DECISION

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

FILE: B-221011 **DATE:** February 25, 1986

MATTER OF: Immigration and Naturalization Service--Lease-back arrangement to pay for renovations to detention facility

DIGEST:

1. Proposal by the Immigration and Naturalization Service (INS) to renovate Government-owned facility at Terminal Island in San Pedro, California, to provide space for detaining aliens by means of a long-term lease-back arrangement raises a fundamental legal problem. In order to lease the facility, which is presently wholly owned by the Government, back from the contractor performing the renovation work, INS must somehow sell or otherwise transfer the facility to the contractor. Nothing in INS's authorizing statute at 8 U.S.C. § 1252(c) provides it with authority to dispose of Government-owned property.

2. Property owned by the Government which was once used as a detention facility but is currently being used by INS as its Western Regional Office and which INS admittedly needs for use once again as a detention facility does not qualify as property which is "excess" to the needs of the INS or "surplus" to the needs of the United States so as to warrant its disposal under the Federal Property and Administrative Services Act of 1949, as amended, either by the General Services Administration or by INS upon a delegation of authority from GSA. There is no other authority of which we are aware which would enable INS to divest itself of a building it now owns under these circumstances.

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3. INS needs to find a way to pay for renovating a facility it now owns over a long period of time because it does not have or expect to have sufficient appropriations to support a contract for the full cost of the repairs, in a single fiscal year. It is no solution for INS to lease its facility to the contractor on a long-term basis in return for repairs and improvements or management of the detention services. In the absence of specific statutory authority, rentals paid to the Government must be in the form of money consideration only. 40 U.S.C. § 303b (1982).

This decision is in response to an inquiry from James A. Kennedy, Assistant Commissioner, Office of Administration, Immigration and Naturalization Service (INS), U.S. Department of Justice, asking whether it may enter into what it has termed a lease-back agreement in order to have a facility already owned by the Government remodeled to serve as a detention center for aliens awaiting deportation.

The inquiry discloses that the INS Western Regional Office (WRO) is currently located at Terminal Island in San Pedro, California, and is scheduled to be relocated by approximately April 1, 1986. Mr. Kennedy states that the facility is "wholly owned by INS and is situated in a U.S. Coast Guard compound, and some years ago was in fact a detention facility." INS would like to again utilize this facility as a detention facility but it will require some extensive remodeling, for which it intends to contract in accordance with the Federal Acquisition Regulation (FAR). The problem, as explained to us during an informal conference with the Assistant Commissioner, is that INS does not have available appropriated funds to support a contract for the remodeling project this year, although the need for suitable space is very urgent. Thus, the Assistant Commissioner proposes a lease-back arrangement, which he feels will enable INS to pay for the work "over a multi-year period even though the work will have been completed in the first year of the arrangement." INS indicates that it is working with the General Services Administration (GSA) to ensure that it may proceed with such a lease-back arrangement. However, it directs our attention to the Attorney General's broad powers under 8 U.S.C. § 1252(c) and suggests that perhaps INS has sufficient authority to enter into a lease-back contract without the need for a GSA delegation.

We have studied the Attorney General's authority under 8 U.S.C. § 1252(c) and agree with the INS characterization that it provides "broad independent authority to acquire detention space." If, as the statute provides, "no Federal buildings are available" or no suitable non-Federal facilities are available for rental, the Attorney General may utilize his lump sum appropriation for the "administration and enforcement of the immigration laws to acquire land and a suitable building on the land."

As mentioned earlier, the INS's proposed solution is a lease-back arrangement. A "lease-back" is generally defined as a transaction whereby a transferor sells his own property and later leases it back from the buyer. As we understand it,[1] INS would sell or otherwise transfer its building at Terminal Island to the contractor selected to perform the renovation work. He would then enter into a long-term arrangement which, he says, is "essentially no different, in a procedural sense, from any other lease-purchase arrangement for real property." We agree that once the INS no longer owns the property, the arrangement to buy it back in the manner proposed amounts to a lease-purchase contract. Our problem is with the first step of the INS proposal--the sale or transfer of its wholly owned Government facility to the contractor in order to buy it back for the price of the renovations, with payments spread out over a long period of time.

