DIGEST - NO CIRCULATION

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

B-164031(5), 02

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JUN 25 1976

The Honorable Lawton Chiles
United States Senate

Dear Senator Chiles:

This is in reply to your request for our views on the refusal by the Department of Health, Education and Welfare (HEW) to approve the application of Mount Sinai Medical Center, Miami, Florida, for transfer of a $2.97 million loan guarantee and 3 percent interest subsidy from fiscal year 1971 Hill-Burton funds. The loan guarantee had originally been approved in 1973 for the Fort Pierce Memorial Hospital, Fort Pierce, Florida, which was unable to use it, apparently due to financial difficulties. Transfer of the loan guarantee to Mount Sinai was requested in October 1974 by the Florida Department of Health and Rehabilitative Services and approved by the HEW Region IV office. Subsequently, however, HEW disapproved the transfer on the grounds that the two hospitals were not located in the same "service area." Your letter indicates a particular interest in whether disapproval on this ground is statutorily required.

The so-called Hill-Burton Program, which provides Federal assistance for construction and modernization of hospitals and other medical facilities, is authorized in 42 U.S.C. Chapter 6A, Subchapter IV. Part B of Subchapter IV, 42 U.S.C. §§ 291j-1 through 291j-7 (1970 & Supp. III, 1973), covers loans and loan guarantees. The original applications by the Mount Sinai and Fort Pierce Hospitals were made pursuant to section 291j-2(d) which provides that:

> "The allotments of any State under subsection (a) of this section for the fiscal year ending June 30, 1971, and the succeeding fiscal year shall also be available to guarantee loans with respect to any project for modernization or construction of a nonprofit private hospital or other health facility referred to in section 291j-1(a)(1) of this title, if the modernization or construction of such facility was not commenced earlier than January 1, 1968, and if the State certifies and the Secretary finds that without such guaranteed loan such facility could not be completed and begin to operate or could not continue to operate, but with such guaranteed loan would be able to do so: Provided, That this subsection shall not apply to more than two projects in any one State."

The 3 percent interest subsidy is authorized by section 291j-4. 42 USC

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The proposed transfer of the loan guarantee was sought by means of an amendment of the original application. Under section 291j-3(d), 42 USC such amendment is "subject to approval in the same manner as an original application." Conditions for approval are contained in section 291j-3(b) which provides in pertinent part:

> "The Secretary may approve such application only if:
>
> "(1) there remains sufficient balance in the allotment determined for such State pursuant to section 291j-2 of this title to cover the amount of the loan for which a guarantee is sought, or the amount of the direct loan sought (as the case may be), in such application,
>
> "(2) he makes each of the findings which are required by clauses (1) through (4) of section 291e(b) of this title for the approval of applications for projects thereunder * * *."

Clause (2) of 42 U.S.C. § 291e(b) (1970) requires the finding that "the plans and specifications are in accord with the regulations prescribed pursuant to section 291c of this title." Clause (3) requires the finding that:

> "the application is in conformity with the State plan approved under section 291d of this title and contains an assurance that in the operation of the project there will be compliance with the applicable requirements of the regulations prescribed under section 291c(e) of this title * * *."

Section 291c(e) 42 USC directs the Surgeon General to prescribe by general regulations:

> "that the State plan shall provide for adequate hospitals, and other facilities for which aid under this part is available, for all persons residing in the State, and adequate hospitals (and such other facilities) to furnish needed services for persons unable to pay therefor. Such regulations may also require that before approval of an application for a project is recommended by a State agency to the Surgeon General for approval under this part, assurance

shall be received by the State from the applicant that (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant * * *."

HEW regulations for the Hill-Burton Program are contained in 42 C.F.R. Part 53 (1975). Section 53.1(d) defines "service area" in part as follows:

> "'Service area' means the geographic territory from which patients come or are expected to come to existing or proposed hospitals or existing or proposed public health centers, or existing or proposed medical facilities * * * the delineation of which is based on such factors as population distribution, natural geographic boundaries, and transportation and trade patterns, and all parts of which are reasonably accessible to existing or proposed hospitals, public health centers, or medical facilities. * * *"

See also section 53.12. Although the regulations cover transfers of allotments to another State (section 53.93) and to another category of facility within the same State (section 53.94), they do not cover transfers within the same State and category.

As noted above, HEW disapproved the instant transfer because the two hospitals are located in different service areas and, therefore, the Mount Sinai project would not be "providing the same services to the same population group as the Fort Pierce project would have done had it been constructed." Based on our review of the Hill-Burton legislation as outlined above, the mere fact that the two hospitals are located in different service areas does not require disapproval of the instant transfer. However, HEW states that it has "consistently taken the position that to qualify as an amendment, the project for the new grantee must be one which will provide services to the same community population group which would have been served by the original project." This position is embodied in a series of written opinions of the HEW General Counsel issued over the past several years.

