DIGEST - — Cont.

1028

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

Released per OCR, 6-8-78, see memo in file

D

IN REPLY REFER TO: B-115369

May 31, 1978

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

Dear Mr. Chairman:

Your letter to our Office dated March 21, 1977, requests that we review the legality of the award of contract No. DOT-TSC-1147 to Kentron Hawaii, Limited (Kentron), by the Department of Transportation (DOT) because DOT failed to obtain a delegation of procurement authority from the General Services Administration (GSA). The memorandum enclosed with your letter also questions the propriety of the award in view of Civil Service Commission (CSC) regulations regarding contracting for personal services and in view of the possible sole-source procurement. Subsequent discussions with the committee staff and a memorandum received here on February 6, 1978, raise certain general questions regarding the applicability of the Brooks Act to similar situations.

As stated in our status letter to you dated May 4, 1977, we requested reports from DOT, GSA, Kentron, and the Office of Management and Budget (OMB). Reports received in response to our request together with the views of our Boston Regional Office (which gathered certain documents and visited the contract performance site) and our Automatic Data Processing (ADP) Policy Group in the Financial and General Management Systems Division form the factual basis for our conclusions.

I. BACKGROUND

In 1975, DOT issued a request for proposals (RFP) for 102 man-years of effort to support and operate DOT's hardware and software (previously acquired in accordance with the Brooks Act, 40 U.S.C. § 759 (1970)) at

DOT's Transportation Systems Center (TSC), Cambridge, Massachusetts. The RFP provided for a 1-year, cost-reimbursement-plus-fixed-fee contract beginning January 1, 1976, with two 1-year options exercisable by the Government. The RFP's description of required work divided the total 102 man-years into the following categories:

-- 46 man-years for scientific applications programming and analysis including system/data base software maintenance, major software modifications and enhancements, data base management, formulation and design of software for system modeling, design specialized software for minicomputers, development computer graphics software, and support for general applications programming.

-- 17 man-years for analog/hybrid simulation and analysis including analog/hybrid computer programming, operation of central analog/hybrid computer facility, and assist system programmers in modification of computer executive programs.

-- 10 man-years for administrative applications programming and analysis including 7 man-years for maintenance and production of existing information systems, and 3 man-years for design and development of new administrative/MIS software or major modifications for existing software.

-- 25 man-years for facilities operation including the operation of consoles, data libraries, card punches, other peripheral input/output devices, and control of documents.

-- 4 man-years for project management and systems planning.

When GSA became aware of DOT's RFP, it advised DOT that pursuant to the Brooks Act a delegation of procurement authority from GSA would be required before DOT could enter into a contract for the

required support. DOT disagreed with GSA's interpretation of the applicability of the Brooks Act to the subject procurement and the matter was referred to OMB for resolution.

In its presentation to OMB, GSA argued that the Brooks Act grants GSA the authority to review prospective procurements for ADP services because: (1) the intent of the act requires a broader interpretation than its strict language; (2) the term "equipment," as used in the act, was not defined since rapidly shifting developments could make any then acceptable distinctions obsolete; and (3) by reviewing procurements for ADP support services their economic and efficient purchase could be ensured.

In response, DOT argued that the "spirit" of the act was not violated because: (1) the RFP was for operation of Government ADP hardware and software not "full ADP services" as an alternative to the procurement of ADP equipment or components; (2) all software, except contractor-developed software incidental to the programming and analysis applications was to be furnished by the Government and acquired through routine GSA procedures; and (3) the act's legislative history provides that once ADP equipment is turned over to the using agency, there is no further participation by GSA (except inventory reports) until the component becomes surplus.

After considering both positions, OMB determined that DOT's RFP for support services for equipment, previously acquired pursuant to Brooks Act implementing procedures, was not subject to GSA's Brooks Act authority and no delegation of procurement authority was required because: (1) "ADP equipment" as used in the act means general purpose, commercially available, mass produced ADP systems and components but does not include software, a custom-tailored component; and

(2) there is no apparent benefit justifying GSA involvement in support service procurements.

Subsequently, based on OMB's determination, DOT entered into the contract with Kentron without GSA's delegation of procurement authority and Kentron is currently performing in the last option year which will end on December 31, 1978.

Your letter and the committee staff's memoranda request that we review the legality of the award to Kentron, the propriety of the award regarding contracting for personal services, and the possible sole-source procurement, and that we provide our views on the applicability of the Brooks Act to similar future procurements.

