COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

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The Honorable Clarence D. Long
House of Representatives

Dear Mr. Long:

Your letter of June 10, 1975, requested us to investigate whether congressional intent was contravened by a February 1975 decision by the Department of Agriculture not to grant the United Nations World Food Program permission to use ~~the firm of Daniel F. Young, Inc.~~, as their freight forwarder. Your request ~~enclosed~~ a June 3, 1975, letter from Daniel F. Young, Inc., and a World Food Program position paper identifying several issues relating to the decision. Your letter of August 7, 1975, enclosed copies of additional correspondence you received from the firm providing information further contesting the Agriculture decision.

In summary, we found nothing illegal about Agriculture's decision nor could we find sufficient evidence to suggest that it contravenes the intent of Congress. The legislative history of title II, Public Law 480, does not specify the extent to which freight forwarding and other services involved in the title II program should be provided by private enterprise. Essentially then, whether Agriculture or a private freight forwarder should provide these services is left to administrative discretion, based on various policy considerations, rather than requiring legal resolution. Our analysis of, and views on, the legislative history in support of this position are set forth in the enclosure.

Agriculture's decision to retain the ocean transportation responsibility for commodities destined for World Food Program recipients appears to be based primarily on a January 1975 audit report by its Office of Audit. The audit was undertaken by Agriculture in response to World Food Program efforts, dating back to 1969, seeking approval to use a freight forwarder to effect ocean transportation arrangements for its title II commodities. Throughout this span of more than 5 years, World Food Program officials have (1) maintained that Agriculture has not provided proper service for shipment of programed commodities and (2) contended that such transportation could be handled more efficiently by a freight forwarder.

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The Agency for International Development, through its Food for Peace office, has generally supported the request of the World Food Program to transfer booking authority contending that it would assist the Program in efforts to develop improved management. Agriculture, through its Foreign Agricultural Service, has consistently opposed the transfer, basically contending that it would result in (1) monetary loss to the Government, (2) reduced U.S. flagship participation in shipments, and (3) reduced control and ability to advantageously negotiate with carriers.

After considering the above positions and the concerns of others having an interest in the issue, Agriculture's Office of Audit concluded in its report that responsibility for ocean transportation booking and freight forwarding for World Food Program commodities should remain within Agriculture, citing the following six reasons.

"1. A serious evaluation of the criticisms leveled at the USDA [U.S. Department of Agriculture] regarding deficiencies in the communication and documentation area surrounding transportation of WFP [World Food Program] commodities disclosed that the deficiencies were not always attributable to USDA shortcomings.

"2. As a result of our comprehensive study, we are not persuaded that the WFP program objectives would be better served by their control of transportation of U.S.-donated commodities.

"3. Transfer of the ocean transportation responsibilities to a commercial agent would not effect greater savings to the USG [U.S. Government]. Further, if such a transfer were effected, USDA administration costs would not necessarily decrease.

"4. USDA has provided booking and freight forwarding services for commodities procured for WFP in a reasonably effective and economical manner. It possesses the necessary resources to improve service to the WFP.

"5. Historically USDA has commendably performed its ocean shipping responsibilities to comply with the tenor and intent of cargo preference requirements.

"6. USDA has effected tangible savings to the U.S. Government. A potential for further reductions in overall transport costs exists in examining the feasibility of standard freight forwarder commissions or alternatively other benefits flowing directly to USDA."

As can be noted, these reasons generally focus on and attest to Agriculture's past performance and capabilities, essentially maintaining that Agriculture has done a good job and that there was no compelling reason to transfer the transportation function to the World Food Program.

World Food Program officials expressed disappointment and disagreement with the decision and its underlying rationale. The executive director of the Program asked Agriculture to reconsider its decision, maintaining that the audit report did not accurately reflect the prevailing situation and that the conclusions appeared to be more subjective than objective. Agriculture reaffirmed its decision in a letter to the executive director, asserting that the report did treat the issues fairly and comprehensively and assuring him that Agriculture intended to adequately serve Program needs and objectives.

Since issuance of the audit report, Agriculture has taken certain corrective actions and continues to perform freight forwarding and ocean transportation booking for World Food Program commodities under the assumption the issue has been resolved. However, the Program's agent, Daniel F. Young, Inc., and the agent's firm of attorneys continue to seek reversal of Agriculture's decision, contending that these functions can be better performed by a freight forwarder and at no increased cost to the Government.

Because these contentions continue to be asserted, even after Agriculture's audit, and seem to fairly represent the crucial considerations in the decision, we are including some observations on their merits. Conclusively substantiating or disproving whether a freight forwarder could perform the Program's transportation functions better than Agriculture would be difficult, if not impossible. Agriculture has been performing the functions for many years and undoubtedly possesses the wherewithal to continue doing the job. On the other hand, freight forwarders, such as Daniel F. Young, Inc., routinely perform such functions for a variety of U.S. exporters, including private relief organizations.

