



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Transportation Safety Board—Application of Section 1072 of the Federal Acquisition Streamlining Act (41 U.S.C. § 254c) to Real Property Leases

File: B-316860

Date: April 29, 2009

DIGEST

Statutory language authorizing the National Transportation Safety Board to “enter into such contracts, leases, cooperative agreements, and other transactions as may be necessary” to carry out its functions and duties permits the agency to enter into leases of real property. The 1994 recodification of that provision omitting the word “leases” did not change the provision’s meaning.

Under 41 U.S.C. § 254c, the phrase “acquisition of property” includes leases of real property. Accordingly, agencies with authority to lease real property may enter into contracts for up to 5 years for the lease of real property using fiscal year appropriations if the conditions of 41 U.S.C. § 254c are met.

DECISION

The General Counsel of the National Transportation Safety Board (NTSB) has requested our decision under 31 U.S.C. § 3529 on whether NTSB may use its fiscal year appropriations to fund multiyear leases of real property and facilities under 41 U.S.C. § 254c, a provision of the Federal Acquisition Streamlining Act of 1994 (FASA).¹ Letter from Gary L. Halbert, General Counsel, NTSB, to Gene L. Dodaro, Acting Comptroller General, GAO, July 3, 2008 (Request Letter). In that letter, NTSB asserted that Congress has given it independent authority to lease real property, but explained that it doubts that it may use its fiscal year appropriations to pay for multiyear leases. *Id.*

¹ Pub. L. No. 103-355, § 1072, 108 Stat. 3243, 3270 (Oct. 13, 1994).

As explained below, NTSB has authority to enter into real property leases pursuant to the Independent Safety Board Act of 1974, Pub. L. No. 93-633, § 304(b)(4), 88 Stat. 2156, 2166, 2170 (Jan. 3, 1975), *codified at* 49 U.S.C. § 1113(b)(1)(B). Real property leases constitute property within the meaning of 41 U.S.C. § 254c. Accordingly, if NTSB complies with the terms and conditions set forth in 41 U.S.C. § 254c, it may obligate its fiscal year appropriations for multiyear real property leases.

Our practice when rendering opinions and decisions is to obtain the views of the relevant federal agencies to establish a factual record and elicit their legal positions in the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. NTSB provided us its legal view in its Request Letter. GSA provided us with its views on whether NTSB's statutes authorize NTSB to enter into leases of real property independent of the general authority given to GSA. Letter from Leslie A. Nicholson, General Counsel, GSA, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Oct. 3, 2008 (GSA Letter). NTSB subsequently supplemented its legal views. Letter from Gary L. Halbert, General Counsel, NTSB, to Thomas H. Armstrong, Assistant General Counsel, GAO, Sept. 29, 2008 (NTSB Supplement).

BACKGROUND

NTSB is charged with investigating and determining the causes of accidents related to the transportation of individuals and property and making safety improvement recommendations to avoid future transportation-related accidents. 49 U.S.C. §§ 1131-1132. In support of this mission, NTSB occasionally needs to lease real property and facilities on short notice for the purpose of storing and studying wreckage from transportation accidents wherever those accidents occur within the United States. Record of GAO Telephone Conversation with NTSB General Counsel, July 24, 2008 (NTSB Telephone Conversation). NTSB foresees that some of its leases may need to cross fiscal years. *Id.* NTSB believes that it has independent authority to lease real property and facilities, but requests our decision on whether 41 U.S.C. § 254c allows it to obligate its fiscal year appropriations to fund multiyear leases of real property. Request Letter, at 2.

DISCUSSION

NTSB authority to lease real property

Congress has centralized in GSA the authority to lease real property and facilities for the use of federal agencies. The Federal Property and Administrative Services Act of 1949 (FPASA) transferred to GSA the authority to lease real property and facilities on behalf of the federal government, subject to several exceptions not relevant here.²

² Previously, the authority to acquire space for use of federal agencies, including leasing (with certain exceptions), was vested in the Federal Works Agency and the Public Buildings Administration. *See* 65 Comp. Gen. 722, 725 n.12 (1986).

