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**DECISION**



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

**FILE:** B-207215

**DATE:** March 1, 1983

**MATTER OF:** National Park Foundation Lease

- DIGEST:**
1. 31 U.S.C. § 3324 (formerly § 529) does not prohibit the advance payment by the National Park Service of the annual rent for property leased to it by the National Park Foundation, a statutorily created charitable nonprofit organization.
  2. Since fiscal year appropriation may be obligated only to meet bona fide needs arising in the fiscal year for which the appropriation is made, rent payments for the months after September may not be paid with the appropriation available on May 1. Contingency clause making liability for those months subject to availability of new appropriation does not solve the problem where entire year's rent, including impermissible portion, is paid in advance from prior year's funds.

A certifying officer of the National Park Service has requested an advance decision on whether 31 U.S.C. § 3324 (formerly § 529) prohibits the advance payment of the annual rent on property leased by the National Park Foundation to the National Park Service. The purpose of 31 U.S.C. § 3324 is to preclude the possibility of loss to the Government in the event that a contractor, after receipt of payment, should fail to perform his contract or refuse or fail to refund moneys advanced, 25 Comp. Gen. 834, 835 (1946). Since the probability of loss to the Government is minimal where the National Park Foundation, which was established by statute to accept and administer gifts to the National Park Service, leases property to the National Park Service, we have no objection to advance payment of the annual rent. For the reasons explained below, however, the lease should be restructured to conform to the Federal fiscal year.

In an agreement dated May 10, 1979, the National Park Foundation, a charitable and nonprofit corporation created by Pub. L. No. 90-209, 81 Stat. 656, to accept and administer gifts to the National Park Service, leased to the National Park Service, Chickamauga and Chattanooga National Military Park, the residence known as the Bennett House on Lookout Mountain, Tennessee. The property was leased for a term of 5 years, commencing May 1, 1979, at an annual rental rate of \$1200. The lessee agreed to pay the rent annually on May 1. A clause in the lease specified that where the operations extended beyond fiscal year 1979, the lease was made contingent upon the necessary appropriation and reservation of funds.

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The Superintendent of the Chickamauga and Chattanooga National Military Park explained to us that the Foundation had purchased the Bennett House with its own funds with a view toward making the House available to the Park Service when the Park Service had sufficient funds available to buy it. According to House Report No. 623, which accompanied the bill to establish the National Park Foundation, the Foundation is authorized to acquire property "which is itself to be turned over to the Government for administration as a part of an authorized unit of the national park system":

"\* \* \* It may thus, in some circumstances, be in a position to acquire property in advance of a price rise—perhaps by donation, perhaps by buying it as an investment with its own funds—and make it available to the Government or liquidate it at a later date as conditions then dictate." 1967 U.S. Code Cong. and Adm. News, P. 2357.

Since making the property in question "available to the Government" arguably includes leasing it to the Park Service at a reasonable price until such time as the Park Service has sufficient funds to purchase it, we see no legal impediment to the leasing of the Bennett House to the Park Service by the Foundation. We thus turn to the question of whether advance payment of the rent is permissible.

Section 3324(b) of Title 31 provides, in relevant part, that:

"An advance of public money may be made only if it is authorized by—

"(1) a specific appropriation or other law \* \* \*."

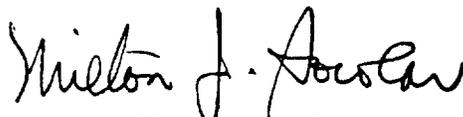
The Department of the Interior appropriation acts for fiscal years 1979-1982, Pub. L. No. 95-465, Oct. 17, 1978, Pub. L. No. 96-126, November 27, 1979, Pub. L. No. 96-514, December 12, 1980, Pub. L. No. 97-100, December 23, 1981, have not provided the National Park Service with such authorization.

While 31 U.S.C. § 3324(b) has been interpreted as prohibiting advance payments under leasehold interests, 19 Comp. Gen. 758, 760 (1940), it has been recognized that the primary purpose of the prohibition against advance payments is to preclude the possibility of loss to the Government in the event that the recipient of advance payments should fail to perform and refuse or fail to refund moneys advanced. Thus advance payments to State and local governments have

consistently been authorized on the basis that the established responsibility of these governmental units reduces to a minimum the possibility of loss to the United States. 57 Comp. Gen. 399, 400 (1978), 39 Comp. Gen. 285, 286 (1959). We have further stated that these considerations apply with even greater force where the advance payment is made by one Government agency to another. 25 Comp. Gen. 834, 835 (1946). While the Foundation is neither a state nor another Federal agency, its unique status virtually assures that there is no threat of loss to the Government. The National Park Foundation consists of a Board having as members the Secretary of the Interior, the Director of the National Park Service, ex officio, and no less than six private citizens appointed by the Secretary of the Interior, Pub. L. No. 90-209, section 2. It is therefore unlikely that the Foundation would voluntarily fail to perform after receiving an advance payment.

Although we do not object to the advance payment of the annual rent for the Bennett House, the lease should be restructured to run from October 1 through September 30 of each year, to conform to the Federal fiscal year. 31 U.S.C. § 1502(a) provides that the balance of an appropriation is available "only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with [31 U.S.C. § 1501]." This means that a fiscal year appropriation may be obligated only to meet a bona fide need arising in the fiscal year for which the appropriation was made. Thus rent for the months of May through September may be paid from the appropriation available on May 1, but rent for the months October through April may not be, since rent for the latter months is not a legitimate expense of the former fiscal year.

A contingency clause in the lease purports to protect the Government from liability for the period of the lease that extends beyond the fiscal year in which the lease was made in the event that new annual appropriations are not made available. However, this clause has no utility if the impermissible portion of the lease costs has already been paid from the prior year's appropriation by reason of the advance payment.

*for*   
Comptroller General  
of the United States