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

B-96983

September 5, 1979

The Honorable William Proxmire
Chairman, Committee on Banking,
Housing, and Urban Affairs
United States Senate

make available to public reading

Dear Mr. Chairman:

[Comments on]

You have requested further comments concerning the impact of the waiver of procurement laws provided for in subsection 305(c) of S. 932 (96th Congress). This subsection provides that, with certain specified exceptions, purchases, commitments to purchase and resales under section 305 of the Act "may be made without regard to the limitations of existing law, regarding the procurement of goods or services by the Federal Government * * *."

As we advised you previously, the debate in the House indicates there is no intention to waive laws relating to labor protection, small business set-asides, the environment, this Office's audit authority, and the prohibition against cost-plus-a-percentage-of-cost contracts. See 125 Cong. Rec. H5136 (daily ed., June 26, 1979). However, as our August 1, 1979 letter indicated, the language of the waiver is so broad that it can be interpreted as applying to the laws mentioned above as well as to the Federal Property and Administrative Services Act, 41 U.S.C. §§ 251-260, and the Armed Services Procurement Act, 10 U.S.C. §§ 2301-2314.

Such broad waiver language has been used before. For example, language similar to that in subsection 305(c) already appears in several sections of Title III of the Defense Production Act of 1950, as amended, 50 U.S.C. App. §§ 2091-2094. In 50 U.S.C. App. § 2091(a), the President is authorized "without regard to provisions of law relating to the making, performance, amendment, or modification of contracts" to guarantee public or private financing institutions against loss of principal or interest on any loan, discount or advance on any related commitment. Subject to certain exceptions, section 2092 authorizes the President to make provision for loans to private

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business enterprises for the development of technological processes or the production of essential materials "without regard to the limitations of existing law and on such terms and conditions as the President deems necessary * * *." Also subject to certain limitations, subsection 2093(b) authorizes the President to make provision for the purchase of metals, minerals and other materials for Government use or resale "without regard to the limitations of existing law, for such quantities, and on such terms and conditions, including advance payments and for such periods * * * as the President deems necessary." Although this broad authority vested in the President by these provisions has existed for years, it appears to have been used sparingly. We recognize that two of the three exceptions pertain to loans, however, procurements which could have been excepted under subsection 2093(b) have been conducted generally within the limitations of existing laws and regulations.

We appreciate the President's desire to implement the urgent synthetic fuel program. However, the existing procurement laws and regulations provide a well-established and understood framework within which agencies have found the flexibility and authority to complete many urgent, highly technical and massive programs. Accordingly, you may wish to consider waiving specific statutes which are thought likely to impede the program, rather than all existing laws relating to procurement.

The limitations contained in the procurement laws have been imposed to prevent recurrence of known abuses, to maintain Congressional control and to promote accountability and efficiency as well as certain socio-economic goals. We believe these purposes are equally applicable to the synthetic fuel program.

The following are examples of statutes pertaining to procurement which would be waived by section 305:

1. 10 U.S.C. §§ 2301-2314 (Armed Services Procurement Act, as amended) and 41 U.S.C. §§ 251-260 (Federal Property and Administrative Services Act, as amended). Within these statutes are the following provisions which we believe to be essential to efficient procurement:

- (a) 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) provide authority for GAO to audit negotiated contracts. The waiver of this

most important provision would prevent our Office from finding out and reporting to Congress on whether the Government's interests are being properly protected in the award and administration of negotiated contracts in connection with the synthetic fuel program.

- (b) 10 U.S.C. § 2306(a) and 41 U.S.C. § 254(b) prohibit contracting on a cost-plus-a-percentage-of-cost basis.
- (c) 10 U.S.C. § 2313(a) and 41 U.S.C. § 254(b) provide authority for procuring agencies to audit any cost or cost-plus-a-fixed fee contract and the subcontracts made thereunder.
- (d) 10 U.S.C. § 2306(f) provides military agencies with statutory authority to audit cost and pricing data submitted by contractors and subcontractors.

