COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON 25

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DEC 10 1946

Director of Central Intelligence,

Central Intelligence Group,

National Intelligence Authority.

My dear General Vandenberg:

I have your undated letter, and enclosures, received here November 7, 1946, relative to a proposed agreement with Mr. John E. Fowler with respect to certain property in Rosslyn, Virginia, now under lease from Mr. Fowler to the Government for the use of your agency, upon which a warehouse was erected by the Government, and further, with respect to certain other warehouse property previously under lease by him to the Government.

It appears from the record that under lease No. OSS-162, dated March 8, 1943, Mr. Fowler leased to the Government certain warehouse property in Rosslyn, Virginia, for a term beginning that date and ending June 30, 1943, with rental at the rate of $10,500 a year, including the furnishing of certain special services by the lessor, with an option to the Government to renew the lease from year to year at the same rental, not, however, beyond June 30, 1945. The lease provided that the property was to be used as office quarters, storage space, repair and shipping shop for the Office of Strategic Services. The papers attached to the lease indicate that it was renewed for the fiscal years 1944 and 1945. However, it appears from the papers submitted with your letter that the property was occupied by the Government until June 30, 1946, but that the lessor then notified the Government that he would not renew the lease. Shortly after the making of the lease of March 8, 1943, Mr. Fowler, by lease No. OSS-401, dated August 10, 1943, leased to the Government a vacant lot west of, and apparently adjacent to the building covered by the first lease, for a term beginning that date and ending June 30, 1944, at a rental of $1, a year, with an option to the Government to renew from year to year at the same rental, not, however, beyond "six months after hostilities in the present World War shall have ceased." It appears that the vacant lot was leased with a view to the erection of a warehouse thereon by the Office of Strategic Services.

Paragraph 8 of lease No. OSS-401--as well as paragraph 8 of the first mentioned lease--provided that the Government should have the right to erect structures on the property, which structures were, however, to remain the property of the Government and could be removed by the Government prior to the termination of the lease, and that the Government, if required by the lesser, should, before the expiration of the lease as extended by any renewals thereof, restore the premises to the same condition as that existing at the time of entering upon them under the lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control excepted, provided, however, that if the lessor required such restoration, he should give written notice thereof to the Government 30 days before the termination of the lease. A warehouse was erected on this property by the Office of Strategic Services, apparently under those provisions of the lease.

It appears from a memorandum of October 30, 1946, of the General Counsel of your agency that your agency is also occupying a warehouse in Bethesda, Maryland, at an annual rental of $13,700, in addition to the warehouse constructed by it on the property in Rosslyn leased under lease No. OSS-401. It is stated in said memorandum that the present operation of widely scattered warehouses is inconvenient; that the warehouse in Bethesda has no railway connection--as the two warehouses in Rosslyn apparently have; that the Bethesda warehouse is not well suited to the Government's present needs; that it does not give the necessary covered space; and that it is insecure insofar as operational and communications equipment is concerned. It is further stated in said memorandum that the owner of the properties in Rosslyn covered by the two leases hereinbefore mentioned has recently shown interest in making an over-all agreement with the Government for both the new and the old warehouses looking forward to renewable terms up to a period of five years, and that under such arrangements the owner wishes to acquire the warehouse erected by the Government on his property under lease No. OSS-401. The view is expressed in the memorandum that the Government has a distinct interest in acquiring the use of both the old and new warehouses, and in giving up the Bethesda warehouse. It is stated that such arrangement would give a centralized warehousing and issuing center, compact and efficient; that it would give far greater security to operational and communications equipment because of the surrounding cyclone fence and the presence of sleeping quarters on the premises; that it would give assurance of at least five years' occupancy of buildings which are most conveniently situated; and that it would provide excellent railroad connections for all its warehousing activities.

