

**DECISION**



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

60795

FILE: B-115369

DATE: April 23, 1976

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MATTER OF: Third Party Leaseback of ADPE

**DIGEST:**

1. Various General Services Administration (GSA) proposals for third party leaseback of installed and uninstalled ADPE are tentatively approved by GAO provided that equipment manufacturer's consent to leaseback arrangement be obtained where necessary. However, recommendation is made that leaseback proposals be instituted on a trial basis because of problems which may arise.
2. Direct assignment by Government of purchase option under ADPE lease to third party lessee for purpose of accomplishing leaseback of equipment to Government under more favorable terms constitutes procurement transaction rather than a disposal of property and therefore laws governing disposal of Government property are not for application.
3. While GSA proposed leaseback arrangements tentatively are approved, GAO recommends that GSA should continue to seek adequate ADP Fund capitalization to finance ADPE purchases. Furthermore, each proposed leaseback should be approved by GSA (no blanket delegation to agencies) and lease or purchase determinations should be made and documented before leasebacks are used.

By letter of August 7, 1975, the Acting Administrator of the General Services Administration (GSA) submitted for our approval a number of plans involving the lease of Automatic Data Processing Equipment (ADPE).

As background, GSA notes that it has consistently sought to improve the ADPE procurement process to take advantage of changes in the market place. As examples of this process, it points out that our decision 45 Comp. Gen. 527 (1966), relating to third party leaseback arrangements, and our decision 48 Comp. Gen. 497 (1969), regarding long-term lease plans, resulted from GSA requests to this Office.

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GSA

With regard to the instant requests, it is reported that various members of the financial market have approached GSA and other Federal agencies with various multi-year and/or leaseback proposals that could result in substantial savings to the Government in the leasing of ADPE. GSA believes that it may accept these various proposals, since each of them constitutes a proper method of procurement under section 201 of the Federal Property and Administrative Services Act of 1949 (which gives GSA authority to prescribe policies and methods of procurement for supplies and services), as amended by Public Law 89-306 of October 30, 1965 (The Brooks Act), and under related Office of Management and Budget (OMB) Directives. In particular, subsection 111(b)(1) of the Brooks Act specifically authorizes GSA to provide ADPE for use by Federal agencies "through purchase, lease, transfer of equipment from other Federal agencies, or otherwise\* \* \*." (Underscoring supplied.) GSA believes that now "with the added broader authority and responsibilities placed in GSA under the Brooks Act (specifically subsection 111(b)(1) thereof), we have more flexibility and greater discretion in determining economic and efficient methods of providing ADPE to Federal agencies than we previously had solely under section 201 of the Property Act."

GSA further reports that financial institutions are interested in placing long-term leases (with or without renewable features) upon installed or uninstalled ADPE. These institutions feel that this special function of theirs has come into being because of two basic reasons: (1) financial institutions are suited to managing long-term rates as well as other long-term fiscal aspects; and (2) financial institutions are willing to assume certain types of risks, particularly long-term risks, which vendors or other suppliers of ADPE are unable or unwilling to assume. Hence such practices are now widely utilized in the commercial market place.

The leasing arrangements are described under the following plans:

"Plan A

"(a) Pertains solely to the placement of an institutional lease on installed equipment covered by an existing OEM lease;

- "(b) Involves a special policy of the OEM (primarily, if not solely that of IBM) precluding the assignment by the Government of an option to purchase but allowing the exercise of the option by an agent;"
- "(c) Covers the use of several simultaneous documentary procedures for the placement of a new institutional lease with a financial institution (leasing firm) on more favorable terms;"
- "(d) Excludes the use of any Government funds for the initial purchase; and
- "(e) Covers a lease involving either a long-term arrangement (requiring obligation of entire amount) or a one-year renewable lease."