II. LEGALITY OF THE CONTRACT

A. DOT's Reliance on OMB's Determination

We considered a similar situation in our decision in the matter of PRC Computer Center, Inc., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. There, the Federal Energy Administration (FEA) relied on authorization from GSA and OMB to proceed with the procurement of certain ADP equipment. In that case, while we may have had reservations concerning FEA's compliance with the Brooks Act and GSA's implementing regulations, we did not question the validity of the contract because FEA was entitled to rely on GSA's and OMB's authorizations.

Here, GSA and OMB reviewed the proposed procurements and OMB's ultimate determination pursuant to its dispute resolving function under the act, 40 U.S.C. § 759(g) (1970), concluded that DOT did not require GSA's delegation of procurement authority. As in the PRC Computer Center, Inc., decision, DOT was entitled to rely on OMB's determination and the legality of the contract cannot be questioned.

B. Contracting for Personal Services

Each contracting agency is responsible for determining, in each case, whether the particular services can be performed by agency employees. Additionally, when the Government procures services on a contractual basis, the contractor's employees cannot in fact function as Government employees. To do so would circumvent the legal provisions of 5 U.S.C. chapter 33 (1970), relating to the competitive recruitment of Federal employees. With respect to DOT's contract, the record indicates that for the past 7 years this work has been performed by contractors rather than Government employees. In the present contract, as in prior contracts, DOT has carefully designed the contractors' duties and responsibilities to eliminate any appearance of an employer-employee relationship, i.e., Government direction of the contractor's employees. We visited TSC to observe whether the critical element--direct Government supervision of the contractor's personnel--that would indicate that contract employees functioned as Government employees occurred. We found none. Moreover, as expressed in OMB circular No. A-76, dated August 30, 1967, it is Government policy to acquire commercial services by relying on the private enterprise system to supply its needs.

Therefore, in view of: (1) the policy to contract for services whenever feasible rather than performing such services in-house; (2) the agency's primary responsibility to determine whether Government employees are qualified and available to perform the required work; and (3) the lack of evidence of direct Government supervision of the contractor's employees, we have no basis to conclude that DOT's decision to contract for required services was improper.

C. Compliance with Competitive Procurement Laws and Regulations

DOT's statement that its contract with Kentron was not based on a sole-source award is supported by the fact that the request for proposals was sent to 115 sources, the requirement was advertised in the Commerce Business Daily, proposals were received from six firms and following evaluation of proposals and negotiation with three offerors in the competitive range, award was made on December 31, 1975, to Kentron. Subsequently, DOT twice extended the term of Kentron's contract for an additional year ending December 31, 1978. The record shows that DOT's first decision to extend the contract was based on a thorough analysis of current market estimated cost and fees for such services from Kentron's competitors compared to the existing contract option's estimated costs and fee. We neither requested nor received data regarding DOT's second decision to extend the contract term.

III. BROOKS ACT APPLICABILITY TO FUTURE SUPPORT SERVICE CONTRACTS

A. Operation of Brooks Act Equipment

As noted above, the DOT contract with Kentron included 25 of 102 man-years for operation of equipment previously acquired in accordance with the Brooks Act and its implementing regulations. OMB determined that this aspect of the DOT contract, and presumably future contracts of other agencies, is outside the scope and intent of the Brooks Act--a determination questioned in the committee staff memoranda.

The staff position is that the term "equipment" as used in the act was expressly not defined so that expected rapid developments would not render the definition obsolete. The staff refers to this statement made during the House debate:

> "This legislation must necessarily be drafted in broad general terms. * * * Traditionally, Congress has approached

problems of this kind through general delegations providing that the agencies involved shall issue appropriate regulations which can be altered from time to time as changes in circumstances and new problems or opportunities for more efficient operations arise." 111 Cong. Rec. 22823 (1965).

The staff states that in spite of Congress' emphasis on the term "equipment," the House Report and House floor debate frequently employed the term "ADP systems" which conveys a far broader meaning. The staff also states that the House Report and House floor debate repeatedly references GSA's duty to provide a coordinated Government-wide management of ADP in order to accomplish economy and efficiency and that GSA's responsibility encompasses all forms of ADP resources.

