ADAPTIVE REUSE OF PUBLIC BUILDINGS: 
Procurement and Historic Preservation Issues

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This paper introduces procurement and historic preservation issues in the adaptive reuse of public buildings. Our focus is primarily on redevelopment of historic buildings owned by the U.S. government. In many adaptive reuse projects, the government disposes of a property and also agrees to lease back space in the completed redeveloped project.

We first discuss dispositions, then historic preservation, then the government as tenant and finally introduce the right to protest a government contracting action.

I. GOVERNMENT DISPOSITION BY SALE OR LEASE

Historic or other properties not needed by the government can be disposed of by sale or lease (or by exchange) by a variety of agencies acting under various authorities and subject to numerous requirements. The principles and requirements for disposition are introduced in this section. The largest holders of space in the U.S. government are the General Services Administration, the Department of Defense, the Department of Energy, the Department of the Interior, the Veterans Administration and, of course, the United States Postal Service.¹

A. Authority:

1. GSA: As provided in 40 U.S.C. § 541, the Administrator of General Services, who is the head of the General Services Administration (“GSA”) “shall supervise and direct the disposition of surplus property…” GSA may dispose of surplus property by “sale, exchange, lease, permit, or transfer, for cash, credit, or other property…” 40 U.S.C. § 543. GSA can and does delegate this authority to other agencies. The Federal Acquisition Regulation, 41 C.F.R. Parts 1 & 2 (“FAR”), applies to most government contracts but does not generally apply to disposition of property by the government. GSA’s regulations for disposition of real property are in the Federal Management Regulation at 41 C.F.R. Part 102-75 (“FMR”). Also, it is not the only agency with authority to dispose of real property….

2. USPS: The United States Postal Service is a part of the U.S. government; it is “an independent establishment of the executive branch of the government of the United States.” (39 U.S.C. § 201) The Postal Service

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operates with fewer non-commercial constraints and often can move with more flexibility than its counterparts in the government. It has authority to acquire, sell and lease real and personal property (39 U.S.C. § 401(5)).

3. Specific Legislation: In certain cases where generally applicable authority is thought to be insufficient, legislation authorizing redevelopment of a single site or type of property is enacted. For example, the Secretary of Agriculture has authority to sell timber from national forests. (16 U.S.C. § 472a) For the Old Post Office on Pennsylvania Avenue in Washington, D.C., the Old Post Office Building Redevelopment Act of 2008, Pub. L. No. 110-359, 122 Stat. 4005 (2008) authorizes GSA to contract for redevelopment to maintain and adapt this historic structure.

B. Solicitation:

1. When it is ready to proceed, in compliance with government contracting requirements, a federal agency will issue a request for proposal or similar document (“RFP”) seeking to market its disposition. The RFP may be preceded by a request for qualifications (“RFQ”), request for information (“RFI”) or other solicitation of interest. GSA recently issued an RFI in connection with the possible exchange of the FBI headquarters building in Washington, D.C. for a new FBI facility.

2. The RFP can be more prescriptive, with relatively complete sale or lease documents attached, or less so, with terms and documents to be bid and negotiated by the parties. Also, the RFP might seek very complete bids, with designs and extensive financial proposals, or more schematic proposals, with more details to be negotiated. An example of the less prescriptive approach is the Old Post Office RFP first issued by GSA in March 2011. In it, GSA describes the steps it already took, including environmental review under the National Environmental Policy Act and historic preservation reviews under the National Historic Preservation Act, and the RFP lays out general parameters of a transaction and seeks interested bidders on a 60 year lease, with agreed base rent plus a profit participation payable to the government.

3. The program for which this paper is presented uses as an example the adaptive reuse of the historic Kansas City Post Office redevelopment, leased by the U.S. Postal Service to a private developer who then, in effect, subleased it back to the U.S. government for use by the Internal Revenue Service. That redevelopment was completed in 2006. The lease-back provides funds via government rent payments that support the project. In Kansas City and other Postal Service adaptive reuses at that time, the Postal Service used a more informal approach to procurement than most other government agencies would have used, while still following the fundamental requirements of government contracting. At the time of that procurement, the Postal Service used something more akin
to an RFQ to narrow the competitive field, followed by a negotiated procurement.

C. Process:

Here are some of the steps a federal agency generally must follow before a private disposition.²

1. Offer to Other Federal Agencies: Under FMR § 102-75.30, a federal real property holding agency offers properties for transfer to other agencies before the agency can dispose of properties it no longer needs.

2. Public Benefit Conveyance: Under FMR § 102-75.350, the agency may offer surplus properties to state and local governments or certain non-profit organizations for prescribed public uses.

3. Offer for Use by Homeless: Under the McKinney-Vento Homeless Assistance Program, GSA must offer surplus properties for use by the homeless (FMR § 102-1160).

4. Lighthouse Program: GSA must offer certain surplus properties for this program.

5. Public or Negotiated Disposition: GSA can offer a surplus property for sale, lease, exchange or other transfer to the private sector for redevelopment. Other than for property management considerations (such as a boundary realignment or for providing access), the government may “dispose of surplus real property by exchange for privately owned property where authorized by law, when the requesting Federal agency receives approval from the Office of Management and Budget and the appropriate oversight committees, and where the transaction offers substantial economic or unique program advantages not otherwise obtainable by any other acquisition method.” FMR § 102-75.260.

D. Competition:

A fundamental tenet of all government contracts is to require competition in most cases. The Competition in Contracting Act, 41 U.S.C. §§ 3301 et seq.: requires “full and open competition” in U.S. government leases and all other contracts. As noted below under “Government Acquisition of a Leasehold,” exceptions are allowed where supported by a justification for other than full and open competition. Id. at § 3304.

E. Environmental Compliance:

1. National Environmental Policy Act, 42 U.S.C. §§ 4321-4347: Agencies must consider the environmental impact of their decisions to dispose of property (and other actions) and often must arrange for preparation of environmental assessments or environmental impact statements before properties can be sold or leased.

2. Clean-Up, 42 U.S.C. § 9620, FMR § 75.340: The government must remediate contaminated properties before sale. A lease can be used to facilitate remediation by the private developer.

F. Antitrust:

Under 40 U.S.C. § 559, the Department of Justice is notified and clears sales for real property with estimated fair value above $3 million.

G. Land Use:

Federal agencies are exempt from local regulation but once a property is sold to a private party, it becomes subject to local zoning and building codes; and federal agencies must consider local land use requirements even for properties that are not sold.

H. Real Estate Taxes:

Real estate owned by the U.S. government is exempt from state and local real estate taxes. Once sold to a private party, the property becomes subject to real estate taxes, even if later leased back to the government.

I. Historic Preservation:

Many surplus properties are historic themselves or in historic districts. Historic properties can be disposed of under the authority of Section 106 of the National Historic Preservation Act. Federal agencies must consider adaptive reuse of historic properties they wish to dispose of (FMR §102-78.65). Adaptive reuse of properties that are historic or in historic districts is subject to a burden of compliance and an opportunity for tax credits, both discussed in the next section.