

DECISION

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

29321

FILE: B-212256**DATE:** September 18, 1984**MATTER OF:** Propriety of certifying payment of
purchase orders**DIGEST:**

1. Under 44 U.S.C. §§ 501, 504, the Forest Service must obtain a waiver from the Joint Committee on Printing (JCP) if it desires to have printing done outside the Government Printing Office. While no waiver is required if the items are pre-printed, any questions concerning whether or not an item involves a printing activity and requires a waiver should be referred to the JCP. Since it was unclear whether the procurement of habitat calendars required a waiver, the issue should have been referred by the Forest Service to the JCP.
2. The Forest Service may not purchase even pre-printed calendars and pocket planners from non-General Services Administration (GSA) sources without first obtaining a waiver from GSA. Calendars and pocket planners are listed by GSA as stock items on the mandatory schedule. Under 41 C.F.R. § 101-26-100-2, a waiver from GSA is required prior to purchasing these items from non-GSA sources. The contrary holding in 62 Comp. Gen. 566 (1983) will no longer be followed.
3. Although Forest Service may not ratify purchase of calendars and pocket planners because it failed to obtain required waivers from the Joint Committee on Printing and the General Services Administration (GSA) before purchasing from non-GSA sources, GAO will allow payment on a quantum valebant basis since procurement of the items was not contrary to law, the Government obtained a benefit from the items provided, and the contractor acted in good faith. However, in determining the reasonable value of the items, the Government may not exceed the amount that would have been charged had the items been procured as GSA stock items. See B-213489, March 13, 1984.

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An authorized certifying officer at the United States Department of Agriculture (USDA), National Finance Center (NFC), has requested an advance decision under 31 U.S.C. § 3529 concerning the propriety of certifying for payment two Forest Service purchase orders totaling \$2,104.22 and \$4,350, respectively. The first purchase order is for 2,100 calendars featuring forest habitat management (habitat calendars), and the second purchase order is for 20,000 Smokey Bear Pocket Planners. In addition, the certifying officer asks whether the payment of \$420 made on another purchase order for 1,500 1983 Woodsy Owl Pocket Planners was correct; if not, whether his office is required to recover the erroneous payment. He also asks whether payment for the habitat calendars and pocket planners could be made on a quantum valebant or quantum meruit basis since the items have been received and used by the Government.

For the reasons explained below, all the questioned procurements were procedurally deficient because necessary determinations and waivers from the Joint Committee on Printing (JCP) and/or from the General Services Administration (GSA) were not obtained before contracting with non-Government sources.

Although the two vouchers not yet paid should not be certified as drawn, we find that the necessary elements for exercise of our equitable jurisdiction are present. We therefore authorize payment to the two suppliers on a quantum valebant basis (the reasonable value of goods sold and delivered). The amounts of the payments, however, may not exceed the amounts from which they should have been purchased under a mandatory Federal Supply Schedule (FSS) contract through the GSA.

Because of the length of time which has elapsed since payment was made on the Woodsy Owl Pocket Planner and the relatively small amount of money involved, we do not require the Forest Service to institute collection nor would we object if the Forest Service decides to terminate collection action if already begun on the difference between the amount paid and the FSS price, pursuant to 4 C.F.R. Parts 103-104.

Habitat Calendars

In December 1982, the Director of the Wildlife and Fisheries staff of the Forest Service requested the Director of the Office of Information to obtain a waiver from the JCP to allow the Forest Service to procure 2,000 habitat calendars. The request for a waiver was based on Agriculture Procurement Regulation (AGPR) 4-4.5012 which states:

"In accordance with the Government Printing and Binding Regulations published by the Joint Committee on Printing, Congress of the United States, only standardized Government desk and wall calendars may be obtained at Government expense. * * * Schedule and appointment sheets are not considered to be calendars. Order calendars for Washington, D.C. delivery from Central Supply; otherwise from GSA Stores." (Emphasis added.)

Agriculture's regulation implements the Joint Committee on Printing's Government Printing and Binding Regulation (GPBR) 22-1 which states:

"Calendars, Date: Desk and Wall.--Standardized Government desk and wall calendars are the only calendars which departments are authorized to obtain at Government expense, and shall be ordered from the General Services Administration."

In response, the Director of the Public Information Office advised the Forest Service that a JCP waiver was not required for pre-printed items. No mention was made of the need for a waiver from GSA. On the basis of this information, the Forest Service issued a purchase order dated December 27, 1982, to Calendar Promotions, Inc., for 2,000 habitat calendars. The calendars have been received and distributed by the Forest Service.

We would agree with the Director of Public Information that a waiver from the JCP is not required prior to contracting for a pre-printed calendar. A pre-printed item is one that is regularly carried in stock by dealers, which requires no printing or binding after the receipt of an order to fit them for the use of the purchaser. See, 30 Comp. Gen. 1, 2 (1950). From the information furnished to us, it appears that the habitat calendar was developed through the contribution of photographs and descriptive texts by several agencies, one of which was the Forest Service, to Calendar Promotions, Inc., which undertook to make it up as a one-of-a-kind publication available only from the promoter. Accordingly, it is unclear, in our view, whether or not the habitat calendars would qualify as a pre-printed item.

