



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

B-152223

November 6, 1963

Dear Mr. Chairman:

Your letter of July 31, 1963, with enclosures, acknowledged August 8, requests our opinion concerning the legal aspects of a proposed negotiated sale of an unimproved tract of land at Porterville, California. The land has been declared excess by the Department of Agriculture, and it is proposed to sell the land to the successful bidder for the construction of a building on the site to be leased to the Government as office and storage space for Forest Service headquarters serving the Sequoia National Forest.

The Explanatory Statement of the proposed negotiated sale submitted to your Committee by General Services Administration pursuant to the requirements of Section 203 (e)(6) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 484 (e)(6) recites that the Department of Agriculture originally reported the land excess on November 1, 1962; that subsequently the Department conveyed approximately .11 acres of the land included in the original report to the City of Porterville for street widening necessitating the issuance of an amended report dated February 21, 1963; that the land proposed to be conveyed contains 1.28 acres and was acquired on September 25, 1936, for \$5,916 (prorated); and that it is proposed to sell the land at a cash sale for \$17,000, representing the present appraised fair market value, to the successful bidder for the construction of a building to be leased to the Government. It is explained that the building to be constructed on the site is intended for occupancy of the Forest Supervisor, Sequoia National Forest, his administrative staff and any other Government agencies designated by GSA. The Statement concludes that the proposed sale is consistent with the objectives and requirements for negotiated sales of surplus real property as set forth in Section 203 (e)(3) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. (e)(3).⁴⁵⁴ In justification for such conclusion it is stated that the property is located within the predetermined designated area for the Sequoia National Forest headquarters and warehouse complex; that the price to be paid for the land will have a direct bearing on the rental rates offered by the bidders for the lease, and consequently must be prescribed in the Invitation for Bids for construction and lease of the building; and that these circumstances make it impractical to advertise publicly for competitive bids.

By letter of May 22, 1963, to your Committee the Administrator of GSA, in further justification of the proposed negotiated sale, stated that the land is adjacent to and contiguous to the Government-owned headquarters and storage area now serving the Sequoia National Forest; that these headquarters have been located in Porterville since 1916; that it is important for operating efficiency to have the Forest Supervisor's Office contiguous to its operating yard; that the present headquarters building is a totally obsolete, temporary, former CCC barracks building of insufficient size to properly house the present Forest Supervisor's Staff; that the property is located approximately one-half mile from the business district of Porterville and no privately-owned buildings available for leasing are located in the immediate vicinity; and that because of the urgent requirement for suitable additional office space, it was determined that the best solution would be for the Department of Agriculture to report as excess a small portion of its holdings suitable to house a leased building to be occupied by the Forest Supervisor and his staff. As authority for the proposed negotiated disposal the Administrator cited Section 203 (e)(3)(G) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 484 (e)(3)(G) and stated that the leasing transaction would be consummated pursuant to Section 210 (h) of the 1949 Act as amended, 40 U.S.C. 490 (h). This latter section authorizes the Administrator to enter into lease agreements for periods not exceeding 20 years on such terms as he deems to be in the interest of the United States and necessary for the accommodation of Federal agencies in buildings and improvements which are in existence or to be created by the lessor for such purposes, and to assign and reassign space therein to Federal agencies. The Administrator stated that the proposed new leased building would contain approximately 7,860 net square feet; that it would house only Forest Supervisor's headquarters personnel totaling 61 employees; that the statement "other Government agencies" contained in the explanatory statement was intended only for the purpose of informing the Committee that should some of the space become available later as a result of reduced Forest Service requirements, GSA would make it available for assignment to any other Federal agency personnel located in the Porterville area having a need therefore that the estimated cost of the building, excluding the cost of site is \$165,000; and that the proposed lease would be for a firm term of five years with renewal options for at least two additional five-year terms. In conclusion, the Administrator stated that GSA had had seven similar transactions in the past, all of which had been submitted to the Senate and House Committees on Government Operations as evidenced by the list attached to his letter.

Under Section 203 (a) of the Property Act, 40 U.S.C. 484, the Administrator of GSA is granted supervision and direction over disposition

of surplus property to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner as hereinafter prescribed. The term "surplus property" is defined in Section 3 (g) (40 U.S.C. 472 (g)), as meaning any excess property not required for the needs and discharge of the responsibilities of all Federal agencies, as determined by the Administrator. The term "excess property" is defined in Section 3 (e), (40 U.S.C. 472(e)), as meaning any property under the control of any Federal agency which is not required for its needs and discharge of its responsibilities, "as determined by the head thereof", in this instance the Secretary of Agriculture.