The staff refers to the preamble of the act--"To provide for the economic and efficient purchase, lease, maintenance, operation, and utilization of automatic data processing equipment by Federal departments and agencies." When the Government contracts for ADP services, the staff concludes that it is contracting for the "utilization" of ADP equipment regardless of whether such equipment is supplied by the Government or by the contractor.

The staff states that its position is supported by a letter dated May 6, 1975, to the General Counsel of GSA, from an Assistant Attorney General, which stated:

> "The intent of the Act would, of course, be seriously undermined if an agency could avoid its application by merely contracting out its ADP work. Thus, I would interpret the Brooks Act as allowing GSA to coordinate and provide for the economic and efficient purchase, lease, and maintenance of ADP by

federal agencies or by contractors who have specifically undertaken to supply ADP services to those agencies."

In addition, the staff refers to "several" decisions of this Office dealing with FEA's efforts to acquire facilities management services outside the Brooks Act in which it was held that the "spirit" of the act would be violated if such a major exception were allowed to occur.

Finally, the staff states that: (1) GSA needs authority over agencies' acquisition of services to fulfill the economic acquisition purpose of the act; (2) since each year ADP services constitute a greater share of the Government total ADP resources, GSA needs to manage all ADP resources--including the review of solicitations for service contracts; and (3) if agencies can obtain service contracts without a GSA delegation of procurement authority, GSA will be required to cease issuing them for such contracts regardless of any short-term adverse consequences.

We believe that the interrelation of the congressional intent of section 759(a)--authorizing GSA "to coordinate and provide for the economic and efficient purchase, lease, and maintenance of [ADP] equipment"--and section 759(g)--prohibiting GSA from interfering with or attempting to control in any way, the agencies' use of ADP equipment--is our primary concern. Unquestionably, the principal purposes of the act were to obtain more information about each agency's ADP needs and capabilities and thus (1) eliminate Government waste by optimizing use of ADP equipment through sharing and multiple use, and (2) when additional ADP equipment was needed, permit the Government to take advantage of economies of scale. S. Rep. No. 938, 89th Cong. 1st Sess. (1965) p. 4; H.R. Rep. No. 802, 89th Cong., 1st Sess. (1965), p. 4. While GSA was to be the agency empowered to accomplish those objectives, great care was

taken to ensure that using agencies would continue to freely determine their ADP requirements including the type of equipment needed. S. Rep. at p. 22; H.R. Rep. at p. 22. The legislative history is equally as explicit concerning the operation of ADP equipment.

> "In addition to the fiscal and policy control of the [OMB], the bill expressly limits GSA's authority. Agencies would maintain their present independence in the determination of ADP requirements. Agencies would be free from any interference from GSA as to the manner in which ADP equipment is used. They would be advised of all significant decisions affecting their ADP operations and would have the right to appeal to [OMB]. The bill limits GSA's authority to 'operate' ADP (other than its own in-house equipment) under this management program to those instances where multiple agency usage of equipment is involved." (Emphasis added.) S. Rep. at p. 22; H.R. Rep. at p. 22.

Four other passages from S. Rep. No. 938 further explain the legislative intent concerning limitations on GSA's role:

> "In addition to the fiscal and policy control of the [OMB], the bill expressly limits GSA's authority. * * * Agencies would be free from any interference from GSA as to the manner in which ADP equipment is used." S. Rep. at p. 22. "* * * Once the components selected by the agency are acquired by GSA, they would be turned over to the agency to be used in whatever specialized application the agency had planned with no further participation by GSA except inventory reports until the component becomes surplus." S. Rep. at p. 34. " * * * It should constitute a further assurance to the

agencies that it is neither the purpose nor the intent of this legislation that their responsibilities in the selection and use of ADP equipment be compromised in any way." S. Rep. at p. 38. "The Administrator is further precluded from interfering with or attempting to control in any way the use of equipment or components furnished to agencies out of the fund.* * *" S. Rep. at p. 41.

It appears that Congress intended to maintain the traditional policy that the head of an agency should be empowered to determine the manner in which agency resources were to be employed to accomplish the agency's mission. Only when ADP equipment was to be used by multiple agencies would GSA become involved in its operation.

In the DOT situation, if DOT had qualified employees available to operate its Brooks Act equipment at TSC, then clearly GSA would have no basis to become involved. We do not believe that an agency's need to contract for such equipment operation provides any basis under the Brooks Act for GSA to become involved. Moreover, in situations like DOT's, GSA has already had the opportunity to review and approve the procurement of the hardware and software involved. Therefore, to the extent that an agency contracts for Brooks Act equipment operation in lieu of performing the work through its employees, our views would be in accord with OMB's and we would find no violation of the act.

