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

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B-183079

March 19, 1979

The Honorable Abraham Ribicoff
Chairman, Committee on
Governmental Affairs
United States Senate

Dear Mr. Chairman:

By letter dated January 19, 1979, you requested our views on S.5, 96th Congress, a bill to provide policies, methods and criteria for the acquisition of property and services by executive agencies.

This bill is directly related to two prior bills, S.3005 introduced during the 94th Congress and S.1264 introduced during the 95th Congress. The purpose of this bill, like those introduced before, is to repeal the two basic laws governing Federal purchasing and replace them with a single modern statute which is designed to stimulate competition and encourage innovation.

Title

Our initial comments are directed toward Title VII and section 306 which concern the operations of this Office.

Title VII - Protests

This title confers statutory recognition on our bid protest activity. For over 50 years, we have in fact acted as an impartial arbiter of contract award disputes, and during that period our actions have been recognized by the Congress and the courts as well as the procurement community, which has come to rely upon the Comptroller General's bid protest decisions as a body of administrative law governing the procurement process. We believe that statutory recognition of our Office as the bid protest resolving forum would serve the public interest.

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letter

Title VII proposes procedures which are similar to those presently used by our Office. However, there are some areas where the proposed title should be changed. Our specific comments follow.

Section 701 makes plain that GAO's bid protest jurisdiction is to rest solely on the account settlement authority contained in the Budget and Accounting Act of 1921. The use of appropriated funds does not automatically indicate that the expenditure is subject to our account settlement authority. There are certain Government programs and operations which utilize appropriated funds but over which we do not have settlement authority. Therefore, we believe the phrase "to be financed by appropriated funds" should be removed from the definition of the term "protest" contained in section 701.

We also recommend that the United States Postal Service (Service) and Government corporations as defined by 31 U.S.C. 846 be excluded from the list of agencies in section 701 whose protests are to be considered by GAO. Since we do not have settlement authority over the accounts of the Service we do not presently consider protests concerning their procurements. We do not consider protests concerning procurements by the Government corporations because of their broad authority in determining their expenditures and obligations.

The definition of interested party in section 702(a) should be omitted. That definition substantially restricts the concept of interested party as developed under our current procedures and decisions and could be confusing with respect to subcontracts.

First, we have not limited an "interested party" to one whose direct economic interest is that of a contractor. For example, we believe that organizations such as labor unions, contractor associations, and Chambers of Commerce, as well as civic organizations, whose membership's economic interests could be affected by the award of a contract, should be permitted to file a protest, as frequently they can present their position

more effectively than could single parties. There may also be circumstances where it would be appropriate to regard other individuals or firms as interested parties even though they would not have the direct economic interest of a contractor.

Second, the reference to subcontractor does not distinguish between a would-be subcontractor's protest of a prime contract award and an award of a subcontract. We have recognized circumstances where a potential subcontractor is an interested party for purposes of protesting the award or solicitation leading to the award of a prime contract. However, subcontractor protests of awards by prime contractors are not normally considered because in most instances the subcontractors are not contractually related to the Government and the practices and procedures followed by a contractor in awarding subcontracts are generally not subject to the statutes and regulations governing Federal procurement. As presently worded, section 702(a) could be read as expanding our current view of subcontractors as interested parties by permitting protests by potential subcontractors in all cases involving prime contract awards and perhaps in all cases involving subcontract awards. It could also be read as applying only to the award of prime contracts, thereby eliminating those situations (e.g., where the prime contractor acts as the Government's purchasing agent or where the selection of a subcontractor results from the Government's direct involvement in the subcontractor selection process) in which we do entertain protests of subcontract awards.

In short, we believe there should not be a precise statutory definition of interested party and that the concept of interested party should continue to be developed on a case by case basis. We suggest that the last sentence in section 702(a) be omitted and the first sentence be changed to read "In accordance with the procedures issued pursuant to section 704, the Comptroller General shall have authority to decide any protest either submitted by an interested party as defined by the Comptroller General or referred by any agency or Federal instrumentality."

