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

OFFICE OF GENERAL COUNSEL

B-181432

FEB 5 1979

Mr. Francis X. Reed, President
Manufacturers Hanover Trust Company DLG 00808
P. O. Box 75
Latham, New York 12110

Dear Mr. Reed:

This is in response to your letter concerning a loan guaranteed by the Small Business Administration (SBA) that your bank--Manufacturers Hanover Trust Company--made to the Ideal Steel Corporation. Apparently, SBA refused your request for it to purchase the guaranteed portion of this loan on the basis of our decision, B-181432, March 13, 1975, because the Bank had not paid the required guarantee fee prior to default by the borrower. DLG 00807

Your letter requests our Office to "re-examine this matter, bearing in mind the mutually satisfactory relationship that has long existed between Manufacturers Hanover and the U. S. Small Business Administration." Elsewhere in your letter you indicate that you have requested our Office to "reconsider" this matter because of our recent denial of your request to SBA for it to purchase the guaranteed portion of the loan.

We believe that you are under a misapprehension. Although SBA's refusal to purchase the loan was presumably based on our decision of March 13, 1975, in which we held that SBA could not purchase the guaranteed portion of a loan if the required guarantee fee had not been paid before the borrower defaulted, our Office was never asked by SBA, or anyone else to rule on the propriety of SBA's purchasing the specific loan your bank made to the Ideal Steel Corporation and we have absolutely no knowledge of the facts in this case. The approval or disapproval of a specific purchase request is, in the first instance, always a matter for decision by SBA, the administrative agency charged with responsibility for this program. Ordinarily, we become involved only when SBA is uncertain how to proceed in a particular situation and requests our opinion on the legality of a proposed course of action.

[Propriety of Purchasing Loan] 503422 letter pertinent

In your letter to us, you explained the circumstances as follows:

> "In the matter at hand, denial of payment is based solely on our failure to remit a minimal guarantee within a specified period following the loan closing. I have personally discussed this matter in detail with the SBA officials involved and they have unanimously expressed complete satisfaction with our handling of this account. Furthermore, they fully agree with our contention that late payment of the guarantee fee was reasonable under the circumstances and did not adversely effect their position."

The decision of March 13, 1975, upon which SBA apparently relied in this matter, has been consistently and repeatedly upheld in subsequent opinions issued by our Office. See B-181432, November 12, 1975; B-181432 August 15, 1977; B-181432 July 7, 1978; and most recently in B-181432 October 20, 1978; (copies of which are enclosed). For example, in our November 12, 1975, opinion, we explained the basis for our original decision of March 13, 1975, in the following manner:

> "* * * we concluded in B-181432 March 13, 1975, that SBA could not accept late payment of the required guarantee fee when the underlying loan was already in default or when SBA or the lender was aware of the possibility of imminent default. Our conclusion was based primarily on the language of paragraph 2 of the Guaranty Agreement which provides that 'An approved loan will not be covered by this agreement until lender shall have paid the guarantee fee for said loan * * *', and on the longstanding principal that no officer or agent of the Government has the authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the Government, without adequate legal consideration or a compensating benefit to the Government."

Most recently, in our October 20, 1978 decision, which resulted from a request by SBA for us to reconsider our original 1975 decision, we amplified and expanded upon that decision instead. We held that the provision in paragraph 2 of the Guaranty Agreement, which had been the primary basis for our original decision, was a material and unambiguous condition precedent to SBA's guarantee. Also we held that SBA had not waived that provision and could not be estopped from enforcing it. From the scant information you have given us, we believe that the rationale of our decision in that case, as well as in the other cited decisions is probably equally applicable to the loan in question here.

If, however, you have information which you think warrants reconsideration of SBA's denial because your situation is distinguishable from our prior cases, you should forward this information to SBA. If SBA agrees with your legal theory, it can request our views as to the propriety of purchasing your loan.

Sincerely yours,

Rollee H. Efros

Rollee H. Efros
Assistant General Counsel

Enclosures