Also, we note that the DOT contract did not involve ADP hardware maintenance services. Such services are expressly covered by the Brooks Act. 40 U.S.C. § 759(a) and (b)(1) (1970). In that regard, current regulations provide that Federal agencies may not procure ADP maintenance services without GSA's approval, except in limited circumstances.

Furthermore, we note that GSA's management functions under the Brooks Act and the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471, et seq. (1970), permit GSA to review properly authorized and existing ADP installations or service contracts to ensure that the Government is obtaining maximum economy and efficiency. In this regard, current regulations require Federal agencies to review the need for and use of ADP equipment "when there has been, or there may be, a substantial change in the circumstances germane to the initial decision." 34 C.F.R. § 282.6(f) (1977). This report does not concern those GSA management functions.

Finally, we must address the staff's comments regarding our views on FEA's efforts to acquire facilities management services outside the Brooks Act. As stated in the PRC Computer Center, Inc., decision, in November 1974, we expressed reservations that FEA may not have complied with the Brooks Act and implementing regulations since the procurement appeared to be an ADP equipment acquisition, not an acquisition of ADP services, as the staff suggests. In a letter dated July 15, 1975, to a Member of Congress, we stated that FEA's proposed acquisition of ADP equipment through a contractor to avoid the Brooks Act's coverage was, in our view, violative of the "spirit" of the act. As recently as February 6, 1978, in a letter to the General Counsel of GSA, our Office has continued its efforts to ensure that procurements of ADP equipment for the Government through Department of Energy contractors are in accord with the "spirit" and intent of the Brooks Act.

B. Full ADP Services

The DOT contract involved in part the operation of Brooks Act equipment. While the committee staff's position is that a contract for such operation is the same as the situation where an agency procures "full ADP services" (a contractor's ADP equipment operated by a contractor's employees) in lieu of purchasing or leasing ADP equipment, we disagree.

In a latter-type procurement, the Government is in effect leasing an ADP system for specific purposes and periods. Such a procurement is functionally identical to the Government's leasing of equipment as congressionally contemplated by the Brooks Act and the purposes of the Brooks Act in eliminating waste in Government ADP capacity and maximizing economies of scale in procurement can readily be accomplished by GSA's administrative functions outlined in the Brooks Act.

In this regard, existing GSA's Brooks Act implementing regulations state that without an approved GSA Form 2068, agencies do not have authority to contract for ADP services from commercial sources. 41 C.F.R. § 101-32.203-2 (1977). Therefore, no additional action on the part of Congress or GSA needs to be taken in order for GSA to execute the legislative intent behind the Brooks Act. Accordingly, it is our view that ADP service procurements which include the use of a contractor's ADP system, in lieu of directly leasing ADP equipment, must be accomplished in accordance with GSA's Brooks Act implementing regulations and procedures including the required delegation of procurement authority. Furthermore, our view is in complete accord with the view expressed by an Assistant Attorney General in a letter (referred to above) dated May 6, 1975, to the General Counsel of GSA.

C. Software Support Services

OMB's determination that software is outside the scope of the Brooks Act is also questioned in the committee staff memoranda. The staff states that all categories of ADP resources are covered under the act including software. The staff contends that future proposed contracts like the DOT example--where some software would foreseeably be developed--require a GSA delegation of procurement authority in order to comply with the Brooks Act as implemented.

We note that although "ADP equipment" is not expressly defined in the Brooks Act, the legislative history contains numerous references to "software" as one of the essential components of ADP; several follow:

"Automatic data processing (ADP) is the concept whereby a machine or computer can accept information or 'input data,' process the data according to a predetermined 'program,' and provide the results in a usable form." S. Rep. at p. 2; H.R. Rep. at p. 2.

"* * * The system is 'designed' or 'configured' by combining various of these mass produced components, the combination depending on the particular needs of the user. Most components are general purpose in design and the system can be programmed to perform various functions. About 90 percent of the computers in Government are general purpose. In addition to the 'hardware,' the user must also obtain the instructions and procedures needed to operate the system. These are called 'software' and often constitute a substantial portion of the cost of an ADP system." S. Rep. at p. 2-3; H.R. Rep. at p. 2-3.