Section 501 of Title 44 of the United States Code, requires, with certain exceptions not pertinent here, that

all printing and binding for the Government be performed at the GPO, absent a waiver from the JCP. 44 U.S.C. § 501. Section 504 of Title 44 further provides that the JCP may permit the Public Printer to authorize an executive department, independent office, or establishment of the Government to purchase such printing directly if the GPO is not able or suitably equipped to execute the printing or if it would be more economical or in the best interest of the Government to have the printing performed elsewhere. 44 U.S.C. § 504.

If a legitimate doubt exists as to whether a particular item is pre-printed, we believe that the agency involved should submit the question to JCP for its determination prior to procurement. Therefore, prior to entering into a contract with Calendar Promotions, Inc., for the habitat calendars, the Forest Service should have requested the JCP to determine whether the calendar qualified as a pre-printed item and if so whether it would grant a waiver. Even if the JCP had granted a waiver or determined that the calendar was pre-printed, the procurement would still have been deficient. A waiver from GSA was also required under 41 C.F.R. Chap. 101 since calendars are an ordinary GSA stock item listed on the mandatory schedule. The procurement of calendars and other items available as GSA stock, are governed by 41 C.F.R. § 101-26.301 which states:

"All executive agencies within the United States * * * shall requisition from GSA needed stock items available from GSA supply distribution facilities * * * except as provided in this * * * [section]."

Under 41 C.F.R. § 101-26.301-1(b) an agency can request GSA to waive this requirement as follows:

"When an agency determines that items available from GSA stock will not serve the required functional end-use purpose of the item proposed to be procured, a request to waive the requirement to use this source shall be submitted to GSA for consideration in accordance with the provisions of § 101-26.100-2."

The provision governing waiver, 41 C.F.R. § 26.100-2(b), is quite explicit:

"Agencies shall not initiate action to procure similar items from non-GSA sources

until a request for a waiver has been requested from and approved by GSA. The fact that action to procure a similar item has been initiated will not influence GSA action on a request for waiver."

The Forest Service indicates that the habitat calendars were purchased in order to promote the National Forest Fish and Wildlife Program. Although it would appear that the standard GSA calendar could not serve the promotional and other specific "end-use purposes" for which the Forest Service needed the habitat calendar, the FPMR provisions cited above clearly provide that in such circumstances, an agency must request a waiver from GSA. In our view, an agency that fails to do so cannot enter into a valid contract to procure these items from non-GSA sources.

We note that, in the past, there has been some confusion as to whether these regulations require an agency to seek a waiver whenever an item similar to the desired one is available from non-GSA stock. In 62 Comp. Gen. 566 (1983), we considered a situation similar to the one at issue here, in which calendars imprinted with program information were purchased solely as a vehicle to disseminate the information from non-GSA sources. GSA's Office of Commodity Management informally advised us that agencies had not been required to request waivers unless there was a legitimate doubt about the availability of similar items from GSA. On the basis of that information, we held that since there were no items available from GSA stock or the Federal Supply Center which could fulfill the specific purpose for which the calendars were needed, "a waiver request was not required."

When the same issue arose in this case, we requested a formal interpretation of the waiver provision in 41 C.F.R. § 101-26.100-2 from GSA. GSA advised us as follows, in its response dated April 30, 1984:

"Our interpretation of that regulation is that agencies must request a waiver from the General Services Administration (GSA) before they acquire an item that is similar to one available through GSA, from another source. A determination of similarity depends on the facts of each situation, taking into account the functions and use of the items involved. A waiver is required unless it is clear that a similar item is not available from GSA. In the fact pattern you cited

from 62 Comp. Gen. 566 (1983), a waiver would have been required." (Emphasis added.)

GSA also indicated that it will generally not grant a waiver retroactively.

As explained above, our present interpretation of these regulations is consistent with GSA's position as set forth in its April 30 letter. We were incorrect in stating that a waiver was unnecessary in the 1983 calendar case. Accordingly, the holding in 62 Comp. Gen. 566 (1983) will no longer be followed by our Office.

Since the Forest Service did not obtain the necessary waivers from either the JCP or GSA (or a determination that such waivers were not required), the purchase order for the habitat calendars was improperly issued and cannot be certified for payment in accordance with its terms.

Smokey Bear Pocket Planners

Prior to the procurement of the habitat calendars, the Forest Service also had issued a purchase order for 20,000 Smokey Bear Pocket Planners. At the time of the procurement, no questions were raised about the need for waivers from either the JCP or GSA. However, we note from the information furnished to us, that in 1980 the Forest Service had attempted to obtain Smokey Bear Pocket Planners but had been informed by the JCP that such items were analagous to calendars and should not be procured at Government expense.

It appears that the Smokey Bear Pocket Planners at issue here, were printed for the National Association of State Foresters and not at the expense of the Government. Although, the contractor's invoice did include an additional charge of \$150 for the printing of a special insert to be enclosed with the pocket planners for the Forest Service this printing would be exempt from JCP requirements since the cost for the insert was under \$500. See, GPBR 49-2 and Agriculture Policy Regulation (AR), Title 3 (3 AR 93).

