



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

B-129709

OCT 14 1976

The Honorable James C. Corman  
Chairman, Subcommittee on Government  
Procurement and International Trade  
Committee on Small Business  
House of Representatives

Dear Mr. Chairman:

This is in response to the letter dated July 7, 1976, from you and Congressman McDade concerning the legality of small business set-asides for architectural and engineering (A-E) services.

As you know, certain procurements are set aside exclusively or in part for small business participation only under the authority of the Small Business Act, 15 U.S.C. 631 et seq. (1970). That act states:

"\* \* \* It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation." 15 U.S.C. 631(a).  
(Emphasis added.)

The act further provides that small business concerns "shall receive any award or contract or any part thereof \* \* \* as to which it is determined \* \* \*(3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns \* \* \*." 15 U.S.C. 644. Pursuant to

this act, the regulations promulgated under the basic civilian and military procurement statutes provides for small business set-asides at the discretion of procuring officials where it can be determined that there exist sufficient numbers of responsible (i. e., capable) small businesses to ensure awards at reasonable prices. See Armed Services Procurement Regulation §§ 1-706. 5, 1-706. 6, and Federal Procurement Regulations §§ 1-1. 706-5, 1-1. 706-6.

The acquisition of A-E services is governed by the Brooks Bill, Public Law 92-582, approved October 27, 1972, 86 Stat. 1279, 40 U. S. C. 541 et seq., which was enacted subsequent to the Small Business Act. The Brooks Bill differs from the basic procurement statutes in that it provides for selection of contractors on the basis of best qualified firms rather than on the basis of a price competition. Under the Bill, a contract is negotiated with the highest qualified firm at a price which the firm and the Government can agree is fair and reasonable. If agreement cannot be reached with the most qualified firm, negotiations are entered into with the second most qualified firm. Failing agreement with that firm, negotiations are then conducted with the third most qualified firm.

It is clear that the Brooks Bill, which makes no reference to small business set-asides, manifests a Congressional intent that A-E services be acquired through competition that will produce the highest professional qualifications and competence. As a result, you state, some procuring agencies believe that set-asides would be incompatible with the Brooks Bill. Other agencies, however, believe that the Bill and the Small Business Act can be read together so as to permit set-asides.

The legislative history of the Brooks Bill makes no reference to the utilization of small business set-asides for the procurement of A-E services. However, the role of small business in such procurements was recognized during debate. Senator Randolph of West Virginia noted that executive agencies had been awarding contracts to A-E firms based upon qualifications without regard to size; that small firms had been receiving their fair share of this work; and that it was his opinion that the Brooks Bill would preserve this situation. 118 Cong. Rec. 36189 (1972). Similarly, Congressman Buchanan of Alabama felt that under the procedures to be codified by the Brooks Bill, procuring agencies would be in a better position to confer awards upon small businesses that demonstrated originality and innovation since price was not to be the major criterion and the larger

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firms better able to absorb costs would therefore not be able to eliminate the smaller firms by lowering their prices. 118 Cong. Rec. 25488 (1972).

Based upon the foregoing, it appears that the Congress was not explicitly contemplating set-asides for small business when it had the Brooks Bill under consideration. However, neither can it be said that the Congress contemplated removing the procurement of A-E services from the mandate of the Small Business Act. Therefore, it is our opinion that the Brooks Bill does not preclude small business set-asides and that, under appropriate regulatory provisions, A-E services may be procured on a set-aside basis.

It is a basic principle of statutory construction that statutes are presumed to be consistent with each other. 73 Am. Jur. 2d, Statutes § 254; 54 Comp. Gen. 944 (1975); see also 2A Sutherland, Statutory Construction §§ 51.01, 53.01, 53.03, 53.04 (4th ed. Sands 1973). The Small Business Act establishes a national policy of placing a fair proportion of the total procurement contracts awarded by the Government with small business concerns. Although the Brooks Bill was enacted subsequent to passage of the Small Business Act, the Brooks Bill did not explicitly exempt A-E procurements from the requirements of the Small Business Act. Although a small business set-aside of an A-E procurement might preclude award to a firm that would be found to be the most highly qualified in an unrestricted procurement, we think the setting aside of an appropriate number of A-E procurements for small businesses and the awarding of a contract to the most highly qualified small business firm would not be inconsistent with the thrust of the Brooks Bill, which is to secure award of A-E contracts on the basis of technical excellence without regard to competitive pricing.

I hope this is responsive to your request.

Sincerely yours,

R. F. KELLER

[Deputy] Comptroller General  
of the United States



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R. F. KELLER

Deputy

Comptroller General  
of the United States

Although Brooks Bill (40 U.S.C. 541 et seq.), which controls method of procurement of architectural and engineering (A-E) services, provides for selection of contractors on the basis of the best qualified, GAO believes that award under small business set-aside to most highly qualified small business firm is not inconsistent with Brooks Bill requirement since there is no evidence that Congress contemplated removing procurement of A-E services from the mandate of the Small Business Act (providing authority for set-asides), and it is a basic principle of statutory construction that statutes are presumed to be consistent with each other.