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

B-208159.9

May 19, 1986

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental
Affairs
United States Senate

Dear Mr. Chairman:

This is in response to your request dated April 25, 1986, for our comments on S. 2030, a bill which would vest authority in the General Services Administration (GSA) Board of Contract Appeals to decide any bid protests. We have serious reservations about the bill.

The Board currently has jurisdiction over bid protests concerning automatic data processing (ADP) procurements subject to the Brooks Act, 40 U.S.C. § 759 (1982). The Board's jurisdiction in the ADP bid protest area was recently conferred by section 2713(a) of the Competition in Contracting Act of 1984 (CICA), 40 U.S.C.A. § 759(h) (West Supp. 1985). Under S. 2030, the Board's authority would be extended beyond the ADP field to bid protests involving any decision by a contracting officer alleged to violate a statute, regulation or other provision of law. The scope of the Board's jurisdiction thus would become coextensive with our Office's authority to decide bid protests, which, prior to the recent grant of specific authority in CICA, 31 U.S.C.A. §§ 3551 et seq. (West Supp. 1985), had been exercised for more than 60 years.

In our view, it is too soon to consider expanding the jurisdiction of the GSA Board. Both the Board's and our jurisdiction under CICA took effect on January 15, 1985, a little more than 1 year ago. In vesting the Board with jurisdiction over ADP bid protests, Congress, in section 2713(a) of CICA, 98 Stat. 1175, 1184, has already provided that the Board's jurisdiction will expire on January 15, 1988. S. 2030 would abbreviate the trial period in favor of an immediate expansion of the Board's jurisdiction. We believe that a longer trial period would permit a fuller review of the Board's performance while still leaving sufficient time for Congress to act before the Board's jurisdiction under CICA expires. A 2-year trial period,

for example, would be a better gauge of the Board's performance record. Allowing the Board to function for at least 1 more year before Congress considers whether to continue or expand its jurisdiction would yield a more accurate picture of the Board's performance based on a greater number of cases filed and decided by the Board and reviewed by the Court of Appeals.

The bill's sponsor has suggested that GAO has not done an effective job because it is hindered by inadequate procedures, unclear authority and an apparent lack of independence. The result, the sponsor concludes, has been a poor track record where the protester loses his case almost all of the time. We do not think that this is a fair description of our record. As discussed below, we have continued to be an objective and accessible bid protest forum of significant value to the procurement system.

Initially, we note that under CICA we have sustained approximately 15.5 percent of the cases we decided on the merits.1/ This figure does not include those cases withdrawn by the protester or otherwise closed without a decision on the merits as a result of corrective action voluntarily taken by the contracting agency. Of those cases where the reason for withdrawal was known, 81 percent were withdrawn due to corrective agency action. We believe these figures bear repeating here in order to ensure that the record accurately reflects our statistics.

1/ The Board has taken the position that it will sustain a protest where a technical violation is shown, even though the protester has failed to show that it is entitled to remedial relief. See, e.g., Sperry Corp., et al., GSBCA No. 8208-P, et al., Jan. 23, 1986. Our practice is to deny such protests, since in our view a protest should be considered sustained only when the protester is entitled to relief. Ashland Chemical Co., B-216954, May 16, 1985, 85-1 CPD ¶ 555. As a result of this difference in approach, it is difficult to make a valid comparison solely on the basis of the number of cases sustained by GAO and the Board.

The bill's sponsor also suggests that the absence at GAO of various fact-finding procedures (discovery, formal hearings) available at the Board affects the number of cases we sustain. We note, however, that the courts do not appear to be sustaining protest cases at a rate equivalent to the Board's, even though their fact-finding processes are similar. For example, of 88 preaward bid protest cases filed with the Claims Court in fiscal years 1984 and 1985, the court granted some form of injunctive relief in only eight cases.

In any event, we reject the idea that our record should be evaluated on the basis of the number of protests we sustain. Our purpose is to decide protests correctly, not to sustain or to deny protests. Moreover, we fill a unique role by offering speedy resolution of protests without the need for protesters to obtain the extensive legal assistance generally required by the more formal procedures at the Board and the courts. The procurement community's continuing confidence in, and reliance on, GAO is demonstrated by the sheer volume of protests filed with GAO. During only the first 16 months after the bid protest provisions of CICA took effect, more than 3,300 protests were filed with GAO. In the ADP area, about as many protests (approximately 120 as of January 1986) have been filed with GAO as with the Board since the Board assumed bid protest jurisdiction in the ADP field.

