



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

B-177095

October 19, 1972

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Dear Mr. Sampson:

Reference is made to your letter of September 20, 1972, concerning a new contracting procedure that has been proposed for use in carrying out the purchase contracting authority contained in section 5 of the Public Buildings Amendments of 1972, approved June 6, 1972, Public Law 92-313, 86 Stat. 219.

The proposed procedure, the so-called "dual system," is set out in a memorandum dated September 27, 1972, subsequently furnished to us. You state that you are scheduled to receive bids on purchase contracts totalling nearly \$200 million on October 30, 1972, and you ask whether contracts to be entered into thereunder are authorized by law.

Under the plan the General Services Administration (GSA) will issue separate invitations for (a) bids for construction of individual projects and (b) bids to finance and sell to the United States a group of such projects. Following competitive bidding, GSA will accept the most favorable construction bid for each project by entering into a "Construction Contract," and accept the most favorable financing bid to provide the funds for the group of projects as a whole by entering into a "Purchase Contract" with a Trustee which would obtain the necessary funds through issuance of Participation Certificates (PC) to the successful financial bidders.

It is presumed that such successful bidders will reoffer to public investors (PCHolders) the Participation Certificates, each evidencing an undivided interest in the obligation of the United States to make payment of the purchase price under the purchase contract.

The Construction Contractor will be obligated to construct the project improvements (the Improvements) on the site owned by the United States in accordance with GSA's plans and specifications and under supervision provided by the GSA, and to furnish performance and payment bonds which will guarantee completion by the surety in the event of default by the Construction Contractor. The GSA will agree to cause monthly payments to be made to the Construction Contractor out of the proceeds of the financing to be supplied by the PCHolders, and as such payments are made, title to the Improvements will vest in the Trustee designated to hold title on behalf of the PCHolders.

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The proposed procedure is further set forth in the memorandum as follows:

"Determination of Amount To Be Financed and Disposition Thereof. (a) A target date for completion of all the projects in the group (the 'Target Date') will be fixed by GSA and set forth in the Purchase Contract. The amount of the financing to be invited by GSA will be a specified amount approximately equal to the amount estimated by GSA as the maximum which might be required to cover all of the following: (i) the costs of construction ("Construction Costs") payable under all the Construction Contracts in the group, (ii) total applicable costs and expenses ('Construction Period Administrative Costs') to the Target Date, including fees and expenses of a financial advisor and special counsel, fees of the Architect-Engineer, printing costs, fees and expenses of the Trustee and Paying Agent, and local real estate taxes (if any), plus (iii) interest ('Construction Interest') to the Target Date on the amount of the financing to be capitalized at the rate stipulated in the winning financial bid. The United States acting through the GSA will enter into a contract with the Trustee on behalf of the PCHolders providing that the proceeds of the financing will be received by the Trustee and held in trust in a 'Construction Fund' for the benefit of the PCHolders.

"(b) During the period to the Target Date, sums will be disbursed monthly from the Construction Fund (i) upon order of the GSA by way of progress payments as construction is completed and upon submission of invoices for services performed, in payment of Construction Costs and Construction Period Administrative Costs approved by GSA, and (ii) in semi-annual payments of Construction Interest. On the Target Date GSA will estimate the amounts required to complete each uncompleted project, if any, and will cause such amounts to be disbursed to a 'Completion Fund.' The total of all such payments out of the Construction Fund to the Target Date (consisting of (i) the payments of Construction Costs, Construction Period Administrative Costs and Construction Interest, and (ii) the payment to the Completion Fund) will become the principal amount (the 'Principal Amount') to be included in the Purchase Price. Any sums left in the Construction Fund will be returned on the Target Date to the PCHolders by way of redemption of Participation Certificates by lot and will not become part of the Principal Amount.

"(c) The Completion Fund will be held by the Trustee in trust for the PCHolders, to be disbursed upon order of the GSA to cover costs in connection with completion of the projects or interest on outstanding Participation Certificates or both. Any balance remaining in the Completion Fund must be disbursed for redemption of Participation Certificates by lot upon the earlier of (i) acceptance by the United States of all of the projects in the group, or (ii) the date of the first installment payment of the Principal Amount.

"(d) Moneys held in the Construction Fund prior to the Target Date and in the Completion Fund after the Target Date will be invested in other U.S. Government securities upon the order of GSA, and income derived from such investments, after expenses, will be added to the Construction Fund prior to the Target Date and to the Completion Fund after the Target Date.

"The Purchase Contract.

"(a) The United States will agree to pay to the Trustee, on behalf of the PCHolders, the following amounts, which constitute the Purchase Price:

"(i) the Principal Amount, in installments commencing in the \_\_\_\_\_ year and continuing for not more than 30 years from the date the Purchase Contract is entered into;

"(ii) interest on the unpaid Principal Amount, in semi-annual installments commencing approximately six months after the Target Date;

"(iii) all costs and expenses of the same nature as the Construction Period Administrative Costs but incurred at any time throughout the term of the Purchase Contract, to the extent they are not paid from the Construction Fund or the Completion Fund; and

"(iv) in any event, such additional amounts (if any) as may be necessary to enable the Trustee to pay the principal and interest and premium, if any, on the Participation Certificates as specified therein. The United States will have the right to prepay Purchase Price in connection with any optional redemption of the

Participation Certificates, and any redemption or payment of interest out of the Completion Fund will be treated as a payment or prepayment of Purchase Price. The obligation of the United States to pay the Purchase Price will be absolute and unconditional.