In our letters of July 22, 1957 and June 25, 1958, B-132099, to you, copies attached, there were considered several questions submitted by you concerning the legality of certain practices of various Government agencies incident to the disposition of property under their control. Questions 5, 6 and 7 of your letter of June 3, 1957, related specifically to the practice of the agency in control of the property declaring same excess to its needs followed by disposal of the property as surplus and the leasing back to such agency. Specifically, questions Nos. 5 and 6 of your letter of June 3, 1957, were stated as follows:

- "5. When a Government agency owns property which it wishes to sell and lease back, can such an objective be lawfully accomplished under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, i.e., by a determination and reporting of such property as 'excess,' a declaration of such property as 'surplus' and thereafter a sale of the property to the entity from whom the Government agency then leases the property? (This question assumes a virtual uninterrupted use of the property by the Government.)
- "6. Is the answer to the question number 5 affected if the entity substantially repairs and modernizes the property which it purchased from and leased back to the Government?"

In our letter of July 22, 1957, to you, it was stated that the heads of Federal agencies and the Administrator of GSA have broad discretionary authority under the Property Act, as amended, and that their determinations that property is "excess" or "surplus" property, respectively, could be questioned legally only when such determinations are clearly arbitrary or capricious. We pointed out that even then the only actions the accounting officers could take would be to report the matter to the Congress or to the Attorney General for any possible legal procedures to recover the property. Further, we pointed out that whether an agency needs to use certain property to carry out an authorized

program depends primarily upon the manner in which the program is to be carried out and that great weight must be given the determination of the agency head vested with the responsibility of carrying out the program. We endeavored to point out that, under such discretionary authority, there could be exceptional cases where the sale of Government property and continued use thereof under leasing or other arrangements might be contrary to the provisions of the Property Act and that therefore, we could not answer categorically in the affirmative or the negative your questions concerning the legality of such practices, it being our view that the questions could be answered only on the basis of the specific facts of each case.

In our letter of June 23, 1958, to you, we stated that we did not intend to imply that the sale and leasing back of property would generally be lawful. On the contrary, in answer to question 5 in your letter of June 3, 1957, involving a situation similar to the present matter (except that such question assumed virtually uninterrupted use of the property by the Government), we stated that, in our opinion, such cases raise serious doubts as to whether there was any basis for determining the property to be excess or surplus property and that the continued use of the property after its sale constituted prima facie evidence that the property was not excess or surplus property.

In this connection we are enclosing a copy of our decision dated December 4, 1961, B-146494, involving disposal of a Government-owned, contractor-operated, ammonium perchlorate plant, the continued operation of which was necessary to meet the Government's needs for ammonium perchlorate. As indicated at page 3 of this decision, it was our conclusion that the Government's need was for ammonium perchlorate, and while such need might preclude a designation of Government-owned ammonium perchlorate as surplus property, the Government's need for the productive capacity represented by the plant in question was no more than a need for continued existence and operation of such plant, without regard to whether the plant was Government-owned or privately-owned. It is our understanding that the General Services Administration considers the foregoing reasoning and conclusion to be equally appropriate to disposal of the land at Porterville, since Agriculture's need is for office space rather than for ownership of the land upon which such office space is to be provided. It should be noted, however, that it is the policy of the Government, as detailed in Bureau of the Budget Bulletin 50-2, to periodically survey Government-owned industrial facilities and to dispose of those facilities producing supplies which can be obtained from private producers. We are aware of no such policy with respect to ownership versus lease of office buildings. Additionally,

It should be borne in mind that all real property is unique, if for no reason other than its location. It is therefore our opinion that a distinction can, and properly should be made between the Government's need for supplies, without respect to where or by whom such supplies are manufactured, and the Government's need for office space at a particular location. We are therefore unable to agree that the reasoning and conclusion with respect to disposal of Government-owned industrial facilities as set out in our decision of December 4, 1961, is applicable to the proposed disposal of land at Porterville.

In the present situation there is nothing in the Explanatory Statement of the Administrator's letter of May 22, 1963, indicating any prior use of the land by the Forest Service. However, the fact that the land is located in a predetermined designated area for the Sequoia National Forest headquarters and warehouse complex, and considering the importance of having the Forest Supervisor's office contiguous to its operating yard coupled with the fact that there are no privately-owned buildings located in the immediate vicinity of the involved tract, it is our view that no proper basis has been stated for determining the land to be "excess property" or "surplus property" within the meaning of those terms as defined in Section 3 (e) and 3 (g) of the Property Act. On the contrary, it appears that the transaction described evidences a need for the tract as a site for the proposed building to be used by the Forest Service and in this connection Section 203 (e) (6) of the Federal Property and Administrative Services Act applies only to disposal of property which is surplus to the needs and the discharge of the responsibilities of all Federal agencies.

The Administrator has stated that there have been several similar transactions in the past, all of which were submitted to the Senate and House Committees on Government Operations with explanatory statements as required by Section 203 (e) (6) of the Act. However, we do not believe that the required submission of explanatory statements to the appropriate committees of the Congress was intended to have the effect of validating an improper disposal action.

Sincerely yours,

JOSEPH CAMPBELL
Comptroller General
of the United States

Enclosures- 3

The Honorable Jack Brooks
Chairman, Subcommittee on Government Activities
Committee on Government Operations
House of Representatives