



Memorandum

Date: June 20, 1996

To: Senior Auditor, AIMD/AOL - Kay Daly

From: Senior Attorney, OGC/AIMD - Richard Cambosos

Subject: Disposal of Excess Property from Offices of Independent Counsel
(B-272256, Job Code 911727)

During the current periodic audit of the Offices of Independent Counsel (OIC), James Sizemore, Independent Counsel Coordinator, the Administrative Office of the United States Courts (AOUSC), informally asked whether a terminating OIC should be treated as an executive agency separate and distinct from the Department of Justice (DoJ) or as a component of the DoJ for the purpose of disposing of excess property. Mr. Sizemore's question was prompted by the DoJ's practice of requiring a terminating OIC to deliver its personal property to DoJ. DoJ makes the property available throughout the agency for use by its officers and employees after it is received. However, if a terminating OIC is a separate executive agency, it is not subject to DoJ's direction and control and it could make the excess property available for use by all federal agencies, not just DoJ. If DoJ may require a terminating OIC to transfer its property to DoJ, Mr. Sizemore also asked whether transferring the property without reimbursement constitutes an unauthorized augmentation of DoJ's appropriations. For the reasons given below, we agree with DoJ that it may require a terminating OIC to deliver its excess property to DoJ without reimbursement.

Background

Mr. Sizemore has raised the questions in connection with the termination of the OIC of Joseph diGenova and the imminent termination of the OIC of Daniel Pearson. DoJ has directed that the excess property be delivered to it for use by officers and employees of DoJ. Mr. Sizemore is aware that in response to questions submitted by the AOUSC in the past, we have opined that Independent Counsels (IC) are, for all practical purposes, heads of "executive agencies" authorized to ratify contracts

and to waive erroneous payments.¹ Mr. Sizemore asks whether in light of our opinions on the authority of ICs, the OICs should be considered executive agencies separate and distinct from DoJ.

Before responding to Mr. Sizemore's questions, you requested and received DoJ's position on this matter which we considered during the preparation of our response.² The DoJ memorandum concludes that OICs are DoJ components under the federal property management regulations relating to the utilization and disposition of property that is no longer required for the purpose for which originally procured. DoJ recognizes that the independent counsel law was intended to insulate OICs from the control and interference of the President and the Attorney General with the OIC's investigative and prosecutorial discretion relating to matters within the jurisdiction of the OIC. However, it is DoJ's opinion that this does not render the OIC totally independent of DoJ for all purposes. In this regard, DoJ points out a number of legal and programmatic relationships between DoJ and OICs in support of the position that OICs are "part and parcel of the Department with respect to matters other than those touching upon their investigative and prosecutorial discretion."

Discussion

DoJ's position that it is authorized to exercise control over the disposition of excess property of terminating OIC's is both persuasive and reasonable. The Supreme Court has accepted the notion that ICs may be subordinate to the Attorney General for some purposes and not for others.³ Similarly, while we have previously concluded that an IC may act with the authority of the head of an executive agency for various purposes, nothing we have said requires our concluding that OICs are completely separate and distinct from the DoJ for all purposes. For example, there is nothing inconsistent in the legal arguments underlying DoJ's position on the subject matter and our opinions on B-251728.3, Dec. 23, 1993, and B-251728.2,

¹See, B-251728.3, December 23, 1993 and B-251728.2, June 9, 1993.

²The DoJ view is set forth memorandum from Stuart Frisch, General Counsel, Justice Management Division (JMD), DoJ to James Williams, Director, Finance Staff, JMD, DoJ, Dated May 17, 1996 (copy attached).

³In Morrison V. Olson, 487 U.S. 654, 670-673 (1988), the Supreme Court observed that while ICs are inferior officers with respect to the Attorney General for purposes of the constitutionality of their appointment by a special three judge panel of the United States Court of Appeals for the D.C. Circuit, ICs are not subordinate to the Attorney General for the purpose of exercising their investigative and prosecutorial functions.

June 9, 1993, on the authority of ICs to ratify agreements or waive erroneous payments. In both of those cases, the IC's were making determinations on matters touching on their investigative or prosecutorial discretion outside the ambit of DoJ interference. In this regard, we fail to see any interference with the investigative or prosecutorial discretion of an OIC caused by accepting DoJ's premise as it relates to control over excess property of a terminating OIC.