"* * * Whenever feasible, general purpose components, including those used in specially designed ADP systems, would be acquired under a volume procurement program. Government software acquisition could also be subjected to more orderly procurement procedures." S. Rep. at p. 5; H.R. Rep. at p. 5.

"* * * There is also another significant advantage in sharing. It will increase the tendency of the various agencies to work together more closely in solving mutual

problems in the 'software' area. The waste that prevails in the duplication of effort in solving 'software' problems which have a common applicability to many agencies are as serious as the wastes in 'hardware.'" S. Rep. at p. 25-26; H.R. Rep. at p. 25-26.

"Although software procurement would present a more complex problem, there is no reason that these complexities should interfere with the establishment of a single purchaser concept as provided in H.R. 4845. Software procurement offers great potential for savings. Under this coordinated Government-wide ADP management program, Government expenditures for these goods and services would be closely defined. Once properly identified, there could be more effective management of software procurement either directly by the agencies or by GSA in conjunction with hardware acquisition. There is no reason why Government software acquisition cannot be subjected to more systematic and orderly procurement procedures. There is also greater potential competition in software procurement, since software does not necessarily have to be furnished by the manufacturer of the equipment." S. Rep. at p. 29; H.R. Rep. at 29.

Our examination of the legislative history of the Brooks Act results in these conclusions: (1) if the act was intended to cover only ADP "hardware," that term would have been used instead of ADP "equipment"; and (2) the act was intended to cover mass-produced, commercially available, general purpose equipment. While "equipment" would not normally encompass software, it is our view on the basis of the legislative history that software designed for general application (for example, payroll, personnel, and financial-type functions and data base management systems) is unquestionably covered by the Brooks Act.

We recognize that our view differs from OMB's and that our views are in accord with the committee staff's on this point; however, we also recognize that the committee staff believes that all software would be covered by the Brooks Act. Therefore, we offer this further explanation.

In contracts like the DOT example--where general capability requirements are set forth but no work is required of the contractor until the Government's task monitor issues the particular task order, whether there would be a need for certain software during the term of the contract was basically unknown at the time of issuing the RFP--review by GSA to ensure compliance with the Brooks Act may be very difficult. There, it appeared from the RFP that all hardware and general application software was to be furnished by the Government and only specially written programs for narrowed limited scientific and administrative applications would be developed incidentally by the contractor. To obtain a better understanding of how DOT implemented the contract, members of our staff visited the TSC. Most (63 of 102 man-years) of the programming support related to nongeneral purpose, mission-related work--outside the scope of the Brooks Act. With regard to the 10 man-years of administrative and management programming support in the DOT contract, our examination did not disclose any programming and analysis work for new, general-type software systems. We found only a small amount of work relating to maintenance, conversion, and improvement of existing administrative and management systems. We did not find that this provision was being used to obtain general application, commercially available software. Nor do we have any basis to conclude that this provision was intended to be an avenue to evade Brooks Act software requirements.

However, in the future when an agency may believe that needed software can best be acquired by contracting out for its development, several considerations (such as whether the software is for "mission" or "administrative" purposes; whether the software is commercially available;

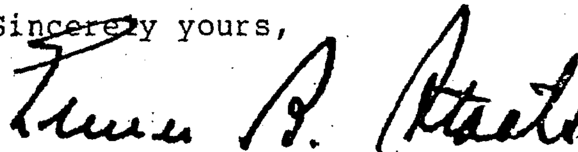
etc.) as discussed above, will determine whether the procurement is for "Brooks Act software." Expected rapid advancements and developments in software technology should increase the commercially available software subject to the "Brooks Act." Therefore, all future proposed contracts which include a requirement for software development or maintenance, in full or in part, should be reviewed by GSA in advance to determine if generally available software already exists to meet the agency's needs, in conformance with existing regulations.

IV. SUMMARY

In view of DOT's reliance on OMB's determination, we have no basis to question the legality of the DOT contract. Further, our review of the record provides no basis to conclude that DOT violated Civil Service rules or competitive procurement laws or regulations in connection with the Kentron contract.

We believe that GSA should review all future agency procurements for software support services or full ADP services because of the intricacies and inherent complexities involved. It is our view that the purposes of the Brooks Act--the economic and efficient acquisition and utilization of ADP equipment--can be realized only when agencies commence such procurements after obtaining a delegation of procurement authority from GSA.

Sincerely yours,



Comptroller General
of the United States