DISPOSAL OF GOVERNMENT-OWNED PROPERTY

It has uniformly been held in the decisions of the courts and in the opinions of the Comptroller General and the Attorney General that Article IV, section 3, clause 2 of the Constitution of the United States confers on the Congress exclusive jurisdiction to dispose of real or other property of the United States. Therefore, without express or reasonably implied statutory authorization, the head of a

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[1] The Assistant Administrator did not really state that the INS plans to divest the Government of ownership of the Terminal Island facility. However, unless it does so, we do not see how it can lease the facility back.

department or agency of the Government is powerless to dispose of the property of the United States.[2]

INS does not itself have express statutory authorization to dispose of property owned by the United States, either by sale or by lease. Even the broad authority of 8 U.S.C. § 1252(c), discussed earlier, is concerned only with the acquisition of space used for detention of aliens, but not with the disposal of such space.

There is statutory authorization for the Administrator of General Services (and by delegation of authority from the Administrator, the head of a department or agency) to dispose of surplus property of the United States. Under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, the head of a Federal agency may declare property under the control of that agency which is not needed for the discharge of agency responsibilities to be "excess property." 40 U.S.C. § 472(e). Such property thereby becomes available for transfer to and use by another Federal agency. See 42 C.F.R. § 101-47.201 through 101-47.203. If the Administrator of General Services determines that excess property is not required for the needs of any Federal agency, he may declare it "surplus property." 40 U.S.C. § 472(g). The Administrator of General Services is the designated agency to supervise and direct the disposition of all Government-owned surplus real property. The Administrator may designate or authorize any executive agency to dispose of surplus property by sale, exchange, lease, permit or transfer, for cash, credit, or other property. 40 U.S.C. § 484(c). However, these disposals, whether made directly or by delegation, must conform to statutory and regulatory requirements.

Based upon the facts as presented in the INS submission, neither the GSA nor the INS (pursuant to a delegation

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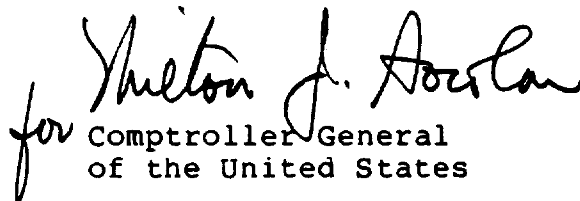
2/ See e.g., United States v. Nicoll, 27 Fed. Cas. 149, No. 15,879 (C.C.D. N.Y., 1826); Irvine v. Marshall, 61 U.S. (20 How.) 558 (1857); Wisconsin R. Co. v. Price County, 133 U.S. 496 (1890); Light v. United States, 220 U.S. 523 (1911); Royal Indemnity Co. v. United States, 313 U.S. 289 (1941); 34 Op. Atty. Gen. 320 (1924) and opinions cited therein; and B-191943, October 16, 1978; 50 Comp. Gen. 63 (1970); 44 id. 824 (1965); 38 id. 36 (1958); 25 id. 909 (1946); 22 id. 563 (1942); 15 id. 96 (1935); and 14 id. 169 (1934).

of authority from GSA) would be authorized under the authority of the Federal Property and Administrative Services Act of 1949 as amended (discussed above) to dispose of the facility located at Terminal Island on the grounds that it was excess to INS's needs and surplus to the needs of the Government as a whole. On the contrary, INS is suggesting the lease-back method of renovation primarily because of its great need to obtain space for detention purposes. Thus the facility could not be characterized as either surplus or excess, and we know of no other authority to transfer title to the property in order to lease it back.

CONCLUSION

We do not think that a lease-back arrangement involving INS's own property at Terminal Island is a feasible solution to its funding dilemma. Before the property can be "leased back" from the contractor performing renovation work, it must first transfer title to the facility to the contractor. There is no authority to make such a disposal of Government property since it is neither excess to INS's needs or surplus to the needs of the Government as a whole.

Our only suggestion is that INS secure legislative approval to enter into a lease-purchase contract for some other suitable property, or otherwise secure supplemental funding on an emergency basis to support a contract for the entire cost of renovations.



for Comptroller General
of the United States