We also reject the sponsor's assertion that our protest forum has been hindered by undue deference to the contracting agency's version of the facts. We do not assume that all agency presentations of fact are correct and incontestable by the protester. On the contrary, where there is a conflict between the protester's and the agency's versions of the facts, we will accept the protester's version if the evidence in the record supports the protester's assertions over the agency's. See Automated Datatron, Inc., et al., B-215399 et al., Dec. 26, 1984, 84-2 CPD ¶ 700 (GAO accepts protester's assertion that it filmed documents in the order received from agency and was not responsible for documents being out of order since evidence presented by protester outweighed agency's conflicting version of the facts).

There does appear to be a difference between our Office and the Board with regard to the standard of review used to

decide protests. As discussed further below, our review is limited to determining if agency officials have violated the law through the arbitrary or capricious exercise of their discretion. This standard of review reflects our belief that the agency officials' actions should not be disturbed simply because we might disagree with their judgments.

Specifically, when issues involving the exercise of discretion by the contracting agency are raised, we review the agency action to determine whether it lacks a reasonable basis and therefore can be regarded as arbitrary and capricious. Wickman Spacecraft & Propulsion Co., B-219675, Dec. 20, 1985, 85-2 CPD ¶ 690. The same standard is used by the Claims Court and the Federal District Courts in reviewing lawsuits which are the equivalent of bid protests before GAO, brought by disappointed bidders or offerors seeking declaratory and injunctive relief against an agency's contracting decisions. See Drexel Heritage Furnishings, Inc. v. United States, 7 Cl. Ct. 134, 142 (1984); Princeton Combustion Research Laboratories, Inc. v. McCarthy, 674 F.2d 1016, 1021-1022 (3d Cir. 1982); M. Steinthal and Co. v. Seamans, 455 F.2d 1289, 1300-1302 (D.C. Cir. 1971).

In defining its protest jurisdiction to review discretionary agency determinations, the Board states that its standard of review is different from that applied by our Office and the courts under the Administrative Procedure Act. The Board points to the provision in CICA (40 U.S.C.A. § 759(h)(1)) which specifies that the Board's review of ADP protests is to be conducted under the standard applicable to review of contracting officer decisions by boards of contract appeals. In the Board's view, CICA "envisioned [for the Board] a unique and innovative method of handling protests modeled after established board procedures for handling contract disputes," rather than the "conventional standards previously applied in other forums to protests." The Board states that it will conduct a "de novo review" of the contracting officer's decision. Lanier Business Products, Inc., GSBCA No. 7702-P, Apr. 2, 1985; Systems Automation Corp., GSBCA No. 8204-P, Dec. 17, 1985. The bill (S. 2030) adopts the Board's current standard, specifying that the Board will "review de novo any decision by a contracting officer alleged to violate a statute, regulation or other provision of law."

We are unable to judge the extent to which the Board's de novo standard of review has made a difference in the outcome of the protests it has decided. Suffice it to say, the standard we and the courts use in deciding bid protests recognizes that the contracting agency, not GAO or any other reviewing body, is responsible for its procurement actions. Our function properly is limited to determining if agency officials have violated the law. It is not, nor should it be, our function to substitute our preference in matters of judgment for the agency's, so long as the agency does not abuse its discretion.

If, however, Congress decides to establish a board as an alternative protest forum under this bill, we question whether it is appropriate to centralize all authority in GSA's Board. The Board's experience to date has been limited to ADP-related bid protests, a field in which GSA itself has the principal contracting responsibility. Outside the ADP field, the most significant number of bid protests--in terms of dollar amounts, technical complexity, and impact on the government's critical needs--involve military and other highly technical procurements. In our view, it is more appropriate to vest binding decisionmaking authority for these procurements in the individual contracting agency boards, which have experience resolving legal disputes arising under such contracts.

In addition to our general comments, we also question the "interested party" definition stated in the bill (31 U.S.C. § 3561(2)). As currently worded, CICA excludes all but actual or prospective offerors from the definition. The bill, however, would extend the right to protest, and with it the ability to hold up contract awards, not only to actual or prospective bidders, but also to subcontractors, suppliers or other parties whose economic interest would be affected, directly or indirectly, by the award or failure to award the contract. Thus, an employee of a company whose offer was not accepted might be able to protest under this definition. While we would favor language that would permit a protest forum, including GAO, to consider restrictive specification protests from potential suppliers, we think the bill's definition of interested party is far too broad.

Sincerely yours,

Charles A. Bowsher

Comptroller General
of the United States