DECISION

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

FILE: B-212887 **DATE:** July 2, 1984

MATTER OF: SBA's Authority to Pay Interest on Funds Advanced by Bank at SBA's Request

DIGEST: Small Business Administration (SBA) is authorized to pay interest on funds SBA requested the guaranteed lender to advance to purchase property at a foreclosure sale to preserve SBA's security interest in the property being sold. Government may pay interest on unpaid debts pursuant to a valid statutory or contractual provision committing it to do so. SBA's agreement to reimburse the lender for SBA's share of the principal amount advanced plus accrued interest, is within SBA's broad statutory authority under 15 U.S.C. § 633(c)(5)(A) to take any and all actions deemed necessary in liquidating or otherwise dealing with or realizing on loans made under the Act.

This decision is in response to a request from Certifying Officer, John E. Lagos, Director, Office of Accounting Operations, Small Business Administration (SBA) for a legal opinion from our Office as to SBA's authority to pay Citizens Bank of Ogden, Utah, (Bank) the sum of $3,565.92[1/], representing the Bank's interest charges on moneys SBA requested the Bank to advance to purchase property at a foreclosure sale. As we explain below, SBA is authorized to pay the claim in question.

BACKGROUND

After a default by the borrower on his SBA-guaranteed loan, SBA purchased 90 percent of the guaranteed loan from the lender bank as it was legally obligated to do under the terms of the guarantee. As is customary, SBA then assumed the loan servicing responsibilities, placed the loan in

1/ The total of $3,565.92 represents interest, accruing at the rate of $17.48 per day, on the principal amount of $56,649.60, between the date on which the Bank disbursed the moneys and the date on which the Bank received reimbursement of the principal amount from SBA.

liquidation, and proceeded to dispose of personal property collateral from the borrower. The bank retained a 10 percent interest in the loan and any subsequent recoveries thereunder by SBA.

The borrower's house, which served as further security for the loan, was subject to a prior lien held by a third party. The first lienholder scheduled a foreclosure sale of the property on October 19, 1982. For some "unexplained reason," the SBA Field Office was unable to obtain a Treasury check through normal channels in time to submit a "Protective Bid" at the foreclosure sale. When the first lienholder indicated that it was unwilling to extend the date of the foreclosure sale, "SBA requested the participating bank to fund a protective purchase of the property." The Bank agreed to do so provided that SBA agreed to reimburse the Bank for SBA's 90 percent share of the purchase price plus interest on that amount until the Bank was reimbursed. On October 14, 1982, SBA's bid, using funds advanced by the Bank, was accepted and the property was purchased for $62,944. While no formal legal agreement was executed between SBA and the Bank, there is no dispute that the Bank furnished these funds based on SBA's agreement to reimburse the Bank for SBA's 90 percent share of the purchase price plus interest at a rate of $17.48 per day.

In June 1983, SBA paid the Bank the sum of $56,649.60, representing SBA's share of the purchase price (90 percent of $62,944).[2] However, in light of the Certifying Officer's doubt as to SBA's authority "to borrow funds from a bank and pay interest thereon", the accrued interest has not been paid pending a reply from this Office.

SBA's Office of General Counsel is of the opinion that the Bank's claim for accrued interest should be paid. In a memorandum dated July 29, 1983, the General Counsel summarized its position as follows:

> "Section 5(b)(7) of the Small Business Act (15 USC 634(b)(7)) authorizes the Administrator to take any and all actions to liquidate

---

[2] SBA has informally advised us that its delay in repaying the principal amount, which obviously caused the total amount of accrued interest that is the subject of the present claim to increase, resulted from the inadvertent misfiling of the claim in SBA's Regional Office.

> or otherwise deal with or realize on loans made under the Act. Absent contrary statutory provisions, we believe section 5(b)(7) is broad enough to allow the Agency to borrow from this lender and to pay interest thereon."

The Certifying Officer's reluctance to accept the General Counsel's opinion is based on two factors. First, he is concerned that section 4(c)(5)(A) of the Small Business Act, 15 U.S.C. § 633(c)(5)(A) may stand in the way of SBA paying the accrued interest. This provision reads as follows:

> "The Administration is authorized to make and issue notes to the Secretary of the Treasury for the purpose of obtaining funds necessary for discharging obligations under the revolving fund created by paragraph (1) of the subsection and for authorized expenditures out of the funds. * * * All borrowing authority contained herein shall be effective only to such extent or in such amounts as are provided in advance in appropriation acts."

The Certifying Officer maintains that under this provision, "SBA's 'borrowing authority' is restricted in the sense that the borrowing must be between SBA and the U.S. Treasury and then, only after Congress has approved the borrowing by way of appropriation acts." Second, the Certifying Officer argues that "borrowing from a bank is an unauthorized augmentation of appropriated funds," even though "the amount involved was available in the revolving fund and did not exceed authorized activity levels." We address the Certifying Officer's concerns in order.

Borrowing Authority Under 15 U.S.C. § 635(c)(5)

The language in 15 U.S.C. § 633(c)(5)(A) was enacted by Congress to enable SBA to borrow large sums of money from the Treasury, as needed, to fund the different loan programs operating out of SBA's two revolving funds. The explicit language of the statute, as well as its legislative history, clearly demonstrates that when Congress enacted the provision it was only concerned with SBA's authority to borrow

from the Treasury.[3] See H. Conf. Rep. No. 96-1087, 96th Cong., 2d Sess. 39, 40 (1980). Accordingly, the provision has absolutely no applicability to a situation in which SBA obtains a short-term and relatively small advance of funds from a private bank with which SBA "shares" a joint interest in a guaranteed loan. This is especially true where, as here, the advance is needed to protect the common interests of SBA and the lender in preserving the collateral for the defaulted loan.

