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

DEC 28 1977

B-165731

The Honorable Charles E. Grassley
House of Representatives

Dear Mr. Grassley:

This is in response to your request for our opinion on whether a proposed Renegotiation Board rule change, eliminating the present exemption for contracts awarded pursuant to the Foreign Military Sales Act of 1968 (22 U.S.C. §§ 2751 et seq.) from the requirements of the Renegotiation Act, would violate the intent of Congress in appropriating $6 million to the Renegotiation Board for fiscal year 1978. Pub. L. No. 95-86, 91 Stat. 419, 439 (August 2, 1977). You point out that during floor discussion of the appropriation in question, the Chairman of the House Subcommittee on State, Justice, Commerce, and Judiciary Appropriations stated that the funds were to be used for the sole purpose of eliminating the backlog of filings pending at the Renegoiation Board. The proposed regulatory change, however, would have the effect of increasing the Board's work load.

Under the Renegotiation Act, 50 App. U.S.C. §§ 1211 et seq.(1970), the function of the Renegotiation Board is to eliminate excessive profits derived by private parties on contracts with the United States which are related to the national defense. Renegotiation is conducted on the basis of aggregate fiscal year receipts and accruals from sales to the Government that are subject to the Act. The provisions of the Renegotiation Act do not apply to:

> "Any contract which the Board determines does not have a direct and immediate connection with the national defense. The Board shall prescribe regulations designating those classes and types of contracts which shall be exempt under this paragraph; and the Board shall, in accordance with regulations prescribed by it, exempt any individual contract not falling within any such class or type if it determines that such contract does not have

> a direct and immediate connection with the national defense." 50 App. U.S.C. § 1216(a)(6) (Supp. V 1976).

The Board no longer has authority with respect to receipts and accruals under renegotiable contracts attributable to performance after September 30, 1976. However, the Board's jurisdiction and authority with respect to receipts or accruals from performance of such contracts prior to September 30, 1976 is still in full force and effect. 50 App. U.S.C. § 1212(c)(1) (Supp. V 1976). We therefore believe that the Board still has the power to issue rules and regulations pertaining to contracts falling within its remaining authority. 50 App. U.S.C. § 1219 (1970).

Foreign military sales contracts are presently exempt from renegotiation by Board regulation, but the Board feels that this exemption was in error. On July 21, 1977, the Renegotiation Board published on page 37424 of the Federal Register, a Notice of Proposed Rulemaking which would bring contracts awarded pursuant to the Foreign Military Sales Act of 1968 subject to the Board's jurisdiction. The Board seeks to amend 32 C.F.R. § 1453.5(b)(3)(ii) to read that:

> "* * * contracts awarded pursuant to the Foreign Military Sales Act of 1968 (22 U.S.C. §§ 2761-2764) are not exempt [from renegotiation] * * *."

As indicated in the Board's Notice, the Foreign Military Sales Act of 1968 requires a Presidential finding, prior to sale, that the furnishing of defense articles and defense services to any country or international organization will strengthen the security of the United States and promote world peace. 22 U.S.C. § 2753(a)(1) (1970). The Board has determined that on this basis, contracts awarded pursuant to the Foreign Military Sales Act could not be said to have no direct and immediate connection with the National Defense. 42 Fed. Reg. 37424 (1977). Determinations as to whether a contract is or is not exempt from renegotiation are not reviewable by any other agency or tribunal. 50 App. U.S.C. § 1216(a)(6), (Supp. V 1976).

Although you do not dispute the Board's general authority to issue rules and regulations pertaining to contracts still under its jurisdiction, you question the validity of the proposed regulatory change in question because its effect may be to increase rather than decrease the Board's existing backlog, which, you feel, is not the purpose for which the $6 million was appropriated by Pub. L. No. 95-86, supra. Your position is

based upon the following discussion in the House of Representatives between Representatives Hannaford and Slack, 123 Cong. Rec. H5711-12 (daily edition June 10, 1977):

"MR. HANNAFORD.

* * * * *

"The report does state that this $6 million appropriation is to be used only for receipts and accruals of the Board prior to the time that the Board's authority ended, September 30, 1976.

* * * * *

"Is it the purpose of the committee in providing for this appropriation, which represents a reduction from both the current appropriation and the budget request for fiscal year 1978 of the Renegotiation Board, that the funds be used for the sole purpose of processing the backlog of work on receipts and accruals made prior to September of 1976, and that further expenditures for anything subsequent to that time received by the Board would not be authorized?

* * * * *

"Mr. SLACK. Mr. Chairman, under the Renegotiation Act of 1951, as amended, receipts and accruals under contracts with certain departments and related subcontracts are subject to renegotiation until September 30, 1976. Consequently, all filings presently processed by the Renegotiation Board, reflecting, as they do, receipts and accruals prior to the present termination date, remain subject to the Renegotiation Act, even if the termination date is not further extended, and thus must be processed in accordance with the law.

"The amount included in the pending bill is to enable the Board to process such filings.

"As of April 30, 1977, the last date for which complete data are available, there were more than 6,000 filings pending before the Board involving renegotiable sales totaling $152 billion.

> "In addition to the Board estimates that, in the absence of any further extension of the termination date, the Board would receive approximately 1,500 more filings in fiscal 1977 and an additional 1,700 filings in fiscal year 1978 and later fiscal years. All of these, of course, would still be subject to the provisions of the Renegotiation Act and would have to be processed according to the terms of the act.
>
> "All of these filings have to be processed and the appropriation of $6 million recommended by the committee is to enable the Renegotiation Board to accomplish just that."

We see nothing inconsistent in the quoted statements with the Board's assertion of jurisdiction over Foreign Military Sales Act contracts as long as they concern receipts and accruals arising from performance prior to September 30, 1976. As Mr. Slack points out, the $6 million appropriation is to be used for processing all filings relating to receipts and accruals prior to September 30, 1976, including filings made in future fiscal years, and not just for the existing "backlog" cases, i.e., those which were filed before September 30, 1976.

The language of the appropriation act itself places no additional restrictions on the use of the $6 million. It reads:

> "For necessary expenses of the Renegotiation Board, including hire of passenger motor vehicles and services as authorized by 5 U.S.C. 3109, $6,000,000." Pub. L. No. 95-86, supra.

The Report of the House Committee on Appropriations on H.R. 7556, which was later enacted as Pub. L. No. 95-86, states only that "receipts and accruals of contractors subsequent to September 30, 1976, are not presently subject to renegotiation." H.R. Rep. No. 95-382, 95th Cong., 1st Sess. (1977) at 42. This, of course, suggests that receipts and accruals prior to that date are subject to renegotiation, and that the appropriation may be used for all filings in that category.

Therefore, it is our opinion that the proposed promulgation by the Renegotiation Board of an amendment to its regulations to require foreign

B-165731

military sales contracts to comply with renegotiation requirements is not inconsistent with the colloquy you cited, or with the relevant provisions of the appropriations act.

We trust this serves the purpose of your inquiry.

Sincerely yours,

E.F.KELLER

Acting Comptroller General
of the United States