FPASA, ch. 288, § 3, 63 Stat. 377, 378 (June 30, 1949), as amended, *codified in* 40 U.S.C. § 585. As presently written, this authority allows GSA, on behalf of all federal agencies, to enter into leases of real property and facilities to meet the government's needs for periods of up to 20 years and to obligate fiscal year funds without violating the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B). 40 U.S.C. § 585. *See* B-309181, Aug. 17, 2007. GSA may also delegate its authority under this statute to the heads of other federal agencies. 40 U.S.C. § 121(d); 41 C.F.R. pt. 102-72. GSA has published separate regulations covering real property leasing by both its officers and the officers of other agencies who lease under GSA delegations. *See General Services Administration Acquisition Regulation*, 48 C.F.R. § 501.101; GSA, *Leasing Delegations FAQs*, Question 10, available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=23688&noc=T.

Congress has authorized some federal agencies to lease real property independent of GSA. For example, the Federal Aviation Administration (FAA) may “acquire (by purchase, *lease*, condemnation, or otherwise) . . . air traffic control facilities and equipment . . . research and testing sites and facilities; and . . . other real and personal property (including office space and patents) . . . the Administrator considers necessary.”³ 49 U.S.C. § 106(n)(1) (emphasis added). *See* 38 Comp. Gen. 588 (1959). *See also* B-195260, July 11, 1979 (FEMA). Without such independent statutory authority and absent a delegation of authority from GSA, a federal agency may not lease real property or facilities for its own use or on behalf of any other government entity. B-309181, Aug. 17, 2007, *citing* B-202206, June 16, 1981.

NTSB states it has authority to lease real property under 49 U.S.C. § 1113(b)(1)(B). Request Letter, at 2. Section 1113(b)(1)(B) authorizes NTSB to “make agreements and other transactions necessary to carry out this chapter.” This language does not mention leasing or GSA’s authority under 40 U.S.C. § 585. However, as originally enacted, the statute authorized NTSB to “enter into . . . such contracts, *leases*, cooperative agreements or other transactions as may be necessary in the conduct of the functions and the duties of the Board.” Independent Safety Board Act of 1974, Pub. L. No. 93-633, § 304(b)(4) (emphasis added). In 1994, Congress condensed the language of section 304(b) to the phrasing now found in section 1113(b)(1)(B) when it codified title 49 of the United States Code. Pub. L. No. 103-272, § 1(d), 108 Stat. 745, 747–48 (July 5, 1994). The 1994 act stipulates that Congress intended this recodification to restate the law “without substantive change.” *Id.*, § 6(a). Accordingly, we agree that NTSB is authorized to negotiate and enter into such leases as it reasonably determines to be necessary and appropriate to the conduct of its statutory functions and duties.⁴

³ Other statutes granting independent leasing authority include, for example, 42 U.S.C. § 7256(a) (Energy Department) and 42 U.S.C. § 2473(c)(5) (NASA).

⁴ GSA also agrees that 41 U.S.C. § 1113(b)(1)(B) authorizes NTSB to lease real property independent of GSA and 40 U.S.C. § 585. GSA Letter, at 2.

Availability of 41 U.S.C. § 254c to enter into leases of real property

NTSB asks whether multiyear contracting authority under 41 U.S.C. § 254c may be used to enter into multiyear leases of real property. NTSB has fiscal year appropriations only. *See* Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, div. I, title III, § 5, 123 Stat. 524, 982 (Mar. 11, 2009) (Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2009). Agencies generally may not use fiscal year funds to enter into multiyear contracts or leases because of the Antideficiency Act⁵ and the *bona fide* needs rule⁶ unless they can cite to other authority. Section 254c of title 41 of the United States Code is one such authority. B-302358, Dec. 27, 2004.

Section 254c permits a civilian agency to use fiscal year appropriations to enter into contracts for up to 5 years “for the acquisition of property or services” if the agency obligates from current fiscal year funds an amount sufficient to cover either the cost of the first fiscal year in which the contract is in effect plus the estimated costs of termination, or an amount sufficient to cover the agency’s obligations for the full period of the contract. 41 U.S.C. § 254c. Congress enacted 41 U.S.C. § 254c as part of the Federal Acquisition Streamlining Act of 1994 (FASA) to “revise and streamline the acquisition laws of the federal government.” Pub. L. No. 103-355, § 1072, 108 Stat. 3243 (Oct. 13, 1994). *See also* H.R. Rep. No. 103-545(II), at 78–79 (1994). It gives agencies greater flexibility to structure contract funding to meet their needs. B-277165, Jan. 10, 2000, n.4. Its purpose is stated in the law itself: An agency may use multiyear contracts if doing so will “serve the best interests of the United States by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency’s programs.” 41 U.S.C. § 254c(a)(2)(B).

