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LAW OFFICE  
THE ARCHITECT-ENGINEER



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**REPORT TO  
THE CONGRESS OF THE UNITED STATES**

**GOVERNMENT-WIDE REVIEW OF THE ADMINISTRATION  
OF CERTAIN STATUTORY AND REGULATORY REQUIREMENTS  
RELATING TO ARCHITECT-ENGINEER FEES**



**BY  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

APRIL 1967

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RELATING TO ARCHITECT-ENGINEER FEES

INTRODUCTION

The General Accounting Office (GAO) has made a review of the interpretations and applications by Federal agencies of the statutory 6-percent fee limitations on architect-engineer (A-E) fees under Government contracts and of certain related statutory and regulatory requirements. We also examined into the methods used by agencies to determine and negotiate A-E fees.

Our review was made in response to a request in the conference report (H. Rept. 1748, 89th Cong., 2d sess.) on the fiscal year 1967 authorization for the National Aeronautics and Space Administration (NASA) that GAO undertake on a Government-wide basis a comprehensive analysis of the interpretations and applications of the statutory fee limitation and that GAO submit to the Congress a report with conclusions and recommendations for legislative action.

The request followed the issuance of our report to the Congress dated June 16, 1965 (B-152306), entitled "Noncompliance with Statutory Limitation on Amount Allowable for Architectural-Engineering Services for the Design of a Facility at the Nuclear Rocket Development Station, Nevada," wherein we reported that the fee payable under a particular A-E contract executed by NASA exceeded the statutory 6-percent limitation.

Subsequently, NASA recommended to the Congress, in its fiscal year 1967 authorization request, that the National Aeronautics and Space Act of 1958 be amended to authorize NASA to enter into contracts, when determined to be necessary by the Administrator, for

A-E services for highly complex research and development facilities without regard to the statutory 6-percent limitation. The amendment was deleted, and it was determined in the conference on the 1967 fiscal year NASA authorization that any legislative action in this regard should await the results of our review.

Prior to this request for our review, we had initiated a survey of the policies and procedures followed by the major construction agencies in their selection of A-Es and in their negotiation of fees. We believe that the areas of this survey and its results are directly related to the statutory fee limitation; therefore they are also included in this report. Some of the statistical information contained in this report was obtained from the respective agencies without audit by us.

The scope of our review is summarized on page **39**.

## FINDINGS AND RECOMMENDATIONS

### REQUIREMENT THAT A-E FEES NOT EXCEED 6 PERCENT OF ESTIMATED CONSTRUCTION COST

Certain statutes hereinafter discussed limit the compensation that may be paid for **A-E** services to 6 percent of the estimated construction cost.

We found that, in the major construction agencies whose contracts for **A-E** services are subject to the limitation, the compensation under many such contracts exceeded the limitation. (See p. 7.) Generally, agencies have interpreted the limitation as applying only to that portion of the total fee (compensation) relating to the production and delivery of the designs, plans, drawings, and specifications. Under this interpretation, most of the **A-E** contracts under which the total fee paid exceeded 6 percent would be in compliance with the limitation.

On the other hand, the military procurement statute (now codified in chapter 137 of Title 10 U.S.C.) and the Federal Property and Administrative Services Act of 1949, which are the statutes under which most **A-E** contracts are negotiated, impose the 6-percent fee limitation on all **A-E** services furnished. Many of the agencies have advised us that under such circumstances they would be unable, in some instances, to obtain necessary A-E services because the fees demanded for such services would exceed the 6-percent limitation.

For reasons discussed hereafter, we believe that the statutory fee limitation should be repealed.

The details on the above and related matters are presented in the following sections.

Section 304(b) of the Federal Property and Administrative Services Act (41 U.S.C. 254(b)), enacted in 1949, imposes an identical limitation.

Agencies' policies and procedures  
implementing compliance with statutes

Agencies have interpreted the statutory fee limitation as applicable only to that part of the fee which covers the production and delivery of designs, plans, drawings, and specifications. The agencies considered that, if this part of the fee was not more than 6 percent of the estimated construction cost, they were complying with the limitation regardless of the amount of the total fee. None of the agencies had developed a complete list of A-E services which **they** excluded in computing compliance. However, our reviews of selected contracts indicated that the excluded services of the agencies were generally similar to those set out in the policies and procedures of the military departments, which implement the pertinent provision of the Armed Services Procurement Regulation of the Department of Defense.

These policies and procedures provide that the 6-percent limitation does not apply to the cost of field investigations and surveys such as topographical, soil borings, soil, chemical, mechanical, and similar fact-finding surveys; supervision and inspection of construction; master planning; technical operating or maintenance manuals; and similar services not involving the production of designs, plans, drawings, and specifications for specific projects.

