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Memorandum

Date: May 28, 2003
To: General Counsel, OGC - Anthony Gamboa
Thru: Deputy General Counsel, OGC - Gary Kepplinger
From: Managing Associate General Counsel, OGC - Susan Poling
Subject: Proposed Purchase of Protective Hoods (B-301152)

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Susan Poling

This responds to your question regarding the availability of GAO appropriations to purchase protective hoods for use in the event of a terrorist attack involving explosives or chemical or biological weapons. For the reasons discussed below, we conclude that GAO's operating appropriation is available to cover the expense of acquiring protective hoods. Further, the Comptroller General would be within his discretionary authority to acquire hoods adequate to cover the estimated number of persons in the building, not just employees.

We are currently in the extraordinary circumstance where the government is advising that everyone take special precautions in the event of a terrorist attack and that government facilities are a likely target. See, e.g., Letter from Kay Coles James, Director, OPM, accompanying the Federal Manager's/Decision Maker's Emergency Guide, March 2003, www.opm.gov/emergency/TEXT/ManagersGuide.txt. Accordingly, GAO is in the process of evaluating to what extent GAO headquarters is at risk from either a direct attack or from collateral damage from attack on a nearby structure.¹ These attacks could potentially involve biological or chemical weapons. One feature of the agency emergency plan in the event of a chemical or biological attack might reasonably include the use of protective hoods.

From an appropriations law standpoint, we have never specifically considered an agency's purchase of hoods or other protective gear on as broad a basis as is being considered here, where the purpose is to address a threat of attack and provide for either a safe "shelter-in-place" or the orderly and safe evacuation of employees and other building occupants in that event. The issue presented in cases such as this is the availability of the public's money to supply equipment and services that inure in a very real sense to the benefit of individuals. We generally resolve this issue by assessing the benefits to the agency from any such expenditure. Of course, an individual is likely to attain at least some collateral benefit from most expenditures such as this, but the potential receipt of a benefit, however real, is not the

¹ GAO is also evaluating the risk to employees in audit sites and field offices.

determinative factor. The determinative factor is whether, on balance, the individual receives the primary benefit. If the primary beneficiary of an expenditure of public funds is the individual, not the agency or government, the well-established rule is that such expenditures are personal in nature and hence not an authorized use of appropriated funds.

As we explain in detail below, so long as an agency determines that the threat of attack is legitimate, and that the protective hoods or other gear, equipment or services sought is an appropriate, reasonable, and responsible response to such threat, agencies' operating appropriations are available for that purpose. In the exigent circumstances that we face today, it would be irresponsible, we believe, for an agency to ignore legitimate dangers posed to the premises the agency occupies. Hence, should GAO determine that there is a threat to the health and safety of its employees and others in the GAO Building, we believe an expenditure for protective hoods is a necessary, bona fide expense chargeable to GAO's appropriations.

Generally, in common law, our society expects that a property owner or an occupant in possession of property, while not an insurer of safety, will exercise reasonable care to keep the premises safe for those lawfully coming onto the premises, including employees, independent contractors, and employees of independent contractors, as well as visitors. See J. Michael Russo, "Failure to Provide Safe Place to Work," 2 Am.Jur. Proof of Facts 2d 517 (2002); 65A C.J.S. Negligence, § 598 (2002). Although our case law and federal statutory law speak most specifically to protection of federal employees and providing them a safe place to work, the case and statutory law, as well as recent emergency guidance provided to federal managers, when viewed together in an historical context, is consistent with the common law notion that an occupant of premises will exercise reasonable care to keep the premises safe for those on the premises.

As far back as World War II we have recognized that agencies have an obligation to protect their employees and maintain a healthy work environment when confronted with exigent circumstances. In 21 Comp. Gen. 731 (1942), we concluded that the then-War Department could use its appropriations to purchase protective clothing and equipment, including gas masks, for all the employees of ordnance plants in the event there are explosions or chemical releases. The Department was retaining title to the equipment; it prohibited employees from removing the equipment from the plant; and, the equipment was available for use in furtherance of the safe and successful operation of the plants primarily for the benefit of the government in keeping everyone safe. We did not view the equipment as equipment the employees reasonably might be expected to furnish as part of equipping themselves for the job. Then-Comptroller General Warren further noted that the War Department's submission made "apparent . . . from an administrative standpoint" that the equipment in question was necessary "not only for the protection of the wearers, but, also, for the protection of their fellow employees, the public, and the plant in which worn." Id. at 733. Analytically, the Comptroller General focused, not narrowly on the individual, but broadly to all workers, the public, and the facility as a whole. Id. See also B-247871, April 10, 1992 (contaminated water supply system to an agency building justified agency purchase of bottled water).

That 1942 case predated three pieces of legislation we considered in later cases involving government purchases of apparel or equipment for the health and safety of employees. The first of these is 5 U.S.C. § 7903, which authorizes the use of appropriations for the procurement of "special clothing and equipment" for the protection of personnel in the performance of their jobs. Most of our cases here involve apparel or equipment needed by specific employees doing specific jobs. The standard we apply is that the item must be special and not part of the ordinary and usual items an employee may reasonably be expected to provide for himself; it must be for the benefit of the government and not just the employee; and, the employee must be engaged in hazardous duty.

