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DECISION

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

FILE: B-188246 DATE: May 17, 1978

MATTER OF: General Services Administration--
Request for Advance Decision

DIGEST:

Letter from military department to General Services Administration (GSA) stating that certain Government-owned property may be considered excess if sale can be arranged does not prohibit military department from leasing property pursuant to 10 U.S.C. § 2667 because letter did not constitute final determination that property was excess and GSA knew department was considering leasing property and voiced no objection.

The General Services Administration (GSA) requests an opinion regarding the validity and enforceability of a lease which the Air Force has entered into with Martin-Marietta Aluminum, Inc. (MMA). The issue presented is whether a letter, dated November 16, 1973, from the Air Force's Chief of Industrial Resources to GSA's Assistant Commissioner for Real Property can be accorded the legal effect of divesting the Secretary of the Air Force of his authority under 10 U.S.C. § 2667 (1976) (Lease Act) to lease certain property.

The letter reads in pertinent part as follows:

"Reference is made to recent meetings between GSA, Air Force and Martin Marietta Aluminum regarding the recent lease-sale appraisal of Government-owned facilities at Torrance, California.

* * * * *

"If the contractor is willing to pay the asking price or will seriously negotiate for purchase at an acceptable price, this letter may be used as the report of excess for the negotiated sale of the property to

> the using contractor. If on the other hand the contractor shows little or no genuine interest in acquiring the property the report of excess is withdrawn and this headquarters should be notified immediately."

GSA takes the position that the Secretary of the Air Force lacked authority to lease the property in question because the above quoted letter constituted a report of the property as excess for disposal under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-492 (1970) (Property Act). The argument advanced is that once a piece of property is declared to be excess under the Property Act, the provisions of the Lease Act are no longer applicable to that property because the authority conferred by the Property Act is paramount to any authority conferred by the Lease Act, 40 U.S.C. §§ 474 (1970). GSA raises the question of the validity and enforceability of the Air Force Lease for two reasons. First, GSA believes that the terms and conditions of the lease are such as to, in effect, constitute the disposal of the leased property for a period of twenty one years. Second, GSA believes that the low rental rate and first right to purchase clause in the lease have rendered impossible GSA's efforts to negotiate the sale of the property.

The bulk of the property consists of five heavy presses (two extrusion presses and three forging presses) which range in size from 4,000 to 14,000 tons. The presses are capable of manufacturing extrusions and forgings large enough to constitute key structural elements in aircraft. The need for presses of this size was recognized soon after World War II when it was discovered that Germany had been producing high strength to weight ratio aircraft components at high rates and low cost using presses up to 30,000 metric tons. The U. S. Government soon thereafter embarked on a heavy press program in order to create a self-sustaining industrial base to support national defense requirements. Because of the lack of any commercial requirement for such large presses, there was a general apathy in the private sector with regard to heavy press investment. The solution was found

by providing Government-owned heavy presses to commercial firms on a rental basis. The property was usually furnished under an instrument known as a facilities lease as authorized by the Lease Act.

The record indicates that in early August 1972 the Air Force wrote GSA regarding a proposal that GSA perform lease appraisals for the Air Force. The Air Force needed such appraisals in order to determine appropriate rental rates for heavy press leases which were at the time up for renewal, the previous leases having expired on June 30, 1972. In mid-August 1972, the Assistant Secretary of the Air Force (Installations and Logistics), in a speech before representatives of the heavy press industry, who were then in the status of holdover tenants, observed:

> "In the case of the heavy presses and hammers, there was no question as to the need for Government ownership at the time they were acquired. I'm sure you all know the circumstances. The situation today is far different, however, and the justification for continued Government ownership is highly suspect.
>
> "I know that we are here today to talk about leases, but I want to get that point across. We must, in the long run, work toward private ownership of the press and hammer facilities and I urge you to consider serious negotiations for their purchase."