The Federal Property and Administrative Services Act of 1949 (Act), as amended (40 U.S.C. §§ 471 *et seq.* (1994)), establishes procedures for the acquisition, use and disposal of property by most agencies of the government. Section 202(a)(1) of the Act, as amended (40 U.S.C. § 483(a)(1)), authorizes the Administrator of General Services to prescribe policies and methods to promote the maximum utilization of excess property⁴ by executive agencies,⁵ and to provide for the transfer of excess property among Federal agencies,⁶ the District of Columbia and mixed-ownership government corporations. The Act requires that the transferring agency be reimbursed the fair value of property by the receiving agency in certain limited circumstances and authorizes the Administrator, with the approval of the Director of the Office of Management and Budget, to prescribe whether reimbursement is required in other circumstances. Finally, section 204 of the Act, as amended (40 U.S.C. § 485) sets forth requirements relating to accounting for the proceeds from transfers or sales.⁷

⁴The term "excess property" means any property under the control of any Federal agency which is not required for its needs and discharge of its responsibilities, as determined by the head thereof. Section 3(e) of the Act, as amended (40 U.S.C. § 472(e)). The Administrator has issued regulations that prescribe certain reporting requirements pertaining to excess property, 41 C.F.R. § 101-43.304 and exceptions to the reporting requirements, 41 C.F.R. § 101-43.305.

⁵The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation. Section 3(a) of the Act, as amended (40 U.S.C. § 472(a)).

⁶The term "Federal agency" means any executive agency or any establishment of the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction). Section 3(b) of the Act, as amended (40 U.S.C. § 472(b)).

⁷Section 203 of the Act, as amended (40 U.S.C. § 484), sets forth procedures for the disposal of surplus property. The term "surplus property" means any excess property not required for the needs and the discharge of its responsibilities of all

(continued...)

Under the applicable law and regulations, DoJ would not be required to reimburse a terminating OIC for a transfer of excess property even if we assumed that the OIC was a separate and distinct executive agency.⁸ In addition, such a terminating OIC could transfer the property directly to DoJ without filing with GSA the otherwise required excess property report.⁹ However, while unreimbursed excess property transfers would be authorized between DoJ and OIC even if they were considered separate and distinct executive agencies, they could not be required by DoJ. Thus the terminating OIC could decide to transfer the property to some other executive agency.

Accordingly, given our agreement with DoJ's position that OICs are DoJ components for purposes of federal property management, there would be little reason to argue that DoJ improperly augments its appropriation when it receives excess property without reimbursements.

One additional comment is in order. Executive agencies are required to "make reassignments of property among activities within the agency when such property is determined to be no longer required for the purposes of the appropriation from which it was purchased." Section 202(c)(1) of the Act, as amended (40 U.S.C. § 483(c)(1)).¹⁰ Consistent with section 202(c)(1)'s requirement that executive agencies determine that the property is *no longer required for the purpose of the appropriation from which it was purchased* before reassigning it other activities within the agency, DoJ should first offer the property to other OICs before providing it to other DoJ activities since the property was purchased from an appropriation specifically available to fund all of the OICs and not just a specific

⁷(...continued)

Federal agencies, as determined by the Administrator of General Services. Section 3(g) of the Act, as amended (40 U.S.C. § 472(g)). An executive agency authorized or designated by the Administrator may dispose of surplus property by sale, exchange, lease, permit, or transfer for cash, credit, or other property. In addition, donations are authorized in certain situations.

⁸See section 202(a)(1) of the Act, as amended (40 U.S.C. §§ 483(a)(1)) and 41 C.F.R. § 101-43.309-3. In such a situation, the law authorizes the augmentation of DoJ's appropriation.

⁹41 C.F.R. § 101-43.305(a)(6).

¹⁰See also, 41 C.F.R. § 101-43.102(a).

OIC.¹¹ From the information provided it is unclear whether DoJ is offering excess property to other OICs before making it available to other DoJ activities. However, if the excess property is not needed by other OICs, DoJ may provide the excess property to other activities having a current need for such property. Neither the law nor its implementing regulations require that DoJ store the property for possible future use by an OIC when none of the OICs have a current need for the property. Further, making the excess property available to fill an existing need (and possibly saving the government the additional procurement costs) seems preferable to DoJ storing the property merely to meet a speculative future need.

Attachment

cc: Mr. Kepplinger, OGC/AIMD
Mr. Jacobson, OGC/AIMD
Mr. Clark, AIMD
Mr. Broderick, AIMD

¹¹Public Law No. 100-202, § 101(a), 101 Stat. 1329 (1987) provides ". . . That a permanent indefinite appropriation is established within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsel appointed pursuant to the provisions of 28 U.S.C. 591 et seq. or other law"

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DIGEST

A terminating Office of Independent Counsel (OIC) may be considered a component of the Department of Justice for the purpose of disposing of surplus property under the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 471 et seq. (1994). Thus, DoJ may direct the terminating OIC to deliver its excess property to DoJ rather than making it available to other federal agencies. Further, nothing in the Act or its implementing regulations requires DoJ to reimburse the terminating OIC for the excess property delivered to it and made available for use by other DoJ activities.