Interpretation of the statutes

The 6-percent fee limitation specified in the 1939 statutes (10 U.S.C. 7212, 4540, and 9540) applies only to those A-E services covering the production and delivery of the designs, plans, drawings, and specifications, whereas the 6-percent limitation

### Statutes limiting A-E fees

There are currently five provisions of law which impose a limitation of 6 percent of the estimated construction cost on fees paid to A-Es. This concept of limiting the fee to 6 percent was derived from Public Law 43, approved April 25, 1939, which provided with reference to the Department of the Navy:

"Sec. 3. Whenever deemed by him to be advantageous to the national defense, and providing that in the opinion of the Secretary of the Navy the existing facilities of the Naval Establishment are inadequate, the Secretary of the Navy is hereby authorized to employ, by contract or otherwise, outside architectural or engineering corporations, firms, or individuals for the production and delivery of the designs, plans, drawings, and specifications required for the accomplishment of any naval public works or utilities project or the construction of any naval vessel, aircraft, or part thereof, without reference to the Classification Act of 1923 (42 Stat. 1488), as amended (5 U.S.C., ch. 13), or to section 3709 of the Revised Statutes of the United States (40 U.S.C. 5). In no case shall the fee paid for any service authorized by this section exceed 6 per centum of the estimated cost, as determined by the Secretary of the Navy, of the project to which such fee is applicable." (Underscoring supplied.)

Public Law 309, approved August 7, 1939, similarly authorized the former War Department to procure such services. These statutory provisions are now codified at 10 U.S.C. 4540, 7212, and 9540.

Section 4(b) of the Armed Services Procurement Act of 1947 (subsequently codified at 10 U.S.C. 2306(d)), which was enacted to provide a similar 6-percent limitation on A-E fees, stated, in part:

"(\*\*\*) that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project)."

stipulated in the later statutes (10 U.S.C. 2306(d) and 41 U.S.C. 254(b)) applies to all A-E services. The Department of the Navy is the only agency that currently negotiates contracts under the authority stated in the 1939 statutes. (See pp. 53 and 54.)

**The** agencies informed us that they had relied on decisions of the Comptroller General reported at 21 Comp. Gen. 580 (December 18, 1941) and 22 id. 464 (November 14, 1942) to interpret all the pertinent statutes. In decisions dated December 12 and 19, 1966 (see **apps. I** and **II**), we advised the Secretary of Defense and the Administrator of General Services, respectively, that, in contrast to the 1939 statutes, the provisions of 10 U.S.C. 2306(d) and 41 U.S.C. 254(b) permit no cost exclusions from application of the limitation.

In these decisions it was pointed out as significant that these latter statutes, as distinguished from the 1939 statutes, made **no** reference to the "production and delivery of the designs, plans, drawings, and specifications" but, rather, fixed a maximum fee "**in** contracts for architectural or engineering services" and that our prior decisions, which concerned only the 1939 statutes, were not applicable to contracts subject to the fee limitation provisions of 10 U.S.C. 2306(d) and 41 U.S.C. 254(b).

Fees paid in excess of  
statutory limitation

Data furnished to us by the major construction agencies show **that** for **many** A-E contracts the total fee exceeded 6 percent of the estimated construction cost. The number of such contracts awarded by the major construction agencies between January 1, 1964, and May 31, 1966, and the extent to which the fees exceeded 6 percent are summarized below.

<u>Department or agency</u>	Number of contracts in which the fee exceeded 6 percent of estimated construction cost				
	<u>Total</u>	<u>6.1-10%</u>	<u>11-15%</u>	<u>16-20%</u>	<u>Over 20%</u>
Air Force	260	236	15	6	3
Army	16	16	-	-	-
Navy	421	372	37	4	8
Agriculture	44 <sup>a</sup>	27	12	5	-
Commerce	3	3	-	-	-
Federal Aviation Agency	2 <sup>a</sup>	2	-	-	-
General Services Admin- istration	218 <sup>a</sup>	215	1	2	-
Health, Education, and Welfare	17	17	-	-	-
Interior	19 <sup>a</sup>	14	4	1	-
National Aeronautics and Space Administra- tion	108	87	15	2	4
Treasury (U.S. Coast Guard)	12	11	1	-	-
Veterans Administration	<u>8</u>	<u>8</u>	<u>-</u>	<u>-</u>	<u>-</u>
Total	<u>1,128</u>	<u>1,008</u>	<u>85</u>	<u>20</u>	<u>15</u>

<sup>a</sup>Data for these agencies are based on a sample number of contracts.

The agencies included in the above listing believed that they had complied with applicable 6-percent statutory fee limitations because of certain cost exclusions mentioned heretofore. However,

only those contracts awarded by the Department of the Navy under the 1939 statute comply with the fee limitation.

