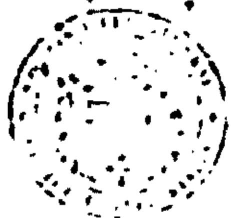

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-177118

May 24, 1973

Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, NW.
Washington, D.C. 20006

Attention: Matthew S. Perlman, Esquire

Gentlemen:

This is in reply to your letter of September 27, 1972, and subsequent correspondence, protesting on behalf of W. M. Passalacqua Builders, Incorporated, the rejection of its bid by St. Luke's Hospital, Cleveland, Ohio, a recipient of a construction grant from the Department of Health, Education, and Welfare (HEW) under the Hill-Burton Act, 42 U.S.C. 291 *et. seq.*

The solicitation, for the "St. Luke's Hospital Addition, Cleveland, Ohio, Project No. Ohio 391," contained a 27-page section entitled BID CONDITIONS - AFFIRMATIVE ACTION REQUIREMENTS - EQUAL EMPLOYMENT OPPORTUNITY, which specified that its provisions were applicable to Federal and Federally assisted contracts in the Cleveland area. This section required bidders to commit themselves to either part I or part II of the bid conditions for each trade to be used on the project. Part I involves a commitment to the local affirmative action plan known as the Cleveland Plan. Part II involved a commitment to various goals and specific affirmative action steps set forth in the IFB. Bidders were required to complete and sign certificates for both part I and part II to establish the required commitments. In lieu of signing the part II certification bidders could submit their own affirmative action plan.

At bid opening on August 1, 1972, the Passalacqua bid was found to be low. It is reported that Passalacqua's bid, as originally submitted, did not contain any affirmative action certification. Our file indicates that after the first bid was opened, but before the bid price was announced, the project architect, who was opening the bids, noted that the bid did not contain the required affirmative action certifications and then asked other bidders present if they had also failed to comply with the affirmative action provisions. Four of the eight bidders, including Passalacqua, so indicated. The architect then allowed the four to complete the certifications, without objection from any of the bidders. Passalacqua signed the part I certification, but did not complete the part II certification. Passalacqua asserts that it did not complete the

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[... Failure To Submit Affirmative Action Certification]

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second certification because its representative was told at the time that it need not do so if it were signatory to the Cleveland Plan. HEW reports, however, that this is "greatly in dispute" since the architect denies that he gave any such advice and other personnel present do not recall having heard such advice being given. The hospital, through the Ohio State Department of Health, subsequently requested HEW's opinion as to the responsiveness of Passalacqua's bid, and was informed that neither the Passalacqua bid nor the next low bid was responsive to the equal employment opportunity requirements of the solicitation. Award was made to the third low bidder (Albert H. Higley Company) on September 27, 1972.

Although we have not been requested to decide if the bid opening procedures were appropriate, we do not believe that, in the context of this procurement, the procedures were improper. In any event, we note that Higley was not one of the four bidders which were permitted to complete the certifications in the bid opening room. Thus, the only significant issue raised in this protest is whether Passalacqua was bound to the material provisions of the solicitation.

You assert that Passalacqua bound itself to all provisions of the IFB when it signed the bid, and that the requirement for signing the part II certification was superfluous. You claim that Passalacqua was not required to sign the part II certification because the Passalacqua bid must be read as a commitment to use only trades covered by the Cleveland Plan. You further assert that the equal opportunity clause of the solicitation obligated the bidder to comply with all regulations and orders of the Secretary of Labor, and that by signing the bid Passalacqua became bound to comply with these requirements.

At the outset, we point out that the Federal Government is not a party to the contract awarded in this case. It is the responsibility of HEW, however, to determine whether the conditions of the grant, including the requirement that competitive bidding be used in the awarding of contracts, have been met. We have recognized that under the Hill-Burton Act, it is within the discretion of that Department to determine if withholding of grant funds is required in the event it finds non-adherence to the grant conditions. B-168784, April 13, 1970; B-166366, May 14, 1969. Thus, our role in this case is limited to a review of the facts and circumstances to determine if HEW correctly advised the grantee that competitive bidding requirements compelled the rejection of Passalacqua's bid.