NTSB asks whether section 254c applies to real property leases. We start with the language of the statute.⁷ Section 254c speaks of “the acquisition of *property* or services.” 41 U.S.C. §§ 254c(a), (a)(2)(A), (d) (emphasis added). The section does not include a definition of the term “property,” but another provision applicable to section 254c does define “property,” albeit in terms of the word itself. It defines

⁵ The Antideficiency Act, codified in 31 U.S.C. § 1341(a)(1), states, in part, that federal officers and employees may not obligate funds in excess or in advance of amounts appropriated by law for that purpose.

⁶ The *bona fide* needs rule, derived from the time statute, 31 U.S.C. § 1502(a), addresses the time availability of appropriations and states that, unless otherwise authorized by law, appropriations may be obligated only to meet the genuine, or *bona fide*, needs of the period for which the appropriation was made. B-308010, Apr. 20, 2007, *citing* 73 Comp. Gen. 77, 79 (1994); B-289801, Dec. 30, 2002.

⁷ *BedRoc Limited, LLC v. United States*, 541 U.S. 176 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004).

“property” (with several exceptions not relevant here) as “any interest in property.”⁸ 40 U.S.C. § 102(9). Although the legislative history of FASA is extensive, it does not discuss leasing real property under section 254c. Understanding the statutory context of section 254c and reviewing the relevant case law, however, help to clarify the meaning of this term.

Section 254c and FASA are part of a larger fabric of law. FASA inserted section 254c into title III of the Federal Property and Administrative Services Act of 1949 (FPASA), as amended.⁹ FASA, § 1072. One part of FPASA, title II, establishes GSA. 40 U.S.C. § 501(b)(1)(A). It also gives GSA the general authority we noted above with respect to leasing real property and facilities on behalf of federal agencies under 40 U.S.C. § 585. As originally enacted, the purpose of title III of FPASA was to “facilitate the procurement of *supplies* and services.” FPASA, title III, § 301 (emphasis added). FPASA defined “supplies” (for the purposes of title III) to mean, “all property except land.” FPASA, title III, § 309(b). In 1952, Congress amended FPASA by deleting the definition of “supplies” as set forth in section 309(b) and “striking ‘supplies’ wherever it appears in title III and substituting therefor ‘property.’” Pub. L. No. 522, §§ 1(h), (m), 66 Stat. 593, 594 (July 12, 1952). The legislative history does not explain the reason for this change.¹⁰ However, since its enactment, FPASA has defined the word “property” to mean “any interest in property of any kind . . . except the public domain and lands reserved or dedicated for national forest or national park purposes.” FPASA, § 3(d).

Congress has amended FPASA many times but continues to use the terminology of “property” and “services.” For example, in 1974 Congress established the Office of Federal Procurement Policy (OFPP) and amended FPASA to give OFPP a critical role in federal procurement policies and procedures. Office of Federal Procurement Policy Act, Pub. L. No. 93-400, §§ 3(b), 5, 6(a), 15, 88 Stat. 796, 797, 800 (Aug. 30, 1974). The law directed the Administrator of OFPP to establish “uniform procurement regulations for the executive agencies” and provide “overall direction of procurement policy . . . in the procurement of . . . *property* other than real property in being [and] *services*.” *Id.*, §§ 6(a), (d) (emphasis added). This law also amended FPASA to render the government’s procurement regulations subject to the Administrator’s direction. *Id.*, § 15. In 1988, Congress amended the 1974 act to refine the authority of the OFPP Administrator and require GSA, DOD, and NASA to promulgate and maintain the Federal Acquisition Regulation (FAR)¹¹ to govern executive agency procurement activities, and bar certain specified inappropriate

⁸ The definitions in 40 U.S.C. § 102 apply to title III of FPASA, 40 U.S.C. § 102 note, which includes section 254c. FASA, § 1072.

⁹ FPASA, ch. 288, § 3, 63 Stat. at 378-79.