"(b) The site owned by the United States will be leased to the Trustee for a nominal rental for a period exceeding the 30-year term of the Purchase Contract, which will automatically terminate upon payment in full of the Purchase Price. The Trustee will take title to the Improvements as they are constructed (as stated above under 'The Construction Contracts'), and hold title thereto during the term of the Purchase Contract. Upon payment of the Purchase Price in full, title to all assets held by the Trustee will pass automatically to the United States. During the term of the Purchase Contract, the United States will occupy the Improvements and assume full responsibility for repairs, maintenance, operation, management and hazard risks.

"Participation Certificates. In order to provide money for the purpose of the program at the lowest possible cost to the United States, the GSA proposes to invite competitive bids for the purchase of Participation Certificates. Such Certificates will evidence undivided interests in the obligation of the United States to pay the Purchase Price to the Trustee under the Purchase Contract. Each Participation Certificate will specify a principal amount (\$5,000 or a multiple thereof) to which it is entitled, and the installments in which such amount will be payable. The initial aggregate principal amount of all Participation Certificates will be the amount of the financing (fixed as described above under 'Determination of the Amount to be Financed and Disposition Thereof'). Each Participation Certificate will also specify that interest will be payable semi-annually on the unpaid portion of its principal amount, at a specified rate (the rate stipulated in the winning financial bid). The Participation Certificates will be redeemable at principal amount and accrued interest as contemplated in paragraphs (b) and (c) under 'Determination of Amount to be Financed and Disposition Thereof' and will also be subject to redemption at the option of the United States under certain conditions, at principal amount and accrued interest plus premium, if any.

"The Trustee and Paying Agent. The \_\_\_\_\_ Bank (Bank') will act as Trustee for the PCHolders and Paying Agent

for the United States. As such Trustee it will (a) hold the proceeds of the sale of the Participation Certificates in Trust for disposition as described above (see 'Determination of Amount to be Financed and Disposition Thereof'), and (b) lease the site from the United States and hold title to the Improvements. The Bank, acting as Paying Agent for the United States, will receive from the United States payments on account of the Purchase Price of the projects, pay costs and expenses (if any) directed to be paid by the GSA under the Purchase Contract, and pay to the PCHolders the principal and interest, and premium, if any.

"The Financial Bidders' Agreement. The successful bidders, which will be the financial bidders whose bid is accepted by GSA, will agree to purchase the Participation Certificates subject to the usual and customary conditions. It is expected that bidders would consist of groups of investment banking firms and banks."

The memorandum discloses that at the time bids are issued under the proposed "dual system" GSA will simultaneously seek combination construction and financing bids for each project under the so-called "package system" and will choose between the two systems on the basis of which is deemed most favorable to the United States.

The purpose of the Public Buildings Amendments of 1972 is stated in its title as being "\* \* \* to provide for financing the acquisition, construction, alteration, maintenance, operation, and protection of public buildings \* \* \*." Section 5 thereof authorizes GSA to provide space by entering into purchase contracts, the terms of which shall be not more than 30 years and which provide that title to the property shall vest in the United States at or before the expiration of the contract term and upon fulfillment of the terms stipulated in the purchase contracts. It is further provided that the terms and conditions shall include provision for the application to the purchase price agreed upon therein of installment payments made thereunder.

It is provided in section 5(b) that no such purchase contract shall provide for any payments to be made by the United States in excess of the amount necessary, as determined by the Administrator of the GSA (1) to amortize the cost of construction of improvements plus the fair market value of the site, if not owned by the United States; and (2) to provide a reasonable rate of interest on the outstanding principal as determined under clause (1) above; and (3) to reimburse the contractor for the cost of any other obligations required of him, including such items as payment of taxes, costs of

carrying insurance, and costs of repair and maintenance. For the purpose of purchase contracts for the erection by the contractor of buildings and improvements for the use of the United States, the Administrator of GSA is authorized in section 5(e) to enter into agreements with any person, partnership, corporation, or other public or private entity, to effectuate any of the purposes of section 5; and is further authorized to bring about the development and improvement of any land owned by the United States, by "providing for the construction thereon by others of such structures and facilities as shall be the subject of applicable purchase contracts \* \* \*."

Section 5 also requires approval of a prospectus for each project by the Committees on Public Works of the Senate and the House of Representatives, and advance notification to the Committees on Appropriations of the Senate and the House of Representatives. You advise that such approval and notification for the projects covered by the proposed financing have been completed.

As noted above, under the proposed plan the Government will make installment payments for a period not exceeding 30 years, and will obtain title to the project within the specified period. Also, the payments will not exceed the limitations placed thereon by section 5(b) and will otherwise conform to the requirements of section 5. We also understand that the proposed plan will be disclosed to the interested committees of the Congress before it is adopted.

Consequently while the purchase contract authority and the contract requirements set out in section 5 of the Public Buildings Amendments of 1972 do not specifically provide for the method of financing construction as provided in the so-called "dual system," we find nothing in section 5 that must be considered as prohibiting the use of the proposed plan in carrying out the purposes of that section.

Accordingly, it is our opinion that the proposed contracting procedure ("dual system") may be considered legally as within the framework of section 5 of the Public Buildings Amendments of 1972.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General  
of the United States

The Honorable Arthur F. Sampson  
Acting Administrator  
General Services Administration