With a view to effectuating such an arrangement, you submit a form of a proposed agreement between Mr. Fowler and the Government whereby it would be agreed as follows: That the value "in place" of the Government warehouse and the improvements thereon are equal to the sum of $26,700; that in consideration of transferring the Government warehouse to the lesser, the lessor will waive payment of rent on said warehouse for a period which will amortize the value of $26,704 at the rate of $10,000 a year beginning November 1, 1946; that on the date the amortized period terminates, title to the Government warehouse and improvements will pass to the lessor, who will then enter into a lease for the transferred warehouse, renewable for a term to and including October 31, 1951, at a rent of 50 cents a square foot, or $10,000 a year; and that the Government shall have the right to use and occupy without payment of rent therefor, for the period referred to therein--that is, up to and including October 31, 1951--the land described on a plat attached to the proposed agreement, which includes the land on which the warehouse is located and apparently adjacent land; and that upon the termination of the amortized period, the Government will begin to pay rent for the above referred to land at the rate of $1,500 a year under a lease to be renewable to and including October 31, 1951. The proposed agreement would further provide that the Government and the lessor would execute a separate lease for the lessor's main warehouse--that previously leased under lease No. 033-162--at the rate of 50 cents a square foot for five years, effective November 1, 1946, with the exception of certain portions to be used or occupied by the lessor; and that the proposed agreement would be in full satisfaction of any obligation of the Government to restore the leased premises. The proposed agreement would also be subject to the approval of the Comptroller General of the United States.

It appears from appraisals made by the United States Engineer Office, War Department, that said office finds the reproduction cost of the warehouse erected by the Government to be $57,130 and physical depreciation to be $11,426. Based thereon, the appraisal estimates the "in place" value to be $45,700. The Engineer Office also estimates the cost of removal of the warehouse and the restoration of the property, less gross salvage value, at $19,055. The "in place" value of $26,700 specified in the proposed agreement appears to be predicated upon those figures--that is, the estimated reproduction cost less depreciation and less removal and restoration costs.

The memorandum of the General Counsel of your agency further states with respect to the matter:

"3. As noted above, the Government's $1.00 a year lease on the property expires six months after the termination of the emergency. To give up this right of occupancy at once means relinquishing an interest equivalent to a minimum of six months' rent at an estimated fair rental value. In present negotiations, this value has been set at 50¢ per square foot for the new warehouse, or $10,000 a year. Thus, the Government stands to lose an interest of from $5,000 up, dependent on when the emergency is terminated. Offset against this is the owner's proposal that if the Government agrees to transfer the building to him, he will waive rent for such period of rental as will amortize the value set on the building erected by the Government, at the end of which time the actual transfer will take place. After such transfer the Government will begin to pay rent at the above stated figure of $10,000 per year. Similarly, rent on the land will be waived until the same date, after which the Government will pay $1500 per year. Contemporaneously with the beginning of this arrangement, the owner will lease the old warehouse to the Government at $13,000 per year, which is also at the rate of 50¢ per square foot. In this connection the owner will furnish written evidence that he has outstanding a written offer from a private concern to rent the old warehouse alone at $15,000 per year. Discussions have been held to establish a fair value for the building which would be amortized by the waiver of rent specified above. U.S. Army Engineers has submitted an appraisal of the value of the new warehouse in place, arriving at a figure of $45,704. This is based on their estimated present replacement cost of $57,130, less 20% depreciation (because of certain cracks and defaults) or $11,426, arriving at $45,704. The cost of restoring the property to its original state, which the owner would have the right to require at the end of the present lease, was estimated by the Engineers (taking possible salvage value into consideration) at approximately $19,000. If the present lease were terminated now or in the near future, it would appear then that a fair reimbursement to the Government for transfer of the building to the owner should be some $26,700. Referring to the owner's proposal above to amortize the value by waiver of rent, this would indicate a rent-free period of somewhat over 2½ years at the proposed rental of $10,000 per year. In essence, therefore, if present negotiations were carried out the Government would, over a period of five years, actually pay approximately

$93,750 in rent. It would, however, have the assurance of occupancy of desirable and efficient warehousing facilities for the full five years. If the agreement were not carried out the Government would have a tentative occupancy at $1.00 a year of the new warehouse, which might terminate any time after six months from the present. It would have to continue the undesirable lease at Bethesda at $13,700 instead of the old warehouse in Rosslyn at $13,000, and, if the new warehouse lease were terminated, the Government would have to search for new space at an unknown rental. The minimum cost under this arrangement would assume extension of the emergency to the full five years, in which case it would be $68,500. It appears that a justifiable administrative ruling could be made that the proposed agreement is in the best interests of the Government."

