



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

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B-176848

January 26, 1973

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Purcell & Nelson
888 Seventeenth Street, N. W.
Washington, D. C. 20006

Attention: Franklin M. Schultz, Esq.

Gentlemen:

This is in reply to your letter dated December 6, 1972, relative to the proposed financing of the construction of a Social Security Administration Building in Birmingham, Alabama, to be leased to the General Services Administration (GSA) under Lease No. GS-04B-14592 (Neg.), dated September 11, 1972.

Your letter is written on behalf of the Public Building Authority of Birmingham, the purchasers and holders of the bonds it proposes to issue, and the Birmingham Trust National Bank, as trustee for such holders. You request an opinion by this Office as to whether a proposed assignment of rents complies with, and a conveyance of the land is prohibited by, the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15. We understand that you urgently require a decision by this Office in order to facilitate the issuance of certain bonds proposed to finance the project.

The pertinent facts recited in your letter of December 6, 1972, are as follows:

*** On September 11, 1972 the General Services Administration ('GSA') entered into a Lease Agreement with Franklin L. Haney of Chattonooga, Tennessee ('the Lessor'), whereby the Lessor agreed to construct the building in the Civic Center of Birmingham on land owned by the Housing Authority of Birmingham which gave GSA its option to purchase the land, assignable to the successful bidder, for the price of \$1,300,000. The GSA Lease specifies

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that the building is to contain a total of 450,000 net usable square feet of office and related space in accordance with plans and specifications to be approved by GSA and that GSA has the option at any time within the first ten years of the initial term of the Lease to acquire up to a total of 150,000 additional net usable square feet of contiguous space. The Lease requires the Lessor to provide all maintenance services to the building other than such services prescribed in the Lease to be performed by GSA. The Lease provides for an initial 20-year term beginning on August 1, 1974 and may be renewed at the option of GSA for two additional terms of ten years each, subject to certain termination rights reserved to GSA. The building is to be occupied by the U. S. Social Security Administration as its 'Birmingham Payment Center.'

"The Authority proposes to finance the construction of the building by issuing for sale to the public its 20-year tax-exempt Social Security Administration Building Revenue Bonds, Series A (1973), in the aggregate principal amount of \$17,900,000 under a Trust Indenture with the Birmingham Trust National Bank, a national banking association, as Trustee for all parties (including bondholders) participating in the financing of the cost of the land, the building and the facilities referred to in the Lease. The Authority will also issue and sell to the City of Birmingham for \$1,300,000 its junior and subordinate Series B Bonds (1973), also subject to the Trust Indenture, in the aggregate principal amount of \$9,500,000.

"Solicitations for Offers AT-2-180 were issued by GSA on March 15, 1972 under Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, for the leasing of the above described land and building. In order to induce bidders to submit bids to GSA pursuant to this solicitation and on the basis of a building to be constructed on a site within the corporate limits of the City of Birmingham, Alabama, the Authority on June 1, 1972 offered to enter into an agreement with any bona fide

bidder for the issuance of tax-exempt bonds and for the construction of the required building out of the proceeds of such bonds. A number of bidders, including the Lessor, submitted bids based on tax-exempt bond financing. The Lessor's bid, simply a square-foot annual rental, could not have been made without tax-exempt bond financing because the rentals stated in his bid will not provide sufficient revenues for debt service on a conventional loan in the required amount.

* * * * *

"When the bonds are issued, sold and delivered by the Authority, the following will have taken place or then will be consummated: (1) GSA will reassign its option to purchase the land to the Lessor who shall exercise the option and the Housing Authority shall convey the land to the Lessor; (2) the deed of conveyance and the Lease will be duly recorded in Jefferson County, Alabama; (3) at the Authority's request and with the consent of the authorized contracting officer, the Lessor will assign the rents due and to become due to the Lessor under the Lease to the Birmingham Trust National Bank as Trustee for all parties participating in financing; (4) the Lessor will convey the land subject to the Lease to the Authority; and (5) the Authority will pledge the land and the building with the Trustee to secure the bonds.

