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DECISION

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

FILE: B-205685 DATE: December 22, 1981

MATTER OF: Secretary of the Army--Leasing authority

DIGEST: Army may not accept offer from City of Bell, California to construct a new National Guard Armory on Army-controlled parcel of land in lieu of paying monetary compensation for its lease of a different parcel of land. The only exception to requirements in 40 U.S.C. § 303b that the United States must lease its property for money consideration only is found in 10 U.S.C. § 2667, which permits defense agencies to lease military property in exchange for maintenance, protection, repair, or restoration of the property leased, by the lessees. The City of Bell offer does not fit within the exception because the Armory would not be located on land leased to the City.

The Director of Real Estate, Office of the Chief of Engineers, Department of the Army, requested our opinion on whether the Army may accept a new National Guard armory rather than money, as compensation for leasing Army-controlled land to the City of Bell, California. The Army may not accept the armory for the reasons stated below.

The City owns two acres of land abutting Army-controlled land. Both parcels were formerly part of the Cheli Air Force Base. The Army land is licensed to the California National Guard. The Guard uses the property for vehicle maintenance and storage. The Government buildings the Guard uses are wood-frame warehouses constructed during World War II and which are not really suitable for maintenance and storage purposes.

The City wants to turn its property into taxable real estate by allowing a private developer to build a hotel and restaurant on it. However, the developer is interested in building the restaurant and hotel only if he can also build recreational facilities on the eastern portion of the adjacent Army land. The City would therefore like to lease the eastern portion from the Army in order to accommodate the developer. Under the City's proposal, the National Guard would relinquish its license on the eastern portion but retain its license on the western portion of the Army land. The City offers to raze the outdated buildings on the western portion and replace them with a new $1.5 million armory and maintenance shop as consideration for the lease.

The Army is precluded from accepting a new armory building as consideration for leasing the eastern portion to the City by section 321 of the Economy Act of 1932, 40 U.S.C. § 303b (1976). Only if the costs of construction are less than the fair market value of the land would the City be required to make a cash payment to the Army. 40 U.S.C. § 303b (1976) sets forth the general rule concerning consideration for Government leasing. It provides that except as otherwise specifically provided by law, the United States must lease its property and buildings for money consideration only. It expressly prohibits the Government from accepting agreements to alter, repair, or improve leased property as consideration. It requires that funds received as rent be deposited and covered into the Treasury as miscellaneous receipts.

The Army urges that 10 U.S.C. § 2667, which governs military leasing, authorizes it to accept the City's proposal. That section authorizes the Secretary to lease Army-controlled property "upon such terms as he considers will promote the national defense or be in the public interest." The Army believes that Congress intended section 2667 to be a grant of leasing authority broad enough to allow the Secretary to accept the lease proposed here. The Army relies primarily upon subparagraph (b)(4), which states that a lease:

> "(4) May provide, notwithstanding section 303b of title 40 or any other provision of law, for the maintenance, protection, repair, or restoration, by the lessee, of the property leased, or of the entire unit or installation where a substantial part of it is leased, as part or all of the consideration for the lease." (Emphasis added.)

As the phrases underscored above indicate, in order for a lease provision to fall within the exception the subparagraph provides, the lessee must agree to perform the maintenance, protection, repair, or restoration work on the property leased (or if a substantial part of a property is leased, the work may be performed on the entire property). Here, the City is not proposing to maintain, protect, repair, or restore the property it wants to lease; as compensation for the lease, rather, it is offering to tear down the old building and build a new one on the western portion which would not be leased to the City but would remain in the Army's control. Accordingly, since the work the City is offering to perform would not be on the property it would be leasing, the proposed lease fails to fall within the exception provided under subparagraph (b)(4).

Further, we do not agree that section 2667 gives the Army sufficiently broad authority to accept the City's proposal as the Army contends. The enactment of 10 U.S.C. § 2667 did give the Army broader leasing authority than it had had before.

The statute was enacted to allow the military departments to lease during peacetime a group of plant facilities which had been built for manufacturing war materials to private companies which could "operate them without making such changes as to prevent their being put back into operation in the event of an emergency." S. Rept. No. 626, 80th Cong., 1st Sess. (1947) reprinted in U.S. Code Cong. Serv., p. 1592. Under 40 U.S.C. § 303b, the leases could not require the lessees to maintain the plants as part of the consideration for the lease. Id. The 80th Congress, however, recognized, that section 303b made it difficult for the military to enter into leases in those cases where private concerns would have to make substantial capital investments in the plants leased. Accordingly, section 2667 was enacted to provide that the maintenance, protection, repair, or restoration of the leased property may be consideration for the lease.

Notwithstanding the above considerations, there is no indication in the statute or its legislative history that the Congress intended to create an additional exception to the restrictions of 40 U.S.C. § 303b where the work proposed to be done as compensation is not to the leased property itself.

While we have been unable to find a definitive statement from its legislative history of the reason for the restriction in section 303b, because of the Army's need for an expedited reply, we suggest the following as a plausible explanation.

Both section 303b and section 2667 require that all rent receipts for Government-owned property be deposited in the Treasury as miscellaneous receipts. This requirement is consistent with 31 U.S.C. § 484 which requires this treatment for all moneys received for the Government from any source unless specifically provided otherwise by statute. As discussed above, the Congress did provide a statutory exception where it was difficult to obtain a lessee without allowing him credit against his rental payments for expenses necessarily incurred to make the leased property habitable or suitable. In this case, however, the City is offering to perform a service for the Army unrelated to the land it wishes to lease, in lieu of paying monetary compensation. Thus leasing compensation, which would ordinarily flow into the Treasury if paid in monetary form, remains with the Army as a possible augmentation of appropriations otherwise available to perform the same type of work on its property.

Accordingly, for the reasons discussed above, the provisions of 10 U.S.C. § 2667, particularly subparagraph (b)(4), which authorize the acceptance of maintenance and repair of a leased building to be all or part of the rental consideration, cannot be applied in the instant

situation. Hence, any transaction must be governed by the provisions of 40 U.S.C. § 303b which require that in leases of Government-owned land and buildings, money must be the sole consideration.

Our decision does not prevent the Army from leasing the parcel in question to the City if otherwise proper, nor does it prevent the Army from constructing a new armory building if appropriations are made available for that purpose. Our holding is only that the Army cannot receive the proposed new armory as consideration for the lease.

Harry R. Van Cleve

For Comptroller General
of the United States