Augmentation

Similarly, we do not view the transaction as constituting an "unauthorized augmentation" since, as recognized in the submission, the amount advanced by the Bank did not exceed congressionally authorized spending levels for SBA and was subsequently repaid from the appropriate revolving fund, thereby reducing the total amount of money that could be used by SBA for program purposes. Thus, there was no improper increase or augmentation of the funds made available for SBA's loan programs by Congress.

Authority to Pay Interest

We agree with SBA's General Counsel that the authority granted the Administrator of SBA in 15 U.S.C. § 634(b)(7) to "take any and all actions" deemed necessary "in making, servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans" made under the Act, is sufficiently broad to encompass what SBA did in the case (emphasis added). See B-140673, December 3, 1974. There is no dispute that the only reason SBA requested the Bank to advance these funds and agreed to repay 90 percent of the amount advanced to the Bank, plus accrued interest, was to protect SBA's security interest in the loan collateral that, in all likelihood, would otherwise have been lost. Given the specific circumstances that existed, there was a reasonable basis for SBA to exercise its broad statutory authority under this provision.

---

[3] This does not mean that we necessarily think that SBA otherwise has the inherent authority to "borrow" from private sources. As explained at greater length hereafter, we believe the relevant issue is the extent of SBA's authority to pay interest on a debt it incurs in connection with its efforts, as the agency administering this program, to maximize its recovery on a defaulted loan.

Moreover, while the Certifying Officer casts the issue in terms of SBA's authority to borrow from a private bank, we note that SBA's legal obligation to reimburse the Bank for the principal amount the Bank advanced--which SBA has already done--has not been raised as an issue in this case. The only question that is actually before us is SBA's authority to pay interest on the funds disbursed by the Bank to preserve the collateral on the defaulted loan. There is ample legal precedent to support SBA's authority to do so, in our view.

It has been the consistent position of our Office that, unless otherwise specifically prohibited, the Government may pay interest on an unpaid debt pursuant to a valid statutory or contractual provision that obligates it to do so. B-186494, July 22, 1976; B-184962, November 14, 1975. Moreover, we have held that even where there is no formal written contract between the parties, the Government is bound to pay late payment charges assessed against it by a utility company, which we viewed as analogous to interest charges. In B-173725, September 16, 1971, we advised a Forest Service Certifying Officer that since the Government had accepted the services of the utility company "with the understanding" that its obligation to pay for these services would be governed by the utility's published rate schedule which contained a late payment clause, the Government was legally bound to pay the late charges.

We note that in B-173725, September 16, 1971, we ruled that the Government was liable for the late charges even though it had not expressly agreed to pay such charges. In the case at hand, SBA did expressly agree to pay accrued interest to the Bank at a specified daily rate. Moreover, as stated above, we believe that SBA was authorized to enter into such an agreement pursuant to 15 U.S.C. § 634(b)(3).

While many of the cases in this area resulted from delays by the Government in making payment when due on contracts or other claims--a situation which is arguably distinguishable from the one at hand--we have on several occasions upheld the authority of an agency to pay interest

that accrued on "borrowed" funds. B-154492, November 29, 1968; B-185016, July 8, 1976.[4]

Finally, there have been several prior instances in which our Office has upheld SBA's authority to make similar payments to banks or other lenders. For example, in B-149685, June 26, 1967, we held that SBA was authorized to pay interest on certain SBA guaranteed debentures which accrued as a result of SBA's "administrative delay" in promptly making payment when due under the terms of its guarantee. Although we expressed the view that SBA had no authority to engage in a general program of direct borrowing, we held that under the specific circumstances of that case, SBA's broad authority under 15 U.S.C. § 634(b)(7) and other statutory provisions was sufficient to authorize SBA to enter into the guarantee agreement and to pay the interest provided for thereunder.

Also, in a more recent case, 54 Comp. Gen. 219 (1974), we implicitly upheld SBA's authority to pay interest on moneys advanced by a bank to further SBA's objectives, when the advance was made at SBA's request and with SBA's assurance that the amount advanced plus interest thereon would be repaid by SBA.

Accordingly, since SBA requested the Bank to advance these funds to protect their joint interest in the collateral and expressly agreed to pay interest thereon to the Bank, as it was authorized to do under the broad authority contained in 15 U.S.C. § 634(b)(7), SBA may pay the Bank's claim of $3,565.92 in accrued interest. However, our conclusion that SBA may pay this claim is based on the unique circumstances of this case. Thus, this decision is not intended to establish a broad legal precedent for future actions of this type and does not imply that we approve of

---

[4] While these cases both involved situations in which a Government contractor or grantee requested reimbursement of the interest expense it incurred on funds it had borrowed from private lenders to complete performance of its Government contract or grant, we believe the principle is substantially the same where, as here, a bank charges interest on funds it advanced to the Government which were therefore no longer available to the bank to earn interest elsewhere.

SBA's actions in this case from a policy or procedural standpoint. In the latter respect, we are especially concerned about the informal, oral nature of the SBA commitment to the Bank.

for Milton J. Socolar
Comptroller General
of the United States