The word "General" should be added after "Comptroller" in the penultimate line of section 702(b) so that it reads "that the Comptroller General is advised."

Section 705 provides for judicial review of actions by an agency or the Comptroller General to the extent provided by 5 U.S.C. 702-706. We strongly recommend that the reference to the Comptroller General be omitted and that the section be removed from Title VII and established as a separate title.

The real parties in interest in a contract award dispute are the protester and the agency, not this Office, and what should be appealable to the courts is not a GAO decision but the action taken by the agency. Where a GAO ruling is involved, that ruling is properly part of the record and as such is subject to judicial review as part of the overall basis for judging the agency's action.

By letter dated January 26, 1978, Senator Chiles requested that our comments include a reference to protests involving classified material. Our Bid Protest Procedures provide that interested parties will be supplied information bearing on the substance of a protest except to the extent that withholding of information is permitted or required by law or regulation. In such cases where classified information may not be distributed our agency will conduct an independent review of classified materials along with the rest of the record including interested parties comments on the unclassified material and rule on the protest. We see no need to alter this procedure.

We believe that Title VII is most significant in that it provides specific congressional recognition to the role of the Comptroller General in the bid protest area and recommended its enactment with our proposed modifications.

Section 306 - Access To Records By Executive Agencies And The Comptroller General

This section includes a provision at 306(c)(1) which states that an agency must obtain the Comptroller General's (Comptroller) concurrence with an agency's waiver of the Comptroller's access to a foreign contractor's records except where that contractor is a foreign government or precluded by its laws from making its records available, or the agency head determines that waiver is in the public interest. Presently both 10 U.S.C. 2313(c) and 41 U.S.C. 254(c) provide for waiver without the Comptroller's concurrence if the contractor is a foreign government or precluded by its laws from making its books available and the agency head determines that the public interest would be served by the waiver. Both S.3005 and S.1264 also contained the waiver provisions as set forth in 10 U.S.C. 2313(c) and 41 U.S.C. 254(c).

We believe the Comptroller's concurrence should be required for all waivers except where the conditions described in 306(c)(1)(A) are present and the proper determination under 306(c)(1)(B) is made. Foreign contracts are frequently noncompetitive and higher priced than contracts with domestic suppliers. Some agencies have exhibited a willingness to delegate their audit responsibilities to foreign government audit agencies; that willingness, when combined with the proposed expanded right to waive the Comptroller's access authority, would eliminate any assurance that prices are fair and reasonable.

We strongly recommend that the word "or" be omitted from the last sentence in section 306(c)(1)(A) and the word "and" substituted. This change would return the waiver provisions to their present form in 10 U.S.C. 2313(c) and 41 U.S.C. 254(c).

Section 303 - Evaluations, Award, And Notifications

Section 303(a) provides for written or oral discussions with all offerors who submit proposals within a competitive range. We note that the present section omits the limiting sentence contained in

section 303(a) in S.1264 which stated: "Such discussions shall generally be limited to obtaining any needed clarification, substantiation or extension of offers." We are in favor of the expanded scope of discussion envisioned by the current form of section 303(a).

Section 304 - Noncompetitive Exceptions

Section 304(a)(2)(B) provides that notice of intent to award a contract pursuant to an unsolicited proposal should be publicized prior to award according to section 512. Section 512 provides that notice be published immediately after the necessity for acquisition is established. In order to encourage competition more stringent and specific notice requirements should be required. For that reason, and to make section 304(a) more clear, we suggest that subparagraph 304(a)(2)(B) be deleted and that the first sentence of subparagraph 304(a)(2)(A) be revised as follows:

> "(2)(A) that notice of intent to contract shall be publicized pursuant to section 512 at least thirty days in advance of solicitation of a proposal from the prospective contractor; or, at least thirty days in advance of the proposed award date when (i) earlier notice is impracticable or (ii) a contract is to result from the acceptance of an unsolicited proposal."

