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

RELEASED

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Dear Mr. Esch:

By letter of October 15, 1971, you requested that we identify the person responsible for waiving the bid bond, and ascertain the reasons therefor, in connection with the contract for leasing the Air Pollution Laboratory, Ann Arbor, Michigan. Our review evidenced, however, that no formal or deliberate waiver of the bid bond had occurred.

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In February 1969 the General Services Administration (GSA) delegated to the Department of Health, Education, and Welfare (HEW) the authority to enter into a contract for leasing space for an air pollution laboratory. Subsequently HEW requested GSA to advertise for the required space within a prescribed geographical area, solicit and review proposals, determine the financial capabilities of offerors, and make a recommendation to HEW.

Of the 12 parties who expressed an interest in constructing a facility for lease to the Government, only two submitted offers in response to the advertised invitation for bid which contained a provision requiring a bid bond. Only one of the two offerors' bids included a bid bond.

In considering the offers a determination had to be made that the offers were within the limitations imposed by section 322 of the Economy Act of 1932, as amended (40 U.S.C. 278a). The fair market value of the space to be leased and the fair annual rental thereof were appraised at \$10,400,000 and \$1,760,790, respectively. Under the Economy Act limitation, the annual rental could not exceed 15 percent of the fair market value of the space to be leased. According to this criteria the annual rental limitation was \$1,560,000.

The records indicate that the lease was awarded to the offeror who had not furnished a bid bond principally because:

1. His annual rental bid of \$1,529,500 (later increased to \$1,535,000) was about \$338,000 less than the \$1,868,000 bid of the unsuccessful offeror.

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2. The unsuccessful offeror's bid exceeded the limitation imposed by the Economy Act of 1932.
3. The unsuccessful offeror's bid was conditioned on his ability to obtain financing from a specified lender and was "qualified upon the availability and cost of interim financing at the time of the Government's award" to him.
4. The construction site of the successful offeror was preferable.

Although there were oral discussions among the officials of GSA and HEW and the two offerors concerning a waiver of the bid bond requirement, such requirement was not waived by either GSA or HEW. A GSA official informed us that:

1. GSA's participation in the project consisted of providing HEW with support services and technical assistance. GSA was not a party to the contract, did not prepare the specifications, and did not exercise contractual authority.
2. GSA does not require bid bonds to accompany offers submitted in response to GSA solicitations for leased space.
3. GSA did not waive the requirement for a bid bond, but, if it had been requested to do so, it would have recommended that the requirement be waived.
4. The absence of a bid bond was not a material factor to the substantial difference between the two offers.
5. GSA did not, in any known correspondence, call HEW's attention to the absence of the bid bond. This may have been done orally, but there was no substantiation for it.

Since this was a negotiated procurement, it would have been permissible, after the receipt of offers, to issue to

offerors an amendment to the solicitation that deleted the bid bond requirement. In any event the bid bond requirement is for the purpose of ensuring that the offeror, upon acceptance of the offer, will execute the contractual documents and provide performance and payment bonds. Since, in this case, the offeror furnished the requisite performance and payment bonds in compliance with the solicitation for offers and performed the contract, the purpose which the bid bond was to serve was accomplished without it. Also, in view of the negligible expense which is incurred in obtaining a bid bond, it is evident that such expense could not have caused or contributed to the substantial difference in prices between the two offerors.

On September 25, 1969, GSA forwarded copies of the two offers to HEW. In a letter dated December 12, 1969, GSA informed HEW that GSA had completed "all technical procedures and negotiations required in obtaining a responsive offer" for a leased facility for the Air Pollution Laboratory. In addition, GSA recommended that HEW send an acceptance letter to the offeror who had submitted the bid which was the low bid but which had not included a bid bond. An assistant to the HEW contracting officer stated that his office considered a responsive offer as one meeting all the requirements of the solicitation and that, on the basis of GSA's recommendations, HEW had entered into negotiation with the successful offeror.

In a letter dated December 15, 1971, the Project Manager for the Air Pollution Laboratory informed us that he had had no problems with the successful offeror, the architectural and engineering firm, or their contractors. He stated that:

"All of the work appears to be above average in quality. The work has been accepted as substantially complete and is occupied. Although all of the paper work has not been completed, it appears that the work was substantially completed on schedule."

On the basis of our discussions with GSA and HEW officials and of our examination of the agencies' records, we

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found that there had been no formal or deliberate waiver of the bid bond requirement. We believe, however, that the Government's interest was not adversely affected by the award of the lease contract to the offeror who had not met the bid bond requirement.

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We did not furnish the agencies with copies of our proposed report for their comments. We plan to make no further distribution of this report unless copies are specifically requested, and then we shall make distribution only after your agreement has been obtained or public announcement has been made by you concerning the contents of the report.

Sincerely yours,



Comptroller General
of the United States

The Honorable Marvin L. Esch
House of Representatives