In your letter you state that you believe the proposed arrangement would be, considering all the circumstances, in the best interests of the Government, and you pose the following questions:

"QUESTION NO. 1:

"The Government proposed to surrender an existing right consisting of a lease on all the real property at a rental of $1.00 per year for the duration of the present emergency plus six months. Since this lease entitles the Government to a minimum of six months occupancy of its new warehouse, the value of this lease must be taken as not less than $5,000, on the basis that a fair annual rent would be $10,000. This lease, on the other hand, leaves the Government in an uncertain position, as there is no present determination of the duration of the emergency. Balanced against the surrender of this lease is the owner's agreement to rent the entire property to the Government for not less than five (5) years. It is felt that the increased efficiency, economy and security achieved by such centralization of warehouse facilities outweighs the uncertain value yielded by the Government in surrendering the lease. Without such surrender, the owner will not consider leasing the old warehouse to the Government. With the surrender, his old warehouse will be leased to the Government at the rate of $13,000 per year, although the owner has in hand a written offer from a private concern at a rental of $15,000 per year. Incidentally, the $13,000 figure is less than the Government is now paying for its warehouse in Bethesda, although the latter is smaller and far less efficient, which the Government desires to release. Your advice is requested whether, under such circumstances, the surrender of such a leasehold is a question for administrative determination as to the best interests of the Government.

"QUESTION NO. 2:

"The Government proposes to transfer title to the building, which it erected on the owner's land, to the owner during the course of the proposed lease. The actual transfer will not take place for some 2½ years. In the event that this arrangement were not entered into, the Government would be forced to consider the disposition of the building at the end of the duration of the emergency plus six months, in view of the nature of its original lease as noted in Question 1 above. The owner has indicated that he has no intention of paying any substantial consideration to the Government upon such termination of the original lease. The Government would then be in the position of disposing of its warehouse for a nominal sum or of restoring the property at an estimated net cost of $19,000. Consequently, the present estimated value in place less the restoration cost, or $26,704, has been taken as a fair value of the Government's current interest in the building. In consideration for the Government's agreement to transfer title to the building, the owner offers occupancy for not less than five (5) years at an agreed on rental of $10,000 per year, but proposes waiver of such rental for a period sufficient to amortize the current value of $26,704 at the rate of $10,000 per year, or slightly over 2½ years. Actual transfer would not take place until the end of such amortization period and the Government would then begin to pay rent on 142,876 square feet of useable real property which it would use rent-free during the amortization period. Again, it is felt that the unification of operations and the advantageous rental on the old warehouse must be considered as part of the consideration for the proposed transfer of the new warehouse. It is believed, however, that the proposal is a novel one upon which no prior rulings have been found, and your advice is requested as to whether again this might be a matter for administrative determination as to the best interests of the Government.

"<u>QUESTION NO. 3:</u>

"Considerable difficulty has been encountered in drafting the proposed agreement discussed above. Owing to the unusual circumstances, a review of the attached copy of the lease in question would be appreciated to establish whether the interests of the Government have been fully protected; particularly, whether paragraph 10 thereof is sufficient to eliminate any claim that the Government has attempted to obligate beyond the end of the fiscal year."

Your first question raises the propriety of the proposed surrender of the Government's existing right to occupy, for the duration and six months thereafter, the land on which the new warehouse was constructed. This phase of the matter requires but brief comment. It is true, of course, that in the absence of a statute specifically so providing no officer of the Government has authority to give away or surrender a vested contract right. See 22 Comp. Gen. 260. But since such principle has no application to a situation where the Government is adequately compensated for the surrender either by the execution of a new supplanting agreement more advantageous to the Government, or otherwise, it is obvious that if the arrangement described is proper in other respects and if it will prove more beneficial to the Government from an over-all point of view, the mere fact there is involved the surrender of a vested contract right presents no difficulty.

However, consideration of the transaction as a whole discloses several objectionable features. First of all, the proposal contemplates the transfer of title to the new warehouse, presently owned by the Government. Under Article IV, Section 3, Clause 2, of the Constitution of the United States, Congress alone has the power to dispose of property belonging to the United States. Thus, administrative officials of the Government are authorized to sell or otherwise alienate the title to Government property only when specifically authorized by statute to take such action. United States v. Nicoll, 1 Paine (U.S.) 646 (F. Cas. 15879); Irvine v. Marshall, 20 How. 558; Wisconsin R. Co. v. Price County, 133 U.S. 496; Light v. United States, 220 U.S. 523. Also, see 14 Comp. Gen. 169; 15 id.

96; 22 id. 563.

