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STATEMENT OF

MILTON J. SOCOLAR
GENERAL COUNSEL
UNITED STATES GENERAL ACCOUNTING OFFICE

before the

COMMERCE, CONSUMER, AND MONETARY AFFAIRS SUBCOMMITTEE
COMMITTEE ON GOVERNMENT OPERATIONS
U. S. HOUSE OF REPRESENTATIVES

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~~THE~~ [ADMINISTRATION'S ANTI-INFLATION PROGRAM AS APPLIED TO GOVERNMENT PROCUREMENT: LEGAL ISSUES]

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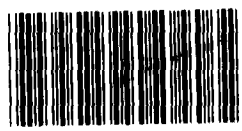

Testimony

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Mr. Chairman and Members of the Subcommittee:

We are pleased to appear today in response to your invitation to testify on the Administration's Anti-Inflation Program as it applies to Government procurement. My comments will cover legal aspects of the program. Mr. Stolarow will follow with a statement concerning practical applications of the program.

You have asked for our legal opinion on the authority of the President to condition eligibility for Government contracts on compliance with wage and price standards issued pursuant to Executive Order 12092. I have a detailed, rather lengthy memorandum which I would like, with your permission, to have inserted as part of the record of this hearing. My statement will touch on the key points in that memorandum.

The President cannot impose mandatory wage and price controls on the economy in the absence of authorizing legislation, and there is currently no operative statute giving the President such power. Indeed, the Council on Wage and Price Stability Act which supports the wage and price guideline program states explicitly that the Act does not authorize mandatory controls. The Administration's Anti-Inflation Program clearly aims toward achieving wage and price stability through voluntary compliance; failure to abide by the President's guidelines is not a violation of law.

The President seeks to maximize the effectiveness of his voluntary program by decreeing that Government contracts

above a threshold level of $5 million will not be awarded to anyone who chooses not to comply with the guidelines. Compliance is determined on the basis of the overall activity of an enterprise, not just that portion related to Government contracts. To be sure, provision is made for waiver of compliance requirements under varying circumstances, but the fact remains that compliance with Government price and wage dictates becomes a crucial element of eligibility to compete for Government contracts.

At the outset we have a fundamental question concerning the voluntary character of the program as applied to Government contractors. To the extent that private enterprise is vitally dependent upon Government business, the requirement to comply with "voluntary" guidelines poses an obvious dilemma. The enterprise must comply, cease doing business, or obtain from the Government a waiver of the requirement. Compliance under such circumstances can hardly be labeled voluntary. And even though an enterprise may not be dependent on Government contracts for its survival, the dilemma still exists, albeit in a more subtle form.

The Administration appears to recognize that specific legislative authority is necessary to overcome the inherent inconsistency in requiring compliance with a voluntary program. It finds such authority in the Federal Property and Administrative Services Act of 1949, which contains the statutory framework for the procurement of goods and services by the

Government. Section 205(a) of the Act provides specifically that the President may prescribe such policies and directives as he may deem necessary to effectuate the provisions of the Act. One of the broad stated purposes of the Act being economy and efficiency in Government procurement, and the purpose of the program being to lower overall costs to the Government in purchasing goods and services, it follows--so the argument goes--that section 205(a) supplies the requisite legislative authority. The essential justification of the program lies in the concept that by reducing inflationary pressures overall costs to the Government will decline and it, therefore, is of no consequence that the Government may pay higher prices in isolated procurements where a noncompliant bidder submits the lowest price in response to an invitation.

We find the argument appealing but believe that as a matter of law it is subject to serious question. While the President's authority under section 205(a) to issue policies and directives concededly is broad, it is not without limits. The section explicitly requires that policies and procedures issued under it must be consistent with other provisions of the Act and they must, of course, have reasonable relationship to effectuating those provisions. While economy and efficiency in procurement are policy goals underlying the Act, Congress in various provisions of the Act specified the guiding principles to govern all Federal procurements. Stated simply, the Act contemplates a competitive procurement system with

full and free competition consistent with the nature of the property or services being procured. Any restriction against competition must be consistent with the authorities for limiting competition specifically enumerated in the Act. Control of wages and prices throughout the economy, laudable as the goal might be, is not specified in the Act as a legitimate justification for restricting competition.

The President's wage and price program as related to Government procurement goes beyond any other non-statutory socio-economic purpose engrafted upon the procurement process. The most notable recent example involves the non-discrimination affirmative action requirements incorporated into Government contracts. In the affirmative action program bidders--all bidders, irrespective of prior or contemporary conduct--are eligible to compete on an equal basis against the requirement that a good faith effort be made during contract performance to meet the hiring goals of an affirmative action plan. Under the wage and price program any company which voluntarily chooses, as it has the full right, not to be in compliance with the guidelines at the time of a competition is barred from eligibility to enter that and future competitions.

To this point I have referred only to directly pertinent statutory language measured against conception of the President's program as being voluntary. On this basis alone we have significant doubt as to the legality of the program. The doubt is intensified when we look behind the statutory language

itself. Two further considerations are pertinent.

The legislative history of the 1949 procurement act shows that Congress specifically considered whether the procurement system should be used as a means of regulating or controlling prices, and made clear its intent in the negative. In responding to objections which had been raised against the authority to prescribe policies and methods of procuring goods and services including related functions such as transportation and traffic management and the management of public utility services, Representative Holifield pointed out that:

> "This whole proceeding seems to me to have been based upon a total--or gross--misconception of the problems involved. The regulatory aspects of the public utility problem are concerned with reasonableness of rates, adequacy of service, safety precautions, and other similar and related matters. It is with these aspects of the problem that the regulatory agencies are concerned, and with which, as their legislative counterparts, the Committees on Interstate and Foreign Commerce are concerned. With that, there can be no quarrel.
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> "In the Federal Property and Administrative Services Act, however, the problem is fundamentally different. In this bill, we are concerned, not with the regulation of utilities, but with their use; not with the reasonableness of rates or the adequacy of service, but with the means by which, under existing rate structures and service schedules, the Government of the United States, as a major consumer of transportation services, can obtain the most efficient service at a minimum cost. This, I maintain, is a problem of management, which has no more relation to the problems of utility regulation than has the purchase of the electric current which lights my home."

