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

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B-176843

October 26, 1972

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Dear Mr. Sampson:

Your letter of August 18, 1972 (and enclosures), sets forth your interpretation of section 7 of the Public Buildings Act of 1959, 40 U.S.C. 607, as amended by section 2 of the Public Buildings Amendments of 1972, Pub. L. 92-313, approved June 16, 1972. Section 7 as amended by section 2 provides, among other things, that "no appropriation shall be made to lease any space at an average annual rental in excess of $500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committees on Public Works of the Senate and House of Representatives respectively."

You intend to issue instructions to your operating personnel setting forth guidelines consistent with the interpretation--as set forth in your letter--of amended section 7 of the Public Buildings Act of 1959, unless our Office interposes any objections thereto. Your interpretation of section 7, as amended, and our views thereon are set forth below.

You state that the applicability of the requirements of amended section 7 of the Public Buildings Act to certain lease transactions involving the acquisition of space for Federal agencies has been under review by the General Services Administration (GSA) since enactment of the 1972 amendments. However, while you state that there is little helpful legislative history, you point out that section 7 as originally enacted and in its amended form has for its stated purpose to ensure "the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings." You also state that the apparent intent of the amended language is to permit legislative oversight with respect to the more significant GSA lease transactions. You further note that the Conference Report (House Report 92-1097, dated May 30, 1972), accompanying S. 1736, which became the Public Buildings Amendments of 1972, states on page 10 that amended section 7 requires GSA to submit a prospectus whenever its Administrator "proposes to secure leased space for which he proposes an average annual rental in excess of $500,000."

The first question raised relates to the proper interpretation of the term "average annual rental." You state in this regard:

"In interpreting the term 'average annual rental' as used in section 7, as amended, we have construed the word

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'rental' to be the amount of consideration for use of the land and buildings or portions of buildings during the firm term of the lease. The term excludes the cost of any services, such as heat, light, water, and janitorial services. This interpretation is consistent with the interpretation of the term 'rental' as used in section 322 of the Economy Act of 1932 (40 U.S.C. 278a) made by your office, 12 Comp. Gen. 546. In this regard the following should also be pointed out: (1) while our practice is to lease on the basis of obtaining services and utilities, there are many occasions when leases are awarded on a net rent basis (i.e., unserviced); (2) services and utilities need not be included as part of the per square foot rental amount and can be contracted for separately from the lessor or others; and (3) if (2), above, were followed, there would be no question as to the dollar amount for the net rental as services and utilities would not be included therein.

"We would prefer, however, to continue our usual practice of including charges for services and utilities in the per square foot rental rate in order to avoid dual contracting for space and services. It is a customary business practice to rent space at a single rate which includes all services. Fully serviced space also avoids the problems inherent in a division of responsibility between the Government and the lessor concerning maintenance and major repairs.

"In leasing at a single rate inclusive of services and utilities, GSA now establishes a net rental as a basis to determine whether the same is within the limitations imposed by section 322 of the Economy Act, supra. Accordingly, GSA presently requires that an offer to lease be accompanied by a statement of the estimated annual cost of services and utilities to be furnished by the offeror as part of the rental consideration. The figures may be adjusted by the contracting officer if, in his judgment, and using the expertise of the appraiser and GSA's Buildings Management personnel, the figures are inaccurate. Enclosed are copies of GSA Forms 1217 and 387 which are used for determining the cost of services and utilities and the net rental."

As you point out your construction of the word "rental" as it is used in the Public Buildings Amendments of 1972 (that it is the amount of consideration for use of the land and buildings, or portions of buildings, during the firm term of the lease, excluding the cost of any services such as heat, light, water, and janitorial services), would be consistent with the interpretation of the term "rental" used in 40 U.S.C. 278a, as interpreted in our decision 12 Comp. Gen. 546 (1933). Also, we were informally advised by members of your staff that the cost for such services is fairly uniform throughout the country (ranging approximately from $1.35 to $1.75 a square foot), and that it is the cost of renting space which varies greatly (from $4 to $10 a square foot). We were further advised that in soliciting offers for leased space, you require a "net" rental bid in order to have uniformity in evaluating proposed leases. Also, we were advised informally that when GSA submitted a lease prospectus to the Congress for approval prior to the amendment of section 7, the comparative costs of leasing versus purchasing were presented in net terms. In view of the above, we see no objection at this time to your proposed interpretation of the term "average annual rental."

