the term "similar items" is not a precise one, and that the legislative history of section 201(c) does not require a narrow construction of the term. We held that the term affords the Administrator "a flexible standard in the promulgation of regulations" implementing the statute. Id. at 229.

NASA's letter to us generally endorses the DSA position. In addition, NASA emphasizes the "similarity" of silver and gold with specific reference to the Space Shuttle program:

"* * * In the Space Shuttle, one of the main uses of the gold is in a multilayer insulating film (Kapton film) which protects wiring from reentry heat and post landing heat soakback. The high performance in low emittance and high reflectance suggested several possible metals, among them both gold and silver. Gold was selected over silver because it is not as susceptible to oxidation as silver, which reduces life cycle costs and increases reliability."

Having carefully considered this matter, we are of the view that GSA's decision to reject the proposed silver-gold exchange is a reasonable application of the statute and regulations. While silver and gold may be similar for some purposes, the GSA regulation requires that the item acquired be for "the same specific purpose" as the item replaced. For the reasons stated hereafter, we believe that this requirement is fully justified under the statute and has not been satisfied by the instant proposal.^{1/}

As indicated in 41 Comp. Gen. 227, *supra*, at 229, section 201(c) of the Federal Property and Administrative Services Act was designed to generalize exchange authorities previously available to certain agencies for certain types of transactions under a number of separate statutes. While the prior statutes differed somewhat, their common purpose--retained by section 201(c)--was to facilitate the replacement of old equipment for newer equipment. See 27 Comp. Gen. 540, 542 (1948); 23 *id.* 931, 934 (1944).^{2/} GSA's requirement that the acquired item be for "the same specific purpose" implements this concept of replacement.

It is difficult to understand how a silver-gold exchange could be viewed as a replacement in this sense considering that these metals do not depreciate in usefulness. Even apart from this, it seems at best doubtful that the gold to be acquired would in fact serve "the same specific purpose" as the silver to be exchanged. In this regard, NASA's statement, quoted above, concerning the needs of the Space Shuttle program appears to support the opposite conclusion. It indicates that NASA's "specific purpose," *i.e.*, obtaining a metal with certain properties, would be served best by gold to the exclusion of silver.

^{1/}We also note that the GSA regulations--FPMR § 101-46.202(d)(9)--do not authorize:

"The sale, transfer, or exchange of scrap materials in connection with the acquisition of personal property except in the case of scrap gold for fine gold." (Emphasis supplied.)

Although GSA did not refer to this provision in connection with its decision, the provision would seem to flatly preclude the instant silver-gold exchange since the silver to be used was recovered as scrap material.

^{2/}It is unnecessary to consider here whether or to what extent the specific holdings of the cited cases, which construed prior statutes, would apply under the present statute and implementing regulations.

DSA's submission is more general in describing the relationship between silver and gold, but the same dilemma is present. DSA asserts that silver and gold are "virtually interchangeable" in filling Government requirements, except that gold does not require "replacement" as often as silver. However, DSA apparently receives very distinct orders for the two metals. Thus its submission states:

"This Agency has generated sufficient refined silver from scrap and other silver-bearing materials to meet known silver requirements. The recovery of gold, however, has not reached the same state of the art as that of silver recovery and as a result, the availability of refined gold has been depleted temporarily."

If silver and gold are "virtually interchangeable" to the extent of serving "the same specific purpose/s/" contemplated by the exchange proposal, the exchange seems unnecessary, particularly since the quantity of silver to be exchanged would far exceed the quantity of gold to be acquired. Rather, it appears that silver could be diverted from silver orders and applied directly to gold orders. (We assume that some diversion from stated silver requirements is contemplated in any event since, with the exception of automatic data processing equipment, excess property cannot be used for exchange. See FPMR 8 101-46.202(a)(2).)

Further, the proposed exchange of silver for gold by DSA is distinguishable on its facts from the exchange of used ambulances for converted station wagons to be used as ambulances approved in 41 Comp. Gen. 227, supra. In that decision, the converted station wagons acquired were to be used for the same specific purpose as the ambulances replaced.

In view of the foregoing, we conclude that CSA's determination in this matter represents, at the very least, a reasonable application of its "same specific purpose" requirement, which, in turn, is an appropriate criterion under section 201(c).

R.F.KELLER

| Deputy Comptroller General
 of the United States