This change is desirable as it should increase competition which may result in more novel, superior, economical approaches. In addition, there is some danger that sole-source contracts which are awarded pursuant to "unsolicited proposals" may be the result of informal communication of agency needs to a favored contractor. Our report entitled "Competition for Negotiated Procurement Can and Should Be Improved" dated September 15, 1977, PSAD-77-152, contains examples where this occurred.

Section 305 - Price And Cost Data and Analysis

Under section 305(b)(3) and 305(d) price or cost data is not required for any contract if there was a recent comparable competitive acquisition. The value of pricing of a comparable competitive acquisition as an indicator of price reasonableness diminishes rapidly over time. We believe there is a need for strict time limits, e.g. 90 days or less after the comparable competitive acquisition. Also, reliance should be

limited to comparable price competitive acquisitions to prevent those acquisitions where price was not a significant factor in the award from being used to justify a subsequent award without submission of cost or price data. Accordingly, we suggest that the following subsection be added to section 305(b)(3).

> "(a) Recent comparable competitive acquisitions are limited to those acquisitions made no more than 90 days prior to the date of submission of the contractor's data and to acquisitions where price or cost was a significant factor in the award."

Section 504 - Multiyear Contracts

This section provides that agencies can make contracts for periods of not more than 5 years, except for longer periods upon certification by the agency head. There is no prohibition against the noncompetitive award of multiyear contracts. We believe the section should include such a prohibition as the objective of awarding multiyear contracts should be to stimulate competition while sole source multiyear contracting would foreclose other contractors from competing for such procurements for several years. We suggest that section 504(c) be redesignated section 504(d) and a new section 504(c) added which states "Multiyear contracts shall only be awarded on a competitive basis."

Section 505 - Advance, Partial And Progress Payments

Section 505(c) provides that advance, progress, and partial payments shall not exceed the unpaid contract price. To protect the Government's interest, there should be a further limitation on progress payments. They should not exceed costs incurred by the contractor. Section 505(c) should include an additional sentence which reads "Progress payments shall not exceed costs incurred by the contractor at anytime during the life of the contract."

We also wish to point out that the definition of "incurred costs" currently found in Defense Acquisition Regulation (DAR) appendix E-509.5 (1976 ed.) is especially important since it does not permit a prime contractor to collect progress payments for money owed subcontractors that have not been paid or approved for current payment. It should be retained in the implementation of section 505.

Section 509 - Government Surveillance Requirements

Section 509(c)(3) provides for agency waiver of the provisions of the Cost Accounting Standards Act if the criteria specified in sections 509(a) and (b) are met. This provision is of concern to the Cost Accounting Standards Board and was the subject of a letter from the Board to Senator Chiles dated February 16, 1979.

Section 902 - Repeals

This section provides for the repeal of 10 U.S.C. 2306(d) and 41 U.S.C. 254(b) which, among other things, set forth a six percent fee limitation on contracts for architectural and engineering (A-E) services for the military and civilian branches respectively. 10 U.S.C. 4540, 7212 and 9540 which place a six percent fee limit for A-E work for the Army, Navy and Air Force are not repealed. If it is intended that the six percent fee limitation be repealed, the fee limitation should be repealed for all military departments.

Since S.5 does not apply to acquisitions by the General Accounting Office it will have no impact from an economic, privacy or paperwork standpoint on individuals and businesses concerned with acquisitions by our Office. Title VII of S.5 does concern our bid protest function. Since Title VII substantially follows our present Bid Protest Procedures it will have a minimal impact from a paperwork, economic or privacy aspect on individuals and businesses taking advantage of our bid protest forum.

We support the enactment of S.5 with the inclusion of our proposed changes. We appreciate the opportunity to comment on S.5 and we would be glad to provide any additional comment or information you may wish in connection with this matter.

Sincerely yours,

R.F. Keller,

Deputy Comptroller General
of the United States