However, as we stated above with reference to the habitat calendars a waiver from GSA would have been required since pocket planners are carried as GSA stock items on the mandatory schedule. 41 C.F.R. § 101-26.100-2. Absent the necessary waiver the contract for the pocket planners was also improper and the purchase order may not be certified for payment according to its terms.

Woodsy Owl Pocket Planners

The Forest Service also had contracted and paid for 1,500 Woodsy Owl Pocket Planners before questions arose about the purchase. Although we have not seen a sample of this pocket planner, we have been informed that it was not printed at Government expense, and there were no special printed inserts and it was available from the Colorado State Forest Service as a stock item generally available to the public.

As discussed above, pre-printed items do not require a waiver from the JCP. However, since pocket planners are GSA stock items on the mandatory schedule, a waiver is required from GSA prior to entering into a contract for such items from outside sources. 41 C.F.R. Chap. 101, supra. Therefore, in view of the fact that no such waiver was requested, this contract was also improper and payment of the invoice should not have been made.

Equitable Relief

Having found that each of the questioned procurements were improper, we turn now to the issue of equitable relief. Under GAO's claim settlement authority, 31 U.S.C. § 3702, the Comptroller General may authorize payment on a quantum valebant basis under certain conditions.

Where a performance by one party has benefited another, even in the absence of an enforceable contract between them, equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party. The law thus implies a promise to pay by the receiving party whatever the goods are reasonably worth. See, e.g., Bouterie v. Carre, 6 So.2d 218, 220 (La. App. 1942); Kintz v. Read, 626 P.2d 52, 55 (Wash. App. 1981). However, before GAO will authorize a quantum valebant payment, we must make a threshold determination that the goods or services would have been a permissible procurement had the proper procedures been followed. Next we must find that (1) the Government received and accepted a benefit; (2) the contractor acted in good faith; and (3) the amount claimed represents the reasonable value of the benefit received. See, 33 Comp. Gen. 533, 537 (1954); 40 Comp. Gen. 447, 451 (1961); and B-210808, May 24, 1984.


First, in order to make the threshold determination we must examine and weigh the facts of each case. Here, we have already determined that the three procurements were

procedurally defective. Otherwise, we would not even be considering an equitable remedy such as quantum valebant. An equitable remedy is not considered appropriate when there is a clear violation of a statutory prohibition. For example, in most of our printing cases, equitable relief was not available since there was no doubt that printing was involved and therefore no question that 44 U.S.C. § 501 was violated. See, e.g., B-195566, March 17, 1980. However, unlike these cases, we believe a strong argument can be made that the procurement of the habitat calendars at issue here did not necessarily violate the JCP standard. As stated earlier, we could not even conclude that the statutory prohibition on printing in 44 U.S.C. § 501 was applicable to this procurement since the habitat calendars may very well have been pre-printed. Thus, while the Forest Service should have submitted this matter to the JCP for its determination, we cannot conclude in these circumstances that this procedural defect necessarily resulted in an impermissible procurement. Moreover, with respect to GSA, there is no statutory prohibition against the Government purchasing pre-printed calendars and pocket planners; nor do the regulations absolutely prohibit such purchases from non-GSA sources. Instead, the regulations set forth procedures whereby an agency can request and obtain a waiver from GSA that will allow it to properly make such purchases. As indicated above, a strong argument could be made that the calendars and pocket planners available from GSA could not possibly have fulfilled the specific end-use purposes for which the Forest Service needed these items. Therefore, it is reasonable to assume that had proper procedures been employed, a waiver might have been obtained, and the procurement would have been permissible. For this reason, we think the above-described threshold test for equitable relief has been met.

Second, the Forest Service has received a benefit as a result of the goods provided by the contractors, that were received, distributed, and used by the Forest Service and its employees. Third, it appears that the contractors acted in good faith and charged a reasonable amount for their products. However, while the prices charged for the questioned items seem reasonable, we have held that payment on a quantum valebant basis in these circumstances cannot exceed the amount that would have been charged for these items had

they been procured as GSA stock items. See, B-213489, March 13, 1984.^{1/}

Accordingly, it is our view that while the purchase orders for the habitat calendars and pocket planners cannot be certified for payment since the procurements were improper, payment is permissible on a quantum valebant basis. However, payment on that basis is limited to the amount that GSA would have charged for comparable items. Similarly, payment for the Woodsy Owl Pocket Planners was improper and could only have been justified on a quantum valebant basis. However, even if the contract price paid for the pocket planners exceeded the amount allowable under a quantum valebant payment, we will not require the Forest Service to institute collection action nor will we object to a decision to terminate collection action for the price differential if already begun in view of the time that has elapsed since payment and the relatively small amount of money involved.

for 
Comptroller General
of the United States

^{1/} Our decision in that case, which involved a very similar situation in which a Forest Service employee ordered an item from a private contractor that was listed on a mandatory Federal Supply Schedule contract, without requesting or obtaining a waiver from GSA, provides a strong precedent for payment on a quantum valebant basis in this case.