We have consistently held that the failure of a bidder to commit itself, prior to bid opening, to affirmative action requirements of a

solicitation requires rejection of the bid. 50 Comp. Gen. 844 (1971); B-176487, September 28, 1972; B-176328, November 8, 1972. We have also recognized that a bidder could commit itself to such requirements in a manner other than that specified in the solicitation, and that a bidder's failure to meet the literal requirements of an IFB could be waived so long as it was otherwise fully bound to the material affirmative action provisions. B-176260, August 2, 1972; 51 Comp. Gen. 329 (1971). However, we have not held that a bidder commits itself to affirmative action requirements of a solicitation merely by signing the bid when the IFB requires something more. See B-176328, supra; Northeast Construction Co. v. Romney, Nos. 71-1091 and 71-1693, March 6, 1973 (D.C. Cir. 1973).

Here we are unable to see how Passalacqua was committed to all of the solicitation's affirmative action requirements. There is nothing in the bid which would bind Passalacqua in any way to comply with the part II requirements for trades not covered by the Cleveland Plan. The part II certification was not signed, a separate affirmative action plan conforming to the part II criteria was not submitted, and there was no other statement or document submitted with the bid which committed Passalacqua to the part II provisions. Thus, this case is distinguishable from those in which we found sufficient commitments from bidders who did not strictly adhere to solicitation requirements. For example, in B-176260, supra, we held that a bidder's failure to return with its bid the affirmative action plan page of the IFB was not material since it submitted a properly executed bidder's agreement by which it agreed to comply with the plan provisions. See also B-177846, March 27, 1973, in which we held that the bidder's failure to properly complete an affirmative action provision was cured by the submission of the bidder's own affirmative action plan which met the requirements of the solicitation.

We do not agree with your contention that Passalacqua was not required to commit itself to part II because it did not intend to use trades not covered by the Cleveland Plan on the project. We have held that affirmative action requirements of a solicitation may not be regarded as material if they relate to trades which clearly will not be used to perform the work called for by the invitation. B-177509, April 13, 1973. However, in this case HEW has informed us that both operating engineers and sheetmetal workers, two trades not covered by the Cleveland Plan, must be utilized to perform the contract. You have offered no rebuttal with respect to HEW's position on this point. See B-176487, supra. You state, however, that these trades, although not covered by the plan at the time of bid submission, might become part of the plan and that the part I certification covers this contingency. Paragraph (f) of the certification states:

(f) with regard to any trade under this prime contract now proposed (paragraph (b) of this certification) to be covered by the Cleveland Plan, and with regard to any trade not now proposed to be used on the project, if, in the future, work in such trade on this project is in fact being performed by a contractor or subcontractor who is not a participant, with a labor organization for which there are OFCC-approved minority utilization goals, in the Cleveland Plan or other affirmative action plan acceptable to the Director of the Office of Federal Contract Compliance, such contractor or subcontractor shall be deemed committed to an affirmative action plan meeting the criteria of Part II of these "Bid Conditions."

The above provision is applicable to trades which might no longer be covered by an approved affirmative action plan and to trades "not now proposed to be used on the project" which would not be covered by an approved plan. You claim that at the time of bid submission Pascalacqua did not propose to use any trade not covered by the Cleveland Plan. We think the record suggests otherwise.

As indicated above, HEW states that the work called for by the solicitation clearly requires the use of two trades not covered by the Cleveland Plan, sheetmetal workers and operating engineers. In this regard, we note that the specifications contain a specific section dealing with sheetmetal work. We also note that Pascalacqua, while signing the part I certifications, did not properly complete the certification to indicate what trades it did propose to use and which of those trades were and were not covered by the Cleveland Plan. Furthermore, the record shows that Pascalacqua has claimed its failure to sign the part II certification was due to advice received from the project architect and not because of its intention not to use trades covered by the part II certification. Finally, you admit, in your letter of October 4, 1972, that "some work normally performed by trades that are not part of the Cleveland Plan is included in the job," but state that these trades "might become part of the plan * * * or subcontractors might be able to work around" them. This, of course, does not mean that Pascalacqua did not plan to use such trades. Under these circumstances, we do not believe that the Pascalacqua bid can be read as a commitment to use only trades covered by the Cleveland Plan.

We also do not agree that because the equal opportunity clause of the solicitation obligated the bidder to comply with all orders and regulations of the Secretary of Labor that Pascalacqua would be bound to the part II requirements by its bid signature. It is well established

that a bidder is not bound to the goals, timetables and affirmative action steps for trades not covered by a local plan unless there is a specific, independent commitment to such requirements. 50 Comp. Gen. 844, _supra_; _Northeast Construction Co._ v. _Romney_, _supra_.

Accordingly, we believe that HUD's advice to the grantee that the Passalacqua bid should be rejected was not contrary to Federal competitive bidding principles.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States