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

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B-215021

June 27, 1984

RELEASED

The Honorable Jack Brooks  
Chairman  
Committee on Government Operations  
House of Representatives

Dear Mr. Chairman:

This responds to your April 12, 1984 letter concerning an article in Civil Engineering magazine regarding certain statements about the Brooks Act, Pub. L. No. 92-582, by a senior attorney in our Office of General Counsel at the October 1983 loss prevention seminar of the Association of Soil and Foundation Engineers (ASFE). You ask whether the attorney was quoted correctly and, if so, whether his views--particularly his purported comment that federal agencies do not have to obey the Brooks Act "if they don't want to"--represent the views of the General Accounting Office (GAO) on implementation of the statute.

The article misstates our view on the act and distorts the attorney's comments.

The services involved in the Civil Engineering article, and in our ongoing disagreement with ASFE about the applicability of the Brooks Act, are not those that the Act's legislative history identifies as intended to be encompassed by the statute. The history illustrates that the services contemplated by the Brooks Act are design and consultant services traditionally obtained in connection with federal construction and related programs, including alteration and renovation projects. There is no question that the Brooks Act's procedures must be used in these situations, and if called upon we would insure that those procedures were used.

ASFE, however, is not concerned with design and consultant services and, indeed, we seldom receive a bid protest that an agency is not using the Act's procedures to secure them. Instead, the central issue in the bid protests filed by ASFE has been how far beyond the clearly contemplated services a federal agency must apply the Brooks Act before the agency will run afoul of the laws

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that generally mandate price competition for government contracts.

For example, ASFE has complained about the Army Corps of Engineers' use of standard competitive procedures to secure services, materials, and equipment necessary to drill soil borings, on the basis that the solicitation required the services of registered professional engineers to supervise the drilling operations. ASFE also has protested the Federal Highway Administration's use of standard procedures to procure an investigation, not incident to an architect-engineer (A-E) project, of the behavior of pile group foundations, on the basis that the solicitation required the principal investigator to be familiar with soil mechanics principles and analytical and practical methods used in pile group design. In those and in similar ASFE protests, we could not find unreasonable the contracting agencies' conclusions that the contracts, which could be successfully performed by other than professional A-E firms, were not within the purview of the Brooks Act.

The series of decisions we have issued in response to ASFE bid protests have come with much effort on our part occasioned by ASFE's efforts to expand the Brooks Act's scope, which we hope ended with the April 5, 1983 decision noted in the Civil Engineering article. We pointed out in that decision that we find it difficult to determine precisely how far beyond work that clearly is subject to Brooks Act procedures the Congress intended the Act to apply. We stated that because decisions about the nature and circumstances of the work to be done and the needs of the contracting agency are primarily the responsibility of the agency itself, not our Office, we viewed the agencies as having broad discretion in making their decisions. The thrust of our holding is that we believe the proper role of this Office in these cases is to defer to the judgment of an agency on these matters unless the agency clearly violates the Act.

ASFE's objection to our interpretation of the Act is clearly reflected in the Civil Engineering article, which I note was reported by an attendee of the seminar. I believe the GAO attorney's remarks of that date are put in the proper perspective by reference to the enclosed memorandum

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to our Acting General Counsel that the attorney prepared shortly after the seminar. Specifically regarding the attorney's purported comment that agencies need not obey the Brooks Act "if they don't want to," I note the comment is not an actual quotation, but rather the ASFE reporter's characterization of what was said. The attorney's actual comment was, and the GAO's position is, the same as the view expressed in our April 5 decision. The Civil Engineering report essentially only reflects the ASFE reporter's bias as to the meaning of our position.

Concerning the other reported quotations from our attorney, the first is that our Office finds it necessary to "club some protesters over the head in order to prevent them from continually challenging the agency's decisions [and] ASFE had been clubbed." The actual context of the quoted statement, however, is reflected in the enclosed memorandum. The point made was that we hoped that our April 5 decision would be a final exposition that ASFE could perhaps accept for purposes of future federal procurements.

The second statement quoted at the bottom of the last column on page 22 of the magazine concerns the viability of our April 5 decision on its particular facts. I believe it is clear that the statement is not an expression of GAO position, but rather was simply a comment made in the give and take of a lively discussion. (Again, I refer you to the attorney's memorandum.)

In addition, although it is not reported as a direct quotation, the statement attributed to the attorney concerning GAO's selection of a 1977 case "to implement its bias against the act, to strip it of the applications Congress had intended," actually was made by Mr. Bachner, ASFE's representative.

In short, I am convinced the GAO attorney involved did not misstate this Office's position or provide inappropriate advice.

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In addition to a copy of the attorney's memorandum, I have enclosed a copy of the April 5 decision.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General  
of the United States

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