In late December 1972 the Office of the Assistant Secretary of Defense (Installations and Logistics) approved Air Force plans to enter into long term heavy press leases effective July 1, 1973 for ten years with options to renew for two additional five year periods. On September 24, 1973 the Acting Assistant Secretary of the Air Force (Installations and Logistics) made the following Determination and Finding:

> "Pursuant to Section 2667, Title 10, U.S. Code, I find and determine that the properties are not excess as defined by Section 472,

> Title 40, U.S. Code, but are not for the time needed for public use, and that the leases will be advantageous to the United States, promote the national defense, and be in the public interest."

On November 2, 1973 MMA wrote the Air Force's Assistant Deputy for Systems and Production in the Office of the Deputy Assistant Secretary (Installation and Logistics) the following letter, a copy of which was furnished GSA's Assistant Commissioner for Real Property:

> "As indicated during our meeting of November 1, Martin Marietta Aluminum agrees to enter into dual negotiations, described below, regarding the subject property.
>
> 1. MMA agrees to enter into negotiations with GSA for the purchase of the subject property; and
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> 2. MMA agrees to continue current negotiations with USAF for the continued lease of the subject property.
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> "Pending conclusion of these negotiations, MMA will continue using the subject property as a holdover tenant since the subject lease has expired by its own terms."

It is our understanding that GSA was represented at the above referenced meeting. This communication was followed by the Air Force's November 16, 1973 conditional letter to GSA, set out above, reporting the property excess for negotiated sale to the using contractor, the effect of which we are called upon to determine.

The Lease Act provides that the Secretary of a military department may lease real or personal property that is "not excess property as defined by section 472 of title 40" [the Property Act]. 10 U.S.C. § 2667(a)(3) (1976). The Property Act provides that "the term 'excess property' means any property under the control of any Federal agency which is

not required for its needs and the discharge of its responsibilities, as determined by the head thereof" 40 U.S.C. § 472(e) (1970). It is clear therefore that once property is declared by a military department to be "excess" as provided by the Property Act it may no longer be leased under the Lease Act.

The conditional nature of the Air Force's November 16 letter indicates that it was not intended to be a final determination that the property was excess for the purposes of the Property Act. Likewise it was not unreasonable for the Air Force to conclude from GSA's response which stated "if our negotiations are successful, we will ask you for a formal report of excess on the property. If they are not we will notify you" that GSA shared its view that the final determination in that regard was yet to be made.

The conditional nature of these letters combined with the fact that GSA representatives attended meetings where the Air Force discussed its plans to explore both the possibilities of leasing or selling the equipment, apparently without raising an objection, reasonably could have led to the Air Force's conclusion that it could lease the equipment under the Lease Act while GSA explored the possibility of a sale under the Property Act.

On the other hand we are unaware of any provisions, either in the Property Act, the Lease Act or related regulations, which encompass the sort of "conditional" determination of excess made by the Air Force. However, we believe that when it received the Air Force's conditional letter, GSA should have attempted to clarify the Air Force's specific intent regarding the status of the property.

Since GSA did not express any objection to the Air Force's November 16 letter when the Air Force executed the lease on August 9, 1974 with MMA it reasonably believed it had authority under the Lease Act to do so. We do not believe that its conditional letter to GSA requesting it to explore the possibilities of negotiating a sale of the equipment, without more, divested the Air Force of the authority to enter into an enforceable lease under the Lease Act.

Regarding the terms of the lease we note that the Determination and Findings executed by the Air Force provides, as required by Section (b)(1) of the Lease Act, that the public interest will be promoted by a lease term of more than five years. Similarly the Lease Act provides that leases under it may contain clauses which give the lessee the first right to buy the property if the lease is revoked.

It is our view that this controversy was caused by a lack of effective communication between GSA and the Air Force. We hope that in the future each side will communicate its plans fully to the other so that disputes such as the instant one may be avoided.

R.F. Keller

Deputy Comptroller General
of the United States