The next question raised in your letter relates to the effect of amended section 7 with regard to the 92 leases GSA currently has in effect, which were entered into prior to the enactment of the legislation, at average annual rentals in excess of $500,000, as well as with regard to those cases in which GSA has entered into contracts--prior to the 1972 amendments--under which the Government is obligated to enter into formal lease agreements, exceeding $500,000 per annum, upon delivery of the space. You state in this regard:

> "As discussed above, we do not interpret section 7 as intended to impair existing lease agreements entered into prior to enactment of the 1972 Act. Not only does the legislative history of the Act support this view, but Congress cannot repudiate Government contracts through a general statute, Perry v. United States, 294 U.S. 330 (1935); Cf John McShain Inc. v. District of Columbia, 205 F. 2d. 882 (1953).
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> "Accordingly, in cases where GSA long-term leases entered into prior to June 16, 1972, include a tax escalator clause which allows for an adjustment in the rent to become effective at certain times during the period of the leases, and by

application of the clause, the amount of rent to be paid in the future may exceed $500,000, we do not intend to submit a prospectus. Further, in instances where contracts have been signed prior to the effective date of the amendment to section 7, requiring upon delivery of the space that GSA enter into a lease agreement in excess of $500,000, we do not believe that the Act requires the submission of a prospectus since the proposed lease has become a contractual obligation of the Government which the Act is not intended to impair."

It is a well-established canon of statutory construction that in the absence of an express statutory provision to the contrary, it is not to be presumed that Congress has intended in the enactment of a law to impair existing contracts. Therefore, we agree with your position that section 7 does not require congressional approval of leases entered into prior to the enactment date of Public Law 92-313 (i.e., June 16, 1972), which include a tax escalator clause, allowing for the adjustment of rent, the application of which (the tax escalator clause) subsequent to such date of enactment results in an average annual rental in excess of $500,000. We further agree that section 7, as amended, does not require congressional approval of leases entered into after the enactment date of the 1972 amendments pursuant to contracts entered into prior to such date requiring GSA upon delivery of the space to enter into a lease agreement with a rental in excess of $500,000.

You further ask about the applicability of amended section 7 to situations in which it becomes necessary or desirable to amend an existing lease with an average annual rental of less than $500,000 to cover additional space so that the total average annual rental will be in excess of that figure. You state in this regard:

"We also have not interpreted amended section 7 to require submission of a prospectus in instances where the existing or proposed lease requires payment of an average annual rental of less than $500,000; but because of subsequent change in circumstances it becomes necessary to amend the lease covering additional space, increasing the average annual rental of the building to more than $500,000. Such an amendatory agreement requires all the elements of a new contract and could be accomplished by a separate contract document rather than by amendment. It is not uncommon for GSA to lease portions of a building and as a result of increased program requirements of Federal agencies to seek additional space in the same building.

"In further amplification of the above, an amendment covering additional space in the same building could take place anytime during the term of the lease, and in most instances occurs more than one year from the date the lease is executed. The additional space could be used by one or more agencies in a building occupied by several agencies, for an agency moving into the building for the first time, or for the expanding needs of an agency occupying all of the Government leased space in the building. In any event, the added space could be subject to a separate lease agreement which, if the average annual rental was under $500,000, would not be subject to a prospectus submittal. In any circumstances we would not extend the term of the existing lease and adequate steps would be taken, of course, to prevent the splitting of a space requirement for purposes of evading the requirements of section 7."

We are aware of no legal basis on which to object to the proposed treatment of amendments to existing leases. However, GSA should take whatever precautions are necessary to prevent the splitting of a space requirement for purposes of evading the requirements of amended section 7. This Office, in the course of its normal audits of GSA's activities, will, of course, review GSA's administration of this matter.

With respect to the exercise of options, you state:

"The rationale of our interpretation of section 7, with respect to existing leases, does not apply, however, to renewal options contained in such leases. The options impose no rights on the lessor and are exercised only at the discretion of the Government. However, in most instances the lease option has considerable value. In future lease transactions where a prospectus must be approved and submitted under amended section 7, it is our intention to include in the prospectus a statement relative to the lease options in order that the approval would permit their exercise by the Government. In leases entered into prior to June 16, 1972, where upon exercise of the option the average annual rental would be in excess of $500,000, we do not construe section 7, as amended, as requiring the submittal of a prospectus. As pointed out above, the lease prospectus procedure is intended to ensure the equitable distribution of public buildings throughout the United States with respect to proposed lease transactions, rather than as a control over existing lease arrangements."