Inasmuch as there has been found no statute authorizing you to transfer title to this or other property of the United States the transaction proposed would appear fatally defective on this ground alone. Moreover, it may also be said that the basis upon which it was proposed to fix the amount of $26,704 as the transfer price for the Government warehouse is not entirely clear. Taking the appraisal figures of the Army Engineers it appears that the present replacement cost of the building would be $57,130, which amount less depreciation of $11,426, indicates a present fair market value of the property of at least $45,704. Apparently, in arriving at the price fixed there was deducted from said fair market value the amount estimated as the cost to the Government of restoring the premises if the building had to be removed, said estimated cost being $19,000. However, while such restoration cost well might be considered a factor in determining whether it were more advantageous for the Government to restore the premises or to sell the building, there is perceived no sound basis for crediting to the purchaser such restoration cost when, in fact, the building is not to be demolished and the premises are not to be restored.

Furthermore, the proposal to amortize the "in place" value of the warehouse constitutes, in practical effect, the offsetting of the sale price of the building against rental payments. But, under section 3618, Revised Statutes, 31 U.S.C. 487, the proceeds of sales of all public property, with certain exceptions not here involved, are required to be deposited and covered into the Treasury as miscellaneous receipts, thereafter to be used only in consequence of an appropriation made by law. Hence, even if the transfer of title to the building were effected pursuant to adequate authority, and even if the price fixed therefor were to be considered proper, this office would be required to object to the use of the proceeds of the sale as rent. Cf. 9 Comp. Gen. 166; 10 id. 510; 14 id. 760; 15 id. 295; 20 id. 172.

The amount proposed to be paid as rent under the lease for the new warehouse might possibly be the subject of still further objection. Section 322 of the Economy Act, as amended, 40 U.S.C. 278a, provides that where the annual rental exceeds $2,000, no appropriation shall be obligated for the rental of any building to be occupied for Government purposes at a rental in excess of 15 percent of the fair market value of the premises at the date of the lease. The exception to such restriction provided by the act of April 28, 1942, 40 U.S.C. 278b, with respect to the premises specified as necessary for the prosecution of the war or vital to the national emergency, would not appear applicable under the facts of the instant case. Accordingly, the figures contained in the present record would seem to suggest that the rental proposed to be paid would be in excess of the above statutory limitation.

You ask, also, whether paragraph 10 of the proposed agreement is sufficient to eliminate any claim that the Government would be attempting to obligate beyond the fiscal year. Said paragraph 10 would provide:

"That any agreement herein to lease either the new warehouse or main warehouse is subject to the availability of an appropriation therefor;"

The law is that a lease to the Government made under authority of an annual appropriation is not effective beyond the end of the fiscal year for which the appropriation is made, and that if the lease is for a longer term, it may be viewed as binding the Government to the end of the fiscal year only, with an option to the Government to renew the lease for a further period contingent upon the availability of further appropriations for that purpose. Section 3679, Revised Statutes, as amended, 31 U.S.C. 665; section 3732, Revised Statutes, 41 U.S.C. 11; Leiter v. United States, 271 U.S. 204; Goodyear v. United States, 276 U.S. 287; Brownstein-Louis Company v. United States, 90 C. Cls. 1. Thus, in Leiter v. United States, supra, the court said:

"* * * A lease to the Government for a term of years, when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year. McCollum v. United States, 17 Ct. Cls. 92, 104; Smoot v. United States, 38 Ct. Cls. 418, 427. And it is plain that, to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year. * * *"

Accordingly, if the lease to be executed under the arrangement here proposed were in pursuance of an appropriation for one fiscal year, it would not, as a matter of law, obligate the Government beyond such fiscal year; and, for the lease to be effective thereafter would require affirmative action by duly authorized officials after an appropriation for such purpose had been made.

For the reasons hereinabove stated, the arrangement presently proposed may not be approved. At the same time, the statements contained both in your letter and in the attached memorandum of your General Counsel seem to establish beyond question the desirability from the Government's standpoint of acquiring both the old and the new warehouses, at least for the next five years. In fact, it is somewhat surprising that under the circumstances no mention is made as to whether consideration has been given the acquisition of a fee simple interest in the entire property--or, at least, in the land upon which the Government warehouse is located--either by the institution of eminent domain proceedings or otherwise. In this connection it is noted that the appraiser for the Army Engineers recommended such action in the event satisfactory negotiations for leasing the premises should fail. In view of the proximity of the property involved to the various other departments of the Government in Washington--a factor for consideration inasmuch as your agency might not be in a position to make use of the property at some future date--as well as the many other advantages of the property for warehousing purposes as described by you, it is suggested that serious consideration be given the question of whether it might not be in the interest of the Government to acquire title to the said property.

Respectfully,

(Signed) Lindsay C. Warren

Comptroller General
of the United States.