Plan A is described by GSA as that covered in our prior decision of 45 Comp. Gen. 527, supra, where we considered the propriety of entering into a leaseback arrangement (also called "institutional lease" by GSA) on already installed ADPE. GSA had reported to us that several Federal agencies were leasing certain ADPE equipment from IBM (the original equipment manufacturer or OEM) under leases which contained a nonassignable purchase option clause. However, GSA proposed an arrangement whereby a third party leasing firm acting as the Government's agent, but using its own funds, would exercise the purchase option in the Government's name. At the same time the Government would transfer its title interest in the equipment to the third party leasing firm. In return, the leasing firm would lease back the equipment to the Government at more favorable rental rates and with an option to purchase.)

(We approved the proposed leaseback arrangement, provided that the OEM had no objection to the procedure.) In approving the arrangement, we viewed the proposed leaseback as a single procurement transaction not accomplished for the purpose of vesting title to the equipment in the Government and therefore not subject to the laws concerning the disposal of Government property.)

We note that under Plan A the OEM precludes assignment by the Government of its purchase option but allows exercise of the option by the Government's agent. As indicated in our prior

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decision, our approval of an institutional lease under the circumstances described in Plan A is conditioned upon the Government obtaining the OEM's consent to the placing of the lease, so as not to circumvent the lease provision against assignment of the purchase option.

"Plan B

"(a) Pertains solely to the placement of an institutional lease upon installed equipment where the vendor-lessor has no policy precluding the assignment of the option to purchase contained in the lease;

"(b) Covers the use of several simultaneous documentary actions, including:

- (1) assignment to the financial institution of the option to purchase with the purchase price being paid to the original vendor directly by the financial institution;
- (2) placement by the Government of an institutional lease on more favorable terms, including option to purchase; and
- (3) the lease being either a long-term lease (requiring obligation of entire amount if legislation has not been enacted) or a one year renewable lease."

Thus, (Plan B,) unlike Plan A, (calls for direct assignment of the purchase option.) GSA recognizes, however, that (while direct assignment does not involve even a momentary transfer of title to and from the Government, assignment of the option does involve a transfer to and from the financial institution of certain rights. These include any accrued credits toward the purchase price which the Government may have previously acquired as lessee of the installed equipment under the original lease.) Since property disposal requirements were not deemed applicable under the situation covered in our 1966 decision (such as described in Plan A), (GSA) (believes these requirements would not be applicable under Plan B as well.)

[ We agree. Under both plans the Government essentially would be obtaining (procuring) more favorable lease terms (including purchase options) for its installed equipment rather than disposing of its property rights. We recommend, however, that where a long-term lease is contemplated, requiring obligation of the entire amount of the lease payment, consideration should be given to the desirability or feasibility of out-right purchase of the equipment by the Government. ]

The remaining plans described below apply to uninstalled equipment, since it is reported that financial institutions have offered to issue institutional leases upon uninstalled equipment. For such equipment, GSA contemplates a two-step procedure using the following types of plans:

"Plan C

"Under this plan the method of procurement would involve two steps using successive solicitations, or using a single solicitation containing two parts, and would be accomplished as follows:

"I. Under step one (part one):

- (a) GSA would proceed in a regular manner to issue an RFP for the acquisition of ADPE;
- (b) GSA would request proposals to meet Government-wide requirements from all possible suppliers (not only from OEM vendors or from third party market vendors but also from 'plug-to-plug' suppliers as well as other sources);
- (c) Interested suppliers of uninstalled equipment would be requested to submit offers for purchase, lease, lease with option to purchase, or any other special lease plan;
- (d) Offerors would be notified that in the event an offer involving a purchase privilege is evaluated as reflecting the

lowest overall cost alternative (including the costs of obtaining financial resources to finance the purchase), then the Government reserves the right to designate a financial institution to accept and pay for any or all of the ADPE listed on the proposal on behalf of the Government. Such notice would be issued to enable the accomplishment of a lease-back to the Government, subject to its implementation under step two; and

- (e) Accordingly, when finally purchase is determined to be the method of award, and purchase money is not available in the Government, GSA would activate step two if original RFP is under a single solicitation. However, if the procedure involved successive solicitations, GSA would solicit financial institutions for financial proposals offering the most favorable terms based on purchase offers received in step one.