While we agree that the statutory language indicates that the lease prospectus procedure is intended, in part, to ensure the equitable distribution of public buildings throughout the United States, it is our view that one of the major purposes of amended section 7 is to allow the Congress, through the appropriate committees, to exercise a degree of control over leasing arrangements. Beginning in fiscal year 1963 and continuing until fiscal year 1972 (i.e., until enactment of the Public Buildings Amendments of 1972), the Congress included within the annual "Independent Offices Appropriation Act" a provision to the effect that no part of any appropriation contained in the Act could be used for the payment of rental on lease agreements for the accommodation of Federal agencies in buildings and improvements which were 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 executed such a lease, unless a prospectus for the lease construction of such space was submitted to the Congress and approval made in the same manner as for public building construction projects pursuant to the Public Buildings Act of 1959. The legislative history of that provision strongly indicated the desire of Congress to exercise some control over the Government leasing program and to encourage the construction rather than leasing of buildings for housing the Government. As indicated in reports prepared by this Office, it became apparent that the aforementioned provision did not give the Congress the degree of control over the Government leasing program that it desired. See, for example, our report B-118623, dated April 19, 1972. Accordingly, the Congress amended section 7 of the Public Buildings Act in 1972 in order to give it greater control.

With respect to the specific question raised, while we agree that in most instances it may be advantageous for the Government to renew its option, your agency will need to compare the various alternatives available to determine which will be the most advantageous to the Government in any particular situation. Inasmuch as this evaluation will be tantamount to making a de novo decision as to the location of the building to be occupied by the Government, as well as tantamount to making a new lease, we feel the subject section requires that the prospectus procedure be carried through on all transactions involving the exercise of options in leases entered into prior to June 16, 1972, where the average annual rental will be an excess of $500,000. However, we agree that a lease prospectus need not be submitted for approval of the exercise of an option in those cases in which the initial prospectus, submitted under amended section 7, (i.e., after the date of enactment of the 1972 amendments) clearly and conspicuously states that approval of all the provisions of the prospectus constitutes approval of the

exercise of any options to renew which are contained in the proposed lease.

The final question raised in your letter relates to the need for prospectus approval of interim housing plans. You state in this regard:

> "Also, your opinion is requested on whether a prospectus is required under the following circumstances where the requirement for a prospectus is less clear from the language of amended section 7. For purposes of securing consideration of approval of prospectuses, section 7, in both its original and amended form, requires that a prospectus for a proposed public building include a statement of rents and other housing costs currently being paid by the Government for Federal agencies to be housed in the building to be constructed as well as a comprehensive plan for providing space for all Government officers and employees in the locality of the proposed project, having due regard for suitable space which may continue to be available in existing Government owned buildings and in rented buildings. This plan, referred to in the prospectus submission as a comprehensive housing plan is a part of the prospectus as approved by the Senate and House Committees on Public Works.
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> "The housing plan, among other things, advises the Committee of the amount of leased space then occupied by Federal agencies and the proposed housing upon completion of the proposed public building. In many instances, although the project is authorized by approval of the prospectus, construction funds are not appropriated immediately, and it becomes necessary to renew existing leases to provide for continued Federal occupancy. Since the housing plan is included in the approved prospectus, and is intended for the purpose of advising the Committees of the leasing arrangements to be continued until the public building is constructed, it is our opinion that such leases may be renewed without the submission of a prospectus where the average annual rental exceeds $500,000. Our reason for this view is that by approval of the prospectus for the proposed construction of the public building, the Committees have also approved the interim housing plan, and therefore the need for an additional prospectus upon expiration of a lease term does not exist."

Paragraph 5 of amended section 7, as did its predecessor, merely requires that the prospectus include a statement of the rent and other housing costs currently being paid by the Government for Federal agencies to be housed in the space to be constructed. We would agree that one of the purposes of this section is to advise the committees of the leasing arrangements to be continued until the public building is constructed, but we cannot agree that approval of the prospectus for the proposed construction of the public building necessarily constitutes approval of the interim housing plan. However, insofar as future leases are concerned (i.e., leases approved after June 16, 1972) where the prospectus clearly and conspicuously states that approval thereof will also constitute approval of the interim housing plan, and where the interim housing plan spells out in detail the possibility that certain specific leases involving average annual rentals in excess of $500,000 may have to be renewed pending completion of the public building, we would agree that the requirements of amended section 7 of the Public Buildings Act of 1959 have been complied with and that therefore no separate prospectus would need to be submitted for those leases being renewed as part of the interim housing plan.

In conclusion, except in those instances noted above, we have no objection at this time to your implementing the procedures spelled out in your letter.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States

The Honorable Arthur F. Sampson
Acting Administrator
General Services Administration