¹⁰ *See* S. Rep. No. 82-2075 (1952).

¹¹ 48 C.F.R. ch. 1 (cited hereinafter as FAR).

actions “[d]uring the conduct of any Federal agency procurement of *property or services*.” Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, §§ 3(a)(1), 4, 6(a), 102 Stat. 4055, 4056, 4063 (Nov. 17, 1988), *codified in* 41 U.S.C. §§ 405, 421, 423 (emphasis added). Consequently, in 1994 when Congress used the words “property” and “services” in section 254c as it enacted FASA to amend FPASA, it was using the same terminology that it had adopted in 1952 for this subject matter.

As noted above, we cannot find in the law or legislative history an explanation of Congress’s reasons for switching in 1952 from “supplies” to “property.” Neither can we find a congressional statement of whether the term includes real property leases. In the common law, however, the courts have concluded that real property leases constitute personal property.¹² Under the Contracts Disputes Act, 41 U.S.C. § 602, the boards of contract appeals, the Court of Federal Claims, and the Federal Circuit have held that disputes arising from federal real property leases fall within the jurisdiction of those courts and boards of contract appeals over contracts for the “procurement of property other than real property in being,” as stipulated in 41 U.S.C. § 405(a)(1).¹³ With this statutory context and case law, we believe that the term “property,” as used in 41 U.S.C. § 254c, includes real property leases, and that NTSB, therefore, using its fiscal year appropriations, can avail itself of the contracting flexibility of section 254c to enter into leases of real property or facilities for up to 5 years.

NTSB recognizes that 41 U.S.C. § 254c uses the word “property,” but notes that the FAR uses the word “*supplies*” in its provisions addressing 41 U.S.C. § 254c.¹⁴ Based, in part, on those FAR provisions and other federal procurement statutes, NTSB concluded that section 254c “only applies to contracts for ‘*supplies or services*’” and

¹² *Freeman v. Dawson*, 110 U.S. 264, 270 (1884) (“By the common law, a leasehold interest in land is personal property.”); *Eidman v. Baldwin*, 206 F. 428, 430 (2nd Cir. 1913) (“it is elementary that at common law personal property included leasehold interests in land”); *Bean v. Reynolds*, 15 App. D.C. 125 (D.C. Ct. App. 1899) (“there can be no question under the common law in force in this District that a leasehold interest in lands is personal property”).

¹³ The leading case is *Forman v. United States*, 767 F.2d 875, 879 n.4 (Fed. Cir. 1985). See also, e.g., *Jackson v. USPS*, 799 F.2d 1018, 1022 (5th Cir. 1986); *Modeer v. United States*, 68 Fed. Cl. 131, 136 (2005). *Forman’s* conclusions in this regard have been widely adopted by the boards of contract appeals. See, e.g., *801 Market Street Holdings v. GSA*, CBCA No. 425, 08-1 B.C.A. ¶ 33853 (2008).

¹⁴ For example, FAR § 17.103, which implements section 254c, defines a multiyear contract as “a contract for the purchase of *supplies* or services for more than 1, but not more than 5, program years.” (Emphasis added.) Cf. 41 U.S.C. § 254c(d) (“a multiyear contract is a contract for the purchase of *property* or services for more than one, but not more than five, program years” (emphasis added)).

that a lease of real property is neither a supply nor a service. Request Letter, at 4–5 (emphasis in original).

At each point that 41 U.S.C. § 254c uses the word “property,” the FAR uses the word “supplies.” See FAR subpart 17.1, *passim*. In the FAR, “supplies” means, among other things, “all property *except land or interest in land*.” FAR § 2.101 (emphasis added). The FAR uses the term “supplies” generically throughout its provisions and has done so since the FAR’s inception.¹⁵ In NTSB’s view, the FAR’s use of this word as it addresses section 254c is significant, because the FAR definition of “supplies” excludes from its scope the procurement of “interests in land.”¹⁶ While real property leases result in the creation of personal property, not “real property in being,”¹⁷ NTSB observes that leases also create interests in land,¹⁸ which are not “supplies” under the FAR definition.