In addition to legislative history illuminating limitations on the reach of the procurement act, there is for consideration section 645b of Title 50, United States Code,

Appendix, which provides that:

> "Nothing contained in this Act or any other Federal Act * * * shall be construed to authorize the establishment by any officer or agency of the Government of maximum prices for any commodity or maximum rents for any housing accommodations."

Whatever reach might otherwise be attributed to the President's authority under the procurement statute, the quoted provisions add to the difficulty of construing that reach as embracing the effectuation of control over pricing through the procurement process. The Administration argues that this statute, though still on the books, is no longer operative but we disagree.

We recognize that section 205(a) has been broadly construed by the courts in upholding executive orders which required the inclusion of affirmative action provisions in Government contracts. We believe these cases are distinguishable on a number of grounds. As already noted, the affirmative action requirements did not preclude anyone willing to comply from competing for the Government's business on a contract-by-contract basis. A company's past actions vis-a-vis affirmative action did not make it ineligible to compete under the terms of any solicitation for bids. Under the wage and price program, on the other hand, a company's voluntary and lawful behavior in failing to meet certain standards may well bar it from eligibility to compete for any Government contracts.

Some of the doubts we express regarding the applicability of section 205(a) authority to the wage and price program are indeed pertinent to its application in the affirmative action cases. Yet the courts did not find the affirmative action requirements unauthorized. The courts clearly recognized, however, that the program of executive orders dealing with antidiscrimination and affirmative action was longstanding and involved a recognized and firmly established national policy. And, to the extent there was question as to the President's authority under section 205(a) to implement this policy through Government contracting, other supporting statutes, such as the Civil Rights Act of 1964, helped to fill the gap.

The policy goal of the President's program to control inflation is, of course, important as well. We do not mean to leave any impression that we do not fully share the Administration's concern about the problems of inflation. But, unlike affirmative action, there is no longstanding policy that Executive action in applying mandatory wage and price restraints to Government contracting is a recognized means of achieving the goal of controlling inflation. Moreover, there are no supporting statutes which can be called upon. The history of Presidential authority to control wages and prices is one of tight Congressional limitations, i.e., limited grants of authority to the President for limited periods of time. As previously mentioned, the

legislative history, as well as the plain words, of the statute fundamentally relied upon argues against the Administration's position as does the only other germane statute we could find. Unlike the affirmative action goals engrafted upon the procurement process involving means contemplated by specific statutorily defined objectives, we have here a program utilizing means which are the very antithesis of statutory directives and which have historically required specific Congressional sanction to bring into play.

To sum up, we fully appreciate the seriousness of the issues involved. We share the Administration's perception of the gravity of the inflation problem and the need for effective countermeasures. Moreover, we appreciate that the President's reliance on his section 205(a) power under the 1949 procurement act is entitled to great deference and the most careful consideration. Finally, we recognize that as the President's program is unprecedented, any conclusion we reach as to its legality cannot be free from all doubt. A final determination may ultimately be up to the courts unless the Congress intervenes in the interim.

Nevertheless, we would say that the President is not authorized to implement his program of applying wage and price standards on a mandatory basis to companies involved in Government procurement. It is our opinion that insofar as Executive Order 12092 and implementing regulations thereunder apply a mandatory scheme of wage and price standards

in the Government procurement process, the Order and regulations lack the force and effect of law.

You have also asked that we address the impact of the program on GAO's Bid Protest Procedures and the judicial review process. While it seems likely there will be litigation in the courts, we of course have no way of predicting with any degree of certainty how the courts will respond. It may be that the courts will strike a balance different from the one we arrived at. Whereas we tend to view the necessity for Congressional involvement in structuring any imposed program of wage and price controls as a prerequisite to legal authority, the courts could conceivably measure the broad authority provided in the procurement act against the lack of any entitlement to a Government contract as a matter of legal right.

As far as bid protests are concerned, it should be noted that a protest--which is a legal challenge to the award of a Government contract--is a quasi-judicial administrative proceeding. The outcome of any individual case depends on the particular facts and circumstances involved. However, unless the Congress or the courts in the interim clearly indicate disagreement with our analysis and conclusion, or unless we are persuaded otherwise by legal arguments which have not been presented to us, any protest to our Office would be considered against the background of our position as I have outlined it.

Finally, you have asked for our interpretation of a provision in the implementing procurement regulations which states that any Council on Wage and Price Stability determination concerning noncompliance with the wage and price guidelines is not subject to protest to GAO.

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As I have already indicated, it is our view that the procurement regulations implementing the President's program lack the force and effect of law. Under this view, the provision you question is, of course, of no consequence. Apart from this view, that is, should the program ultimately be determined legally authorized, we would not feel bound by the questioned language to the extent of avoiding issues which we would otherwise deem it appropriate to consider. For example, we ordinarily would not, in any event, go behind a Council determination of noncompliance in light of the statutory functions which the Council serves. On the other hand, that does not mean we would refrain from considering Council determinations from the standpoint of abuse of discretion or failure to provide required due process. The language you refer to in your question would not alter our approach, nor would there be any legal justification for insisting that we are totally removed from considering any Council action.

That concludes my statement, Mr. Chairman.