As a matter of interest and perhaps the basis for the agent's contention, U.S. voluntary agencies (who receive and distribute more than half of the U.S. Government's title II food donations) use freight forwarders, including Daniel F. Young, Inc., for arranging ocean transportation of their commodities. Their use of freight forwarders dates back many years and is the continuation of a practice followed before the Government assumed the costs of ocean transportation. We made no attempt to determine whether such an arrangement is more efficient or more economical than that followed in shipping World Food Program commodities. However, several voluntary agency officials told us that the performance of their freight forwarders had been very satisfactory.

A determination that the Government's costs would not increase by allowing a freight forwarder to perform the World Food Program's transportation functions would be equally difficult to prove or disprove. The agent contends that the Government's ocean transportation costs for the Program's commodities would remain the same--whether the booking function is performed by Agriculture or by a freight forwarder--because the applicable ocean freight rates already include a factor for the shipping company to pay the freight forwarder a fee (2-1/2 percent of the total rate) for the booking service rendered. With Agriculture performing the Program's booking functions, the shipping company retains the fee that would ordinarily be paid to a freight forwarder. Thus, from a freight-cost point of view, the costs would appear to be the same, regardless of who performed the booking function.

Agriculture argues that relinquishing the Program's transportation functions to a freight forwarder would lead to increased transportation costs. Its argument is based on the belief that the forwarder's fees would be ultimately passed on to the Government in the form of increased rates. It further contends that the loss of booking the Program's commodities would diminish its stature and influence with shipping companies in seeking freight rate reductions.

The agent also suggests that, with a freight forwarder performing the functions, Agriculture could reduce its personnel or direct their efforts to other more productive endeavors. Agriculture, however, maintains that to protect the Government's interest it would be necessary to establish and maintain internal records, controls, and audit oversight to such an extent that its administrative costs would not necessarily decrease.

Precise costs being incurred by Agriculture for the Program's transportation functions, largely personnel and communication costs, were not readily determinable. An estimate developed by Agriculture's Ocean Transportation Division showed that personnel costs attributable to Program shipments during fiscal year 1974 were approximately $130,000. Additional costs were incurred for a small number of field personnel performing freight forwarding functions. How much, if any, of these costs could be saved if a freight forwarder performed the transportation functions is also not readily determinable.

It is our view that the agent's and Agriculture's arguments both have merit and some degree of validity; however, we do not believe a conclusive case could be made for either side even through further and exhaustive audit analysis. Therefore, we believe the issue is primarily one of whether the use of private enterprise in this program should be left to administrative policy decisionmaking or whether the congressional intent of its use should be made a part of the legislation.

As pointed out earlier, the legislative history of title II, Public Law 480, contains no provision mandating the use of private enterprise or private trade channels to the maximum extent practicable in carrying out the program. However, such a provision is part of the legislation of title I of this act and of the Foreign Assistance Act. The possibility that the omission of the p , sion from title II may have been an oversight was brought out during an exchange between Senator Jacob Javits and Senator Herman Talmadge (Chairman, Senate Agriculture and Forestry Committee) on the floor of the Senate on November 4, 1975. In response to a question by Senator Javits on the use of pri te enterprise in the title II program, Senator Talmadge affirmed his understanding that the mandate to use private trade channels whenever practicable, explicitly stated in section 103(e) (title I, Public Law 480), is implicitly intended to cover the operations of the Public Law 480 program generally, including title II.

While this exchange, in our view, cannot retroactively alter the historical intent of title II or its legislative history, it does suggest a need to clarify the applicability of this provision to the title II program. In view of this uncertainty, the introduction and favorable Congressional consideration of an amendment to title II, Public Law 480, may be the best way to resolve the matter. Such an amendment could add a sentence at the end of Section 202 providing that "The President shall take appropriate steps to assure that private trade channels are used to the maximum extent practicable." This amendment would express a Congressional policy that both title I and title II are subject to the same provision on use of private trade channels.

Sincerely yours,

Comptroller General
of the United States

Enclosure

ENCLOSURE

ANALYSIS AND VIEWS ON LEGISLATIVE REQUIREMENTS FOR USE OF PRIVATE ENTERPRISE IN CARRYING OUT PUBLIC LAW 480, TITLE II PROGRAMS

In a position paper on "Traffic Control and its Affect on Program Objective," Daniel F. Young, Inc., acting as an agent for the U.N. World Food Program, maintained that the U.S. Department of Agriculture has contravened the intent of Congress by providing foreign freight forwarding services through its Ocean Transportation Division to the World Food Program, an intergovernmental relief agency, rather than allowing private freight forwarders to provide such services. To support this position, the paper relied on (a) sections 601(a) and 621(a) of the Foreign Assistance Act of 1961, as amended, Public Law 87-195, and (b) sections 103(e) and 205 of the Agricultural Trade Development and Assistance Act of 1954, Public Law 83-480, as amended by the Food for Peace Act of 1966, Public Law 89-808.