We think that NTSB’s reliance upon the FAR is misplaced. The FAR covers the acquisition of supplies and services, and, as the definition of “supplies” noted above makes clear, the regulation does not apply to leases of real property. This is consistent with the legal framework of our federal procurement system overall, which, as discussed above, generally gives authority for those leases to GSA, not

¹⁵ See *Final Rule Establishing the FAR*, 48 Fed. Reg. 42102, 42107 (Sept. 19, 1983), *codified in* FAR subpt. 2.1 (1984). We are not aware of anything in the FAR or the *Federal Register* proposing and promulgating the FAR (or the 1996 FAR amendment to implement section 254c) that explains why the FAR promulgators use the word “supplies” rather than the word “property” as found in the statute. *Cf., e.g.*, 48 Fed. Reg. 42102 (Sept. 19, 1983) (original publication of FAR; no Supplementary Information statement); *Final Rule, FAR; Multiyear Contracting*, 61 Fed. Reg. 39203, 39204 (July 26, 1996), *codified in* FAR ch. 1, subpt. 17.1 (1984) (Supplementary Information statement on implementing section 254c).

¹⁶ The FAR states that it “applies to all acquisitions as defined in Part 2 [to mean ‘acquiring by contract with appropriated funds of *supplies or services* . . . by and for the use of the Federal Government through purchase or lease’] except where expressly excluded.” FAR § 1.104 (*Applicability*) (emphasis added).

¹⁷ See cases cited in note 13, *supra*, holding that real property leases are acquisitions, but not of “real property in being” which are excluded from the scope of the Contracts Disputes Act and the statute establishing the FAR.

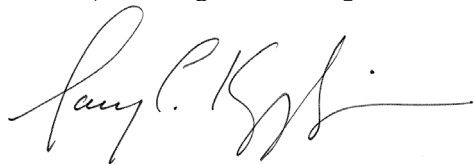
¹⁸ A leasehold is “[a] tenant’s possessory estate in land.” *Black’s Law Dictionary* 909 (8th ed. 2004). An estate is “[t]he amount, degree, nature, and quality of a person’s interest in land or other property.” *Id.* at 586. See, *e.g.*, *Williams v. Jones*, 326 So. 2d 425, 433 (Fla. 1975) (“it is well-established that a valid lease for a term of years is a conveyance of an interest in land”).

individual agencies.¹⁹ We view the FAR’s implementation of 41 U.S.C. § 254c solely with respect to supplies and services to simply reflect the scope of the FAR, not a conscious decision that leases of real property are not “property” for the purposes of 41 U.S.C. § 254c. Accordingly, the relevant question here is not whether a lease of real property is a “supply” as defined in the FAR, but whether such a lease qualifies as “property” as that term is used in section 254c. As explained above, we conclude that it does.

We recognize that the legislative history gives no indication that Congress intended section 254c to cover leases of real property, so that, to that extent, the FAR’s narrower focus on supplies may reflect congressional intent. There is, though, no evidence—one way or the other—that Congress considered the issue of the use of fiscal year funds for multiyear real property leases; this is not surprising, since GSA could already do that, without new authority from FASA. The impact of including real property leases within the scope of section 254c is thus limited to agencies such as NTSB, who have special statutory authority to lease real property but lack authority to use fiscal year funds for multiyear leases. While Congress apparently did not consider that impact in enacting FASA, it chose, as explained above, to use language (namely, the word “property”) that did cover agencies such as NTSB, and we rely on that plain language in our analysis here. If Congress concludes that the extension of section 254c authority to such agencies is undesirable (or if it wants to change the conditions in section 254c, for example, to allow leases longer than 5 years), it can, of course, amend the statute. As the law stands today, however, we conclude NTSB has the authority to enter into multiyear contracts consistent with the conditions in section 254c.

CONCLUSION

In our view, NTSB has authority to lease real property and facilities, and the authority conferred by FASA to enter into multiyear contracts pursuant to 41 U.S.C. § 254c applies to leases of real property. Accordingly, NTSB may use 41 U.S.C. § 254c as the basis for obligating its fiscal year appropriations to fund multiyear real property leases, so long as it complies with the terms and conditions set forth in section 254c.



Gary L. Kepplinger
General Counsel

¹⁹ While the FAR does not address leases of real property, it does include provisions related to leases of other kinds of property. See FAR subpts. 7.4, 8.11 (Equipment Lease or Purchase and Leasing of Motor Vehicles, respectively).