In this context, to the extent that the service area concept as applied herein by HEW is viewed as implementing the requirement of 42 U.S.C. § 291c(a), supra, that the facility be made available "to all persons residing in the territorial area of the applicant," the

concept would appear to be within the scope of HEW's regulatory authority. The wide range of administrative discretion accompanying HEW's regulatory authority under the Hill-Burton program is illustrated in Corum v. Beth Israel Medical Center, 373 F. Supp. 550, 554 (S.D.N.Y. 1974), wherein the plaintiff attempted to challenge the validity of certain HEW Hill-Burton regulations. The Court pointed out:

> "A long line of cases supports 'the familiar principle that a regulation issued under the direct authority of the statute may not be found invalid for inconsistency unless the variance is so clear that it is manifest that the court has no choice except to hold that the administrator has exceeded his authority and employed means that are not appropriate to the end specified in the act.'"

The Court then noted the following excerpt from the decision of the United States Supreme Court in Udall v. Tallman, 380 U.S. 1, 16 (1965):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

The Court then concluded:

> "Accordingly, plaintiffs have the heavy burden of showing not merely that the challenged provisions are not the most reasonable of the alternatives permitted by the statute, but that they are 'plainly erroneous or inconsistent.'"

More significant in examining HEW's use of the service area concept in the instant case is the fact that the proposed transfer would have been made after the period for obligation of the applicable allotment had expired. Under 42 U.S.C. § 291j-2(b):

> "Any amount allotted under subsection (a) of this section to a State for a fiscal year ending before July 1, 1973, and remaining unobligated at the end of such year shall remain available to such State, for the purpose for which made, for the next two fiscal years (and for such years only) * * *."

Thus, the original fiscal year 1971 allotment, from which the $2.97 million loan guarantee to Fort Pierce was initially approved, remained available to June 30, 1973 only. However, the transfer was not requested until October 1974.

Generally, when a recipient of an original grant is unable to implement his grant as originally contemplated, and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, the award to the alternate grantee must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. B-116576, January 21, 1960. Cf. 39 Comp. Gen. 296 (1959). This result, we pointed out in the former decision, follows from the requirements of section 1311 of the Supplemental Appropriation Act, 1955, 31 U.S.C. § 200.

It has been suggested that there is authority under some of our decisions for a contrary result in certain circumstances. Thus, in B-74234, September 3, 1969, we said that we would not object to the approval by the National Institute of Mental Health of amendments to funded grant applications under the Community Mental Health Centers Act, subsequent to the expiration of the period of availability of the grant allotments, where the amendments involved changes in the use of the funds from construction to renovation or vice versa. That case, however, did not involve any change in grantees, and the construction-renovation shift was viewed, in light of the facts presented, as essentially a grant amendment rather than a new and separate undertaking. In B-157179, September 30, 1970, we did not object to the use of unexpended grant funds originally awarded to the University of Wisconsin to engage Northwestern University in a new fiscal year to complete the unfinished project. Our approval in that case was granted because the project director had transferred from the University of Wisconsin to Northwestern University and he was viewed as the only person capable of completing the work. Our decision was based on the peculiar facts and circumstances involved and was not intended to establish a rule for general application. We acknowledge that it may be possible in certain situations to make an award to an alternate grantee after expiration of the period of availability for obligation where the alternate award amounts to a "replacement grant" and is substantially identical in scope and purpose to the original grant. Compare 34 Comp. Gen. 239 (1954), involving a "replacement contract."

You point out that Mount Sinai provides certain specialized services such as the cardio-pulmonary laboratory and radiation therapy department which "cannot be physically distributed throughout the state" and thus serves residents of the entire State. However, the original loan was not made to Fort Pierce to provide these specialized services but rather to provide the services of a community hospital to residents of the Fort Pierce area. Documents submitted with your letter indicate that the two hospitals are located approximately 125 miles apart, with population centers between. It is further indicated that approximately 85 percent of Mount Sinai's patients are from the Greater Miami (Dade County) area (98 percent for the Outpatient Department), while almost 88 percent of Fort Pierce's patients come from St. Lucie County. It is clear, therefore, that even though Fort Pierce residents may have the benefit of the cardio-pulmonary laboratory and the radiation therapy department at Mount Sinai, the geographical distance involved makes it unlikely that Mount Sinai could act as a substitute community hospital.

Based on the foregoing, we cannot conclude that the transfer to Mount Sinai would be a "replacement" in the sense of a continuation of the original guarantee and subsidy to Fort Pierce. Rather, it must be viewed as a new and separate undertaking. Thus, the proposed transfer from Fort Pierce to Mount Sinai may not properly be approved.

With your approval, we are sending a copy of this letter to the Department of Health, Education, and Welfare.

Sincerely yours,

R. F. KELLER

Deputy Comptroller General
of the United States

HEALTH, EDUCATION AND WELFARE DEPARTMENT
Programs
Hill-Burton
Loans

WORDS AND PHRASES
Service area

STATES
Federal aid, grants, etc.
Amendment, etc.
Appropriation availability

LOANS
Health, Education and Welfare
Loan guarantee programs
Transfer of loans