



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20408

B-221101

December 26, 1985

The Honorable Parren J. Mitchell
Chairman, Committee on Small Business
House of Representatives

Dear Mr. Chairman:

We have reviewed H.R. 3482, a bill to amend the Small Business Act, and request that you consider our comments on the bill, presented in detail below. Our comments focus on section 6 of the bill, which amends section 8(a)(3) of the Small Business Act. The proposed amendment provides that any small business selected by the Small Business Administration (SBA) to perform a contract shall, when practicable, participate in negotiating its terms and conditions. The cost of any resulting contract is not to exceed the estimated "current fair market price" of the work to be performed, based on reasonable costs under normal competitive conditions.

The proposed amendment sets forth a number of factors that the agency offering a requirement to the SBA may use to estimate current fair market price; these vary according to whether the requirement is new or has a satisfactory procurement history.

Section (3)(D), with which we are particularly concerned, entitles the small business to request a written statement describing the method used to estimate current fair market price and permits it to protest to the Comptroller General if it believes that this method violates the statute. The Comptroller General must consider the protest and issue a final decision, ordering appropriate remedies, within 10 working days of receipt of the protest. Finally, under the proposed amendment, the agency that is the subject of the protest must consider the Comptroller General's decision conclusive and undertake any remedies specified in it.

Unlike in our bid protest function where our role is to determine whether specific procurement statutes or regulations have been violated, protests challenging the method of determining current fair market price involve highly discretionary business judgments. A contracting agency's method of determining what a contract should cost therefore could not be overturned unless it was clearly without a reasonable basis. Since it is quite difficult for a protester to be able to show that there was no reasonable basis for a discretionary business judgment, we question whether it would be worth the effort for a small business to challenge an agency's method of determining the current fair market price before our Office.

Therefore, we think that the SBA is the most appropriate agency to resolve complaints by small businesses concerning the method used to determine current fair market price. We believe legislation authorizing it to do so would be consistent with its role as the guardian of small business interests in executive branch procurements and with its other responsibilities under the Small Business Act. SBA, of course, has experience in determining fair market price in connection with its negotiation of contracts under the section 8(a) program and its utilization of business development expense funds.

If, however, we are to consider these protests, we do not believe that a 10 working-day period for deciding a complaint of this nature is feasible. Under the recently-enacted Competition in Contracting Act of 1984, 31 U.S.C.A. §§ 3551-3556, our Office is required to decide bid protests within 90 working days of receipt, which we do after considering the contracting agency's report and the protester's response. In our view, protests challenging current fair market price determinations should be subject to a similar schedule and procedures. In the interest of fairness, we believe that the contracting agency should be allowed to present its position with an opportunity for the protester to respond, followed by a reasonable period of time for the decision-making agency to issue its decision. Clearly, this is a process that cannot be completed within 10 working days.

I hope these comments will be useful to you. We will be happy to answer any further questions you may have.

Sincerely yours,

Milton F. Sosler
for Comptroller General
of the United States