"II. Under step two (part two):

- (a) Financial institutions (leasing firms) would be requested to submit offers setting forth the terms of an institutional lease to become applicable to a respective type (or types) of equipment which had been tendered for purchase under step one;
- (b) Evaluation and selection of the best financial institutional proposal would be based on the purchase price established under step one plus the financial institution charges. Accordingly, if such overall amount is still lower than the amounts of a straight lease or a lease with option to purchase, or any other special lease plan, then implementation of the successful tender submitted under step one would be

undertaken by the Government with the financial institution (leasing firm) submitting the most advantageous proposal;

- (c) The financial institution would enter into a separate agreement with the supplier, which would contain all agreed upon terms and conditions between the supplier and the Government as previously established in step one;
- (d) The financial institution would pay directly to the supplier the purchase price of the selected equipment;
- (e) The financial institution would assign to the Government all of its rights with the ADPE supplier, which could include the supplier being obligated to the Government for transportation costs and any costs for support services such as training, etc.;
- (f) The Government's contract with the financial institution, although it could be for one year (renewable), almost always would establish a multiyear leasing arrangement with GSA;
- (g) The ADP Fund would be used to finance the arrangement between the Government and the financial institution;
- (h) Title to the equipment would pass from the ADP supplier directly to the financial institution; and
- (i) ADPE acquired under this plan, if financed through the ADP Fund, would then be assigned to the user agency under an interagency reimbursable lease agreement, and would require (prior to enactment of pending legislation) obligation of the entire amount."

ADPE industry there have been springing up a number of institutions (leasing firms) which have undertaken to provide their financial resources for leasing purposes, or otherwise under a variety of marketing methods. We concluded that such firms may be regarded as "financial institutions" under the Assignment of Claims Act (31 U.S.C. 203, as amended).

In that case, the original supplier rather than the financial institution proposed to be responsible for maintenance and service of the ADPE. However, GSA states that as an incident to placement of the institutional lease, maintenance and other specialized service functions pursuant to the arrangements between the parties could be performed by the leasing firm, could remain in the OEM, or could be established with a newly designated service furnishing concern.)

As in the case of Plan C, we assume that fiscal year funds will not be obligated by the user agency under this plan for multiyear contracting, and we recommend that the plan initially be instituted on a trial basis.) This recommendation is applicable as well to Plans E and F set forth below.

*Examples of Plans E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z*

"Plan E

"A variation of Plans A and C in that the Government would set forth a further alternative.

"(a) Under step one, the Government would indicate that where a supplier has a policy of not permitting the financial institution to accept the purchase offer, but where the supplier would accept the payment from the financial institution after the Government had placed the order, then the Government's purchase privilege would be exercised immediately by the Government, but not using or citing any Government funds for effecting the purchase;

"(b) Payment for the ADPE would be provided by the financial institution furnishing a certified check to the Government made out to the supplier;

"(c) The certified check would be given to the supplier simultaneously with the signing of the purchase order by the Government;



- "(d) All Government rights would be assigned to the financial institution;
- "(e) Title would pass through the Government to the financial institution; and
- "(f) As in Plan C, the Government's lease with the financial institution could involve either a one year or a firm long-term lease requiring obligation of the entire amount.

