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

AUG 6 1965

CIVIL ACCOUNTING AND
AUDITING DIVISION

The Acting Comptroller General

Herewith are documents pertinent to a lease-construction agreement by the General Services Administration providing for the acquisition of facilities to accommodate the National Computer Center, Internal Revenue Service, Martinsburg, West Virginia. Authority for the Administrator of General Services to enter into lease agreements is contained in section 210(h)(1) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 490 h. The Martinsburg lease agreement allows the Government to acquire title to the property for a consideration reducing to one dollar at the end of 20 years and a question arises as to the legality of such an arrangement.

In accordance with terms included in both the invitation for bids and the leasing document, the Government has the option to purchase the property at certain percentages of the original cost of the land and improvements, commencing at 65 percent after the tenth year and reducing annually until the price will be one dollar at the end of the 20-year term of the lease. As a condition of award the successful bidder also had to agree to purchase land previously declared surplus by the Veterans Administration on which the facility would be constructed.

Had the Government chosen to construct the facility through direct appropriation, the project herein described would have required approval by the Public Works Committees of the Congress. Since the nature of the transaction and the terms of the lease indicate a determination to acquire a facility through a "lease-purchase" arrangement, there is a question as to authority for the transaction.

The question of authority arises from the following considerations:

1. If the Government does not exercise its option sooner, it has but little choice at the end of 20 years except to purchase the property at the nominal price of one dollar. In this respect, the net effect of the agreement is not dissimilar to transactions under the former Public Buildings Purchase Contract Act of 1954, Public Law 519, 83rd Congress, July 22, 1954, 68 Stat. 518, 40 U.S.C. 356. That law which expired July 22, 1957, authorized a program for the acquisition of title to real property and construction of public buildings by the General Services Administration and the Post Office Department through lease-purchase agreements. Buildings were financed by private capital, and installment payments on the purchase price were made in lieu of rent. Title to the property was vested in the United States at the

end of an agreed period of time, not less than 10 years nor more than 25 years. The Martinsburg property would be acquired through what appears to be a similar arrangement.

2. With the expiration of lease-purchase legislation, it was the apparent policy of the Congress to discontinue the construction of buildings under lease-purchase or lease-purchase type agreements. Subsequent to expiration of the legislation the Independent Offices Appropriation Act of 1959, Public Law 85-844, August 23, 1958, 72 Stat. 1063, Title I, contained a provision prohibiting execution of any further contracts.

3. By letter dated August 12, 1960, to the Administrator of General Services, the Internal Revenue Service pointed out that the installation in question was designated to be the main nucleus of its automatic data processing system for tax returns, and was considered to be permanent in nature. Thus, it appears to us that the Martinsburg building is in effect a permanent type public building, the acquisition of which is authorized only in the Public Buildings Act of 1959, 40 U.S.C. 601-615. Under the Act, no appropriation shall be made to construct any public building involving an expenditure in excess of $100,000 or to alter any public building involving an expenditure in excess of $200,000 until such construction, alteration, or acquisition has been approved by the Public Works Committees of the Congress. The Martinsburg building, although not treated by the agency as an acquisition under the Public Buildings Act of 1959, had a construction cost of $577,361 and was appraised by the General Services Administration prior to construction at $735,750.

In view of the circumstances stated above, your opinion is requested as to whether General Services Administration had authority under existing law to enter into a lease-construction arrangement providing, in effect, for the eventual purchase of the facility by the Government. In our review of the lease-construction agreement in question, we have considered a similar situation discussed in 38 Comp. Gen. 227. However, the situation discussed therein occurred prior to the enactment of the Public Buildings Act of 1959.

Arthur Schoenhaut

Arthur Schoenhaut
Deputy Director

Attachments

lvb

B-157423-O.M.

September 14, 1965

Indorsement

Director, Civil Accounting and Auditing Division

Returned. Subsection 210(h)(i) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 490(h)(i), clearly authorizes the Administrator of General Services to lease for periods up to 20 years buildings and improvements to be erected by lessors for the accommodation of Federal agencies, such leases to be on terms he deems to be in the best interest of the United States. The lease in question was entered into on April 12, 1961, and but for the fact that it gives to the Government an option to acquire title to the property involved at the expiration of the 20-year lease term for the nominal consideration of $1, there would not appear to be any question in the matter. As stated at 38 Comp. Gen. 227, 228, "* * * options to purchase do not constitute the purchase of land or any interest in land * * *." The quoted portion is equally as applicable in avoidance of the necessity for meeting requirements of the Public Buildings Act of 1959 as to the provisions section 3736, Revised Statutes, 41 U.S.C. 14, in reference to which it related.

Your Division suggests, however, that the option to purchase at lease expiration for a nominal sum is tantamount to a lease-purchase arrangement authority for which has expired and raises serious question as to whether the transaction is not in fact a purchase of realty in violation of Public Buildings Act requirements rather than an option to purchase in any realistic sense. If the lease had been entered into without consideration of other lease term possibilities, we would be inclined to agree on both counts. But the record shows that bids for the property were evaluated on several bases and it is not wholly unreasonable to conclude from the record that the option provision was prompted more in furtherance of United States interests than in an attempt to evade statutory requirements.

In any event the general problem of lease-construction arrangements posed by your submission is one which the Congress has considered and acted upon. Commencing with appropriations for fiscal year 1963, the following limitation covering GSA and other agency activities has been placed in the Independent Offices Appropriation Acts:

> "No part of any appropriation contained in this Act shall be used for the payment of rental on lease agreements for the accommodation of Federal agencies in buildings and improvements which are to be erected by the

lessor for such agencies at an estimated cost of construction in excess of $200,000 or for the payment of the salary of any person who executes such a lease agreement: Provided, That the foregoing proviso shall not be applicable to projects for which a prospectus for the lease construction of space has been submitted to and approved by the appropriate Committees of the Congress in the same manner as for the public buildings construction projects pursuant to the Public Buildings Act of 1959." See Public Law 87-741, 76 Stat. 716, 728; and Public Law 89-128, 79 Stat. 520, 531.

Accordingly, it does not appear that the matter need be further questioned from the standpoint raised.

FRANK H. WEITZEL

Acting Comptroller General
of the United States

Attachments