"A separate Trust Indenture will require that the Trustee apply the rents received by it for the benefit of the following: with respect to the initial 20-year term of the Lease (1) payment of principal and interest to the Series A bondholders, including the Trustee who will be a bond purchaser, (2) payment of the annual maintenance charges to the Lessor, the Lessor having deposited \$250,000 with the Trustee as security for his performance of such maintenance, (3) payment of \$15,000 interest annually to the Series B bondholder or bondholders, and (4) payment of the remainder of such rents to the Lessor; after the initial term of the Lease, and during one or both optional renewal lease periods, (1) payment of maintenance

charges, (2) payment of principal and interest to the Series B bondholder or bondholders, the bonds to be fully paid by December 1, 2000, and (3) payment of the remainder of such rents to the City."

A Government contractor is precluded from unilaterally transferring its Government contract to another party wishing to obtain such contract (41 U.S.C. 15), and an assignment of accounts receivable from the United States can be lawfully accomplished only through compliance with the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15. The latter statute provides, in pertinent part, as follows:

"§ 15. Transfers of contracts; assignments of claims; set-off against assignee

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating \$1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided, * * *. 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; * * *."

The GSA Lease provides, in its General Provisions, as follows:

"8. Assignment of Claims.

Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if

this lease provides for payments aggregating \$1,000 or more, claims for monies due or to become due the Lessor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned or reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off."

You have requested advice as to whether the Birmingham Trust National Bank may be regarded as a "financing institution" within the meaning of the act or, in the alternative, as trustee for two or more parties participating in the financing. You point out that the Bank will be a bondholder and in addition will act as trustee for the other bondholders.

So far as concerns the Bank as a bondholder, it clearly qualifies as an assignee under the act. In terms of its capacity as trustee for the other bondholders we must look to the parties the trustee represents because an assignment to a party or parties not eligible under the act cannot be validated by the simple expedient of having ineligible assignees designate a bank as a trustee for collection. We do not know who the individual bondholders will be. However, it is probably fair to say that many, as individuals, would not qualify as financing institutions under the act. Nevertheless, we have held that a trust corpus, together with the trustees, individual, corporate or otherwise, having as a function the investing of the assets of the trust, may be regarded as a financing institution under the act. 50 Comp. Gen. 613 (1971). Similarly, we believe that the totality of the bondholders, albeit unincorporated, have as a group the function of lending money, specifically in this case in order to make it possible for the contractor to perform a Government contract, and therefore may be considered a financing institution under the act. The assignment may of course be made to the Bank as agent or trustee of all of the parties participating in the financing. Accordingly, it is our opinion that a valid assignment of contract payments may be made to the Bank, acting in such a capacity.

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You also request our opinion as to whether the conveyance of the land by the Lessor to the Authority, subject to the lease, should be regarded as the transfer of a contract, which is prohibited by the act.

It has been recognized that the purposes of the law relative to the assignment of contracts with the United States are (1) to secure to the Government the personal attention and services of the contractor, (2) to render the party performing the contract liable to punishment for fraud or neglect of duty, (3) to prevent parties from acquiring a mere speculative interest in a Government contract, and (4) to prevent speculators from selling such contracts at a profit to bona fide bidders and contractors. See Thompson v. Commissioner of Internal Revenue, 205 F. 2d 73 (1953); Shnitzer, Assignment of Claims Arising Out of Government Contracts, 16 Fed. B. J. 376.

Transfers which do not contravene any of the purposes for the prohibition have been regarded as valid, and the Supreme Court has held that the prohibition does not embrace a simple lease of real estate, under which the Lessor has nothing to do except collect the rent. See Freedman's Serv., etc., Co. v. Shepherd, 127 U.S. 494 (1888).

In the present case, it does not appear that Mr. Haney, as Lessor, will transfer his right to receive rent to the Authority. Further, we have noted the document which you submitted here by letter dated January 10, 1973, wherein counsel for the Lessor proposes to include express language, in the deed from the Lessor to the Authority, to the effect that the conveyance is subject to the existing lease to GSA, and that Mr. Haney is not thereby released from his obligations under the lease to GSA. Under the circumstances, it is our opinion that the conveyance to the Authority cannot be regarded as the transfer of a contract such as would violate the provisions of 41 U.S.C. 15.

We trust the foregoing will serve the purpose of your inquiry.

The documents furnished in connection with our review of this matter are returned as requested.

Very truly yours,

E. H. Morse, Jr.

For the Comptroller General
of the United States