"Plan F

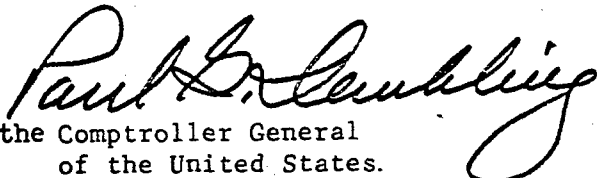
- "(a) This plan would be utilized where the Government has previously determined that one kind (or several specific kind brand names) of equipment would satisfy the Government's needs, but where such equipment is not currently available on the open market except from the OEM;
- "(b) Because delivery is a significant aspect, the Government would have obtained advance agreements from the OEM's stating that they would permit the Government to assign to any designated offeror (the lowest overall offeror), the right to purchase a specific piece (or pieces) of equipment from the OEM at the earliest delivery date available to the OEM for the specific requirement, (provided the designated offeror is not otherwise entitled to a better delivery schedule). This would eliminate any unfair delivery advantage that the OEM might have because of its advance planning under its marketing practices;
- "(c) Under a one step proceeding (where both vendors and financial institutions would be solicited), offerors would be requested to submit proposals for the required equipment for purchase or for long-term or short-term leases (with or without the option to purchase). The solicitation would contain a notice as to the Government's right to a specific advantageous delivery designation for the required equipment;

"(d) Award would be made to the lowest overall offeror (the award covering the OEM's delivery designation if required); and

"(e) Under this plan, no accrued Government rights would be involved in the delivery designation, nor would any Government title or funds be involved."

[ We find no reason to disagree with GSA that each of the methods of procurement described above, whether undertaken in respect to installed or uninstalled ADPE or undertaken by means of a one-step or a two-step proceeding, constitutes a permissible method of procurement under applicable authorities. Nevertheless, we believe that unqualified endorsement of these unique proposals would be premature. At this point, therefore, we can only offer our tentative approval of these proposals. As indicated above, we recommend that each of these plans be instituted on a trial basis for a period of time. At the end of the trial period a determination could be made whether each of the plans is feasible and advantageous to the Government.] In this regard, we would appreciate being advised by GSA of any determinations and proposed actions in the matter.

Finally, as indicated in our Report to the Congress, B-115369, October 1, 1975, LCD 74-115, [we believe that GSA should continue to seek adequate ADP Fund capitalization so that financing through the Fund should be the prime consideration. Therefore, we recommend that (1) each proposed leaseback arrangement be approved by GSA (no blanket delegations to agencies to enter into such arrangements), and (2) lease or purchase determinations based on the present value of money be made and documented before any decision is made to use the proposed financing mechanism as suggested in our 1966 decision.]

  
For the Comptroller General  
of the United States.

As described above, Plan C involves a two-step procedure whereby proposals would be solicited for acquisition of ADPE (including purchase) under step one. Evaluation and selection of the best financial institutional proposal under step two would be based on the purchase price established under step one, plus the financial institution charges. The financial institution would directly purchase the ADPE from the supplier in accordance with the terms and conditions of step one and would assign to the Government all of its rights under the ADPE supplier, which could include costs for support services. The ADP arrangement between the Government and the financial institution, and the ADPE acquired under this plan, would then be assigned to the user agency under an interagency reimbursable lease agreement.

We assume that the user agency would not be obligating fiscal year funds to reimburse the ADP Fund under this type of multi-year agreement. See 48 Comp. Gen. 497, supra. Otherwise, we have no legal objection to the method of procurement described in Plan C at this time. However, it should be recognized that the proposed procedure is novel, and that unforeseen problems could arise once the plan is implemented. Therefore, we recommend that if the proposed method of procurement described above is to be undertaken, it should be instituted initially on a trial basis.

"Plan D

"Same as Plan C except the financial institution would not be responsible for the maintenance and service of the equipment. The Government would have to enter into a separate agreement to obtain such services from the supplier or some other source. The financial institution would merely be a 'financial intermediary'. (See your decision 'Atlantus Peripherals, Incorporated' - B-178674 of August 1, 1974, describing such a financial intermediary.)"

[This plan is the same as Plan C except that the financial institution would not be responsible for the maintenance and service of the equipment. The Government would have to obtain such services from the supplier or some other source. The financial institution would be merely a "financial intermediary."]

In this connection, GSA calls attention to our decision Atlantus Peripherals, Incorporated, B-178674, August 1, 1974, published at 54 Comp. Gen. 80. There, we recognized that in the