APPLICABILITY OF FOREIGN ASSISTANCE ACT PROVISIONS TO PUBLIC LAW 480, TITLE II

Section 601(a) of the Foreign Assistance Act of 1961, in pertinent part, declares it to be the policy of the United States to encourage the contribution of private enterprise toward economic strength of less developed friendly countries "through private trade and investment abroad, private participation in programs carried out under this Act (including the use of private trade channels to the maximum extent practicable in carrying out such programs)* * *." Section 621(a) of the Act provides, in pertinent part, that the head of any Government agency "providing technical assistance under this Act* * * shall utilize, to the fullest extent practicable, goods and professional and other services from private enterprise on a contract basis." Since the "Act" referred to in these sections is the Foreign Assistance Act of 1961, it is clear from the statutory language that these provisions apply only to programs undertaken pursuant to the Foreign Assistance Act. Moreover, we have reviewed the legislative history of the Act as well as that of Public Law 480 and, except for certain specific provisions not herein applicable, the two acts are separate and distinct. Hence, we believe that the provisions of the 1961 Act, including sections 601(a) and 621(a) are not generally or specifically applicable to title II of Public Law 480.

APPLICABILITY OF PUBLIC LAW 480, TITLE I PROVISIONS TO TITLE II PROGRAMS

Title I of Public Law 480 provides generally for the sale of surplus agricultural commodities. Section 103(e), on which the paper also relied, is located in title I and is thereby relevant only to the sale of surplus agricultural commodities, and not to the relief program with which we are concerned. Thus, the fact that section 103(e) directs the President to "take appropriate steps to assure that private trade channels are used to the maximum extent practicable" has no bearing on the question.

CONGRESSIONAL INTENT REGARDING PRIVATE ENTERPRISE IN PUBLIC LAW 480, TITLE II

Title II authorizes a food distribution program to provide voluntary donations to the peoples of both friendly and unfriendly countries having famine or other urgent or extraordinary relief requirements. The President may furnish surplus commodities identified by the Secretary of Agriculture under such policies as the President may establish through friendly governments and through private or public agencies, including intergovernmental organizations such as the World Food Program, in such manner and upon such terms and conditions as he deems appropriate. To the extent practicable, the President is to use nonprofit voluntary agencies. (See sections 201 and 202 of Public Law 480) Unlike title I, there is nothing in the provisions or legislative history of title II which discusses the role, if any, Congress intended for private enterprise.

The position paper's reference to section 205 of Public Law 480, which is part of title II, maintained that Agriculture, to the detriment of the World Food Program, is not effectively handling the freight forwarding function and that:

> "Impairing the effectiveness of WFP's feeding program is directly contrary to the Congressional intent that the program be supported rather than obstructed."

Section 205 provides that:

> "It is the sense of the Congress that the President should encourage other advanced nations to make increased contributions for the purpose of combating world hunger and malnutrition, particularly through the expansion of international food and agricultural assistance programs. It is further the sense of the Congress that as a means of achieving this objective, the United States should work for the expansion of the United Nations World Food Program beyond its present established goals."

Although the paper refers to only the last sentence of section 205, from our review of the legislative history of that section, we believe that the primary purpose of the section is contained in the first sentence thereof--to encourage other advanced nations to make increased contributions for the purpose of combating world hunger and malnutrition.

Section 2(c) of the Food for Peace Act of 1966 amended Public Law 480 so as to add section 205. Section 2(C) of House bill 14929 (89th Cong., 2d sess.), the derivative source of the Food for Peace Act, was amended by the Senate to include section 205. The following explanation of the purpose of the amendment was contained in a Senate report on the bill:

> "* * * we cannot, alone provide all needy people with adequate food and clothing. * * * We cannot give beyond our means and should not try to assume more than our fair share of the burden. Our assistance should be conditional upon other countries assuming their proper share. * * *" (S. Rept. 1527, 89th Cong., 2d sess. (1966).)

In accord is the Senate's explanation of the amendment itself:

> "(28) Expresses the sense of Congress that the assistance of other countries should be sought, particularly through the world food program."

Clearly, the intent of Congress for section 205 was to increase the involvement of other countries in solving world food problems, noting that this might best be accomplished through the World Food Program. Further, there is nothing in the statute or its legislative history which deals with the role, if any, which private enterprise is to be given in the Program's administration.

In view of the foregoing, we cannot say that the intent of Congress for section 205 of Public Law 480 has been contravened by the practice of providing foreign freight forwarding services to the World Food Program through Agriculture's Ocean Transportation Division rather than allowing a private freight forwarder to provide such services. That is not to say, however, that there is a specific requirement for Agriculture to provide such services. Either method of providing foreign freight forwarding services would be legally permissible under the Act.

CONCLUSION

In summary, there is nothing illegal about the decision not to use a private freight forwarder. The legislative history of title II of Public Law 480 does not specify the extent to which foreign freight forwarding and other services involved thereunder should be provided by private enterprise. Essentially, then, whether the Department of Agriculture or a private freight forwarder should provide these services is for administrative discretion, based on various policy considerations, rather than for legal resolution.