In addition, there is specific authority for agencies to establish an agency health service program to promote and maintain the health and physical fitness of its employees in 5 U.S.C. § 7901. This is the authority under which GAO supports our fitness center and health unit, which purchases equipment needed to protect the health of GAO employees, including things like flu shots and other vaccines. In 64 Comp. Gen. 789 (1985), based upon the authority in 5 U.S.C. § 7901, we held that "Smokeeaters" air purifiers placed on the desks of federal employees who smoke can be purchased with appropriated funds where they are intended to provide a general benefit to all employees working in the area.

The third line of statutory authority is the Occupational Safety and Health Act (OSHA) requirements.² Under 29 U.S.C. § 668, federal agencies are required to provide safe and healthful conditions in workplaces. Under section 668(a)(2), heads of agencies are authorized to "acquire, maintain and require the use of safety equipment, personal protection equipment, and devices reasonably necessary to protect employees." The OSHA regulations also have a section on the provision of employee protection in 29 C.F.R. § 1910.132(a), which states that personal protection equipment shall be provided, used and maintained whenever necessary because the hazards of the environment could cause injury or physical impairment. Under the Congressional Accountability Act, Pub. L. No. 104-1, § 215, 109 Stat. 16, Jan. 23, 1995, (2 U.S.C. § 1341), GAO is required to establish and maintain an effective and comprehensive occupational health and safety program consistent with the OSHA regulations. See GAO Order No. 2792.4, Health and Safety Program, April 1, 1999.

In the 1950s and 1960s, our country faced a danger not unlike what we face today; then, we faced the threat of thermonuclear war, and planners assumed that Washington D.C. was a prime potential target. Before the full effect of radiation was understood, early efforts centered on sheltering people from a nuclear blast. There was an extensive program of designating shelter areas in government buildings and building public shelters, and equipping these for survival. As planners learned more about the full effect of nuclear blasts, emergency preparedness turned to plans for evacuation. All of these efforts were taken under the Federal Civil Defense Act of 1950, which provided for a federal role in civil defense. Codified at 50 U.S.C. App. §§ 2251 – 2297, repealed by Pub. L. No. 103-337, div. C, tit. XXXIV, § 3412(a), 108 Stat. 3111 (1994). The Act authorized federal spending for, among other things, building

² OPM's Federal Manager's/Decision Maker's Emergency Guide, *supra*, noted that federal agencies which operate in buildings managed by GSA are required to establish an Occupant Emergency Plan for safeguarding lives and property under OSHA regulations, 29 C.F.R. 1910.38.

shelters and procuring "radiological instruments and detection devices, protective masks and gas detection kits" for civil defenses purposes. 50 U.S.C. App. § 2281(h).³

Recently, the Director of the Office of Personnel Management, in a letter accompanying emergency guidance to federal managers, stated: "We all recognize that Federal office buildings are potential targets for those who would threaten our security...[I]t is up to each agency to design and to communicate a comprehensive plan that takes into account the threats that its employees are most likely to face." Letter from Kay Coles James, Director, OPM, accompanying Federal Manager's/ Decision Maker's Emergency Guide, March 2003.

Consistent with societal expectations rooted in common law, and as reflected in our decisions, the cases and statutes discussed as well as the federal government's response to recent and Cold War threats, when viewed together, evidence the government's willingness to provide not only for the safety and health of government employees and their work environment, but also for maintaining the safety and health of the premises. In considering the availability of an agency's appropriations for operational expenses, it is important to factor into our consideration notice of what our society expects of its employers. Without question, an agency may use appropriated funds to satisfy basic fundamental needs such as potable water, clean air, and sufficient light. It would be unreasonable to suggest that appropriations are not available for maintaining certain facilities such as restrooms. Similarly, we think that it would be irresponsible to conclude that appropriations are not available to exercise the degree of supervisory care to maintain safe premises that our society expects of the owner/occupants of those premises, particularly in the face of exigent circumstances like those we confront today. For that reason, we would not object to an agency, either as an owner of the work premises or as an occupant and supervisor of the premises, using its appropriations to supply appropriate equipment and services to maintain the safety and healthiness of those premises in response to legitimately anticipated dangers and exigencies.

For GAO in particular, the Comptroller General has exclusive custody and control over the GAO headquarters building in Washington, D.C., including the protection of the property and persons in the building. 31 U.S.C. § 781. The Comptroller General has broad authority "to make all needful rules and regulations for the Government of the General Accounting Office Building." 31 U.S.C. § 783. Given the current circumstances, the Comptroller General, in exercising this authority, would be justified in purchasing a reasonable quantity of protective hoods, based on an estimate of the number of people in the GAO headquarters building at any one time, as a necessary expense in furtherance of his responsibilities regarding the protection of persons under 31 U.S.C. § 781. Although our 1942 decision in 21 Comp. Gen. 731, supra, did not specifically address this, we would not have found it objectionable if the War Department had supplied gas masks to contractors or other visitors to the ordnance plants for the same reasons they were supplied to plant employees. Similarly, a protective hood is an emergency item neither employees nor visitors to the building would be expected to provide. GAO would keep title to the equipment and it would be dispensed only when warranted to whomever is in the building at the

³ The GAO Historian was unable to find any memoranda discussing GAO's Cold War efforts in this regard.

time, which would include employees, contractors, and visitors.⁴ Under the unique circumstances posed by the nature of the threat and the unpredictability of a terrorist attack, the protective hoods would prove beneficial to the protection of employees and other building occupants during either a shelter-in-place scenario or an orderly evacuation of the building.

⁴ We note that currently the Army Corps of Engineers is leasing space on the third floor of the GAO headquarters building. It is our understanding that the Corps is planning to purchase and provide protective hoods to Corps employees stationed in the GAO building.