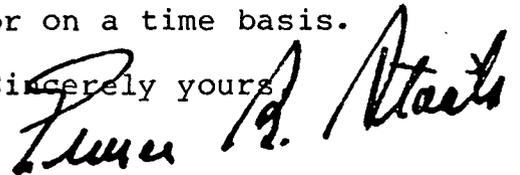
2. 50 U.S.C. App. § 2168, which created the Cost Accounting Standards Board to promulgate Cost Accounting Standards (CAS) designed to achieve uniformity and consistency in cost accounting principles followed by defense contractors and subcontractors under Federal contracts.
3. 31 U.S.C. § 665, 31 U.S.C. § 712 and 41 U.S.C. § 11 (Anti-Deficiency Act) prohibit agencies from assuming obligations requiring expenditures of funds from future appropriations. It appears that subsection 717(a) of the Act (50 U.S.C. App. § 2166(a)) will fulfill at least part of the functions of the Anti-Deficiency Act. See 125 Cong. Rec. H5152, supra.

4. 41 U.S.C. §§ 51-54 (Anti-Kickback Act) prohibit payments of kickbacks or gratuities by subcontractors to induce a prime contractor with a negotiated prime contract to award a subcontract.
5. 41 U.S.C. § 15 and 31 U.S.C. § 203 (Assignment of Claims Act of 1940) prohibit transfer or assignment of Government contracts.
6. 2 U.S.C. § 441(c) prohibits Government contractors from making political contributions any part of which are from funds appropriated by Congress.
7. 41 U.S.C. § 22 and 18 U.S.C. § 431 prohibit members of Congress from participating in Government contracts.
8. 41 U.S.C. §§ 321, 322 (Wunderlich Act) provide standards for judicial review of administrative decisions in disputes arising under contracts and prohibits Government contracts from containing a provision making final any administrative decision on a question of law.
9. Contract Disputes Act of 1978, Public Law 95-563, November 1, 1978 provides for the resolution of claims and disputes relating to Government contracts.
10. 41 U.S.C. §§ 10a-10d (Buy American Act) imposes restrictions on procurement of foreign supplies and construction materials.
11. 37 U.S.C. § 801(c) prohibits for a three year period after retirement the payment of appropriated funds to any retired regular officer engaged in contracting activities with certain agencies.

12. 10 U.S.C. § 2306(b) and 41 U.S.C. § 254(a) prohibit retention on contingent fee basis of sales personnel except for bona fide employees, in connection with negotiated contracts.
13. 10 U.S.C. § 2207 provides for termination of defense contracts where gratuities were offered to Government employee to secure contract.
14. 10 U.S.C. § 2305(d) and 41 U.S.C. § 252(d) require agencies to refer advertised bids which evidence anti-trust violations to the Attorney General.
15. 15 U.S.C. §§ 631-647, as amended by Public Laws 95-89 and 95-507 (the Small Business Act), provide for a fair share of Government procurement to be placed with small business concerns and that priority be given to the award of contracts and placement of subcontracts to concerns which will perform a substantial portion of the work within a labor surplus area or an area of concentrated unemployment.
16. 41 U.S.C. §§ 35-45 (Walsh-Healey Public Contracts Act) require that a Government contractor be a manufacturer of or a regular dealer in the supplies purchased, pay prevailing minimum wages, abide by maximum daily or weekly hour requirements, and provide safe and sanitary working conditions.
17. 41 U.S.C. §§ 351-358 (Service Contract Act of 1965) require service contractors to pay wages and fringe benefits not less than those prevailing in the area.

18. 42. U.S.C. § 1857h-4 (Clean Air Act) prohibits any agency from contracting with any person convicted of violating the requirements of the Clean Air Act.
19. 41 U.S.C. § 5 requires, unless otherwise provided by law, that Government contracts exceeding \$10,000 for supplies or services be made only after advertising a sufficient time for proposals except when public exigencies require immediate delivery, when only one source of supply is available or when the services required must be performed in person by the contractor and are of a technical and professional nature or under Government supervision and paid for on a time basis.

Sincerely yours



Comptroller General
of the United States