The number of contracts shown in the above listing do not represent all A-E contracts of these agencies during the period January 1, 1964, to May 31, 1966. Although our review concentrated primarily on contracts in which the fees exceeded the 6-percent limitation, we did ascertain from related data furnished to us by certain agencies--for some agencies data on total A-E contracts were not readily obtainable--that the fees under many contracts during the same period were apparently within the limitation, as indicated in the following summary.

<u>Department or agency</u>	<u>Total number of contracts</u>	Number in excess of 6 percent as shown <del>above</del>	<u>Number within 6 percent</u>
Navy	2,800	421	2,379
General Services Administration (sample)	393	218	175
Health, Education, and Welfare (National Institutes of Health)	18	17	1
National Aeronautics and Space Administration	276	108	168
Treasury (U.S. Coast Guard)	20	12	8

Types of A-E contracts subject to limitation

The Department of Defense has interpreted the fee limitation in 10 U.S.C. 2306(d) as being applicable only to cost-plus-a-fixed-fee A-E contracts and not to fixed-price contracts. Two civilian agencies have similarly interpreted the fee limitation in the Federal Property and Administrative Services Act of 1949. It is our opinion, however, that the fee limitations in both statutes apply to all types of A-E contracts.

The fee limitation provision in 10 U.S.C. 2306(d) refers only to the "fee for performing a cost-plus-a-fixed-fee contract." The decision of December 12, 1966, to the Secretary of Defense, previously noted, stated that the fee limitations of 10 U.S.C. 2306(d) should not be considered as legally restricted to one class of contracting. This conclusion was premised principally on the reasoning that:

1. 10 U.S.C. 2306(d) is a codification of section 4(b) of the Armed Services Procurement Act of 1947 which, in our opinion, applied to all A-E contracts regardless of type.
2. To restrict the limitation to cost-plus-a-fixed-fee contracts could produce absurd results since the limitation could be avoided by contracting on a fixed-price basis.
3. The apparent exclusion of fixed-price contracts from the limitation in 10 U.S.C. 2306(d) resulted from inadvertent error since the codification expressed the legislative intent to restate, without substantive change, existing law.

We advised the Administrator of Veterans Affairs on August 31, 1966, that the legislative history of section 304(b) of the Federal Property and Administrative Services Act of 1949, codified at 41 U.S.C. 254(b), clearly indicates that the Congress intended to extend, as far as possible, the applicable provisions of the Armed Services Procurement Act of 1947 to the civilian agencies of the Government.

### Agencies exempt from limitation

Section 602(d) of the Federal Property and Administrative Services Act of 1949, as amended (numbered in the original act as 502(d)) (40 U.S.C. 474), exempts certain enumerated agencies and programs from compliance with the 6-percent fee limitation contained in 41 U.S.C. 254(b). We have reviewed the statutory exemptions granted under this section to the Department of State, the Atomic Energy Commission, and the Post Office Department.

The Secretary of State, under the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 292, et seq.), is authorized in section 296 thereof "to obtain architectural and other expert technical services as may be necessary and pay therefor the scale of professional fees as established by local authority, law or custom." The Atomic Energy Act of 1946, as amended (42 U.S.C. 2011, et seq.), authorizes the negotiation of A-E contracts. The Postmaster General has been granted authority in 39 U.S.C. 2103(a)(2) to negotiate contracts in connection with the leasing and building acquisition activities of the Post Office Department without regard to the statutory fee limitation.

The intent of the Congress in granting the limited exemptions contained in section 602(d) is Expressed in House Report 670, Eighty-first Congress, first session, on House bill 4754 which became the Federal Property and Administrative Services Act of 1949, as follows:

"It is not intended by these exemptions that those administering the agencies or programs listed shall be free from all obligation to comply with the provisions of the Act or from all jurisdiction of the Administrator. On the contrary, it is expected that they will, as far as practicable, procure, utilize and dispose of property in

accordance with the provisions of the Act. and the regulations issued thereunder, particularly so far as common use items and administrative supplies are concerned. \*\*\* In other words, to the extent that compliance with the Act and submission to the jurisdiction of the Administrator will not so 'impair or affect the authority' of the several agencies to which the subsection applies as to interfere with the operation of their programs, the Act will govern. \*\*\*"

We believe that A-E contracts negotiated by the Department of State and the Atomic Energy Commission should not be regarded as exempt from the statutory fee limitation in all situations. Consistent with the above statement of congressional intent it would be desirable for these agencies to determine whether application of the fee limitation in a particular case would impair or adversely affect the agencies' authority to administer their programs. The Post Office Department, however, is specifically exempted from the fee limitation and, hence, a determination of impairment or adverse effect would not be necessary.

#### Comments of professional societies

During the course of our review, we met with officials of the American Institute of Architects (AIA), the Consulting Engineers Council (CEC), and the National Society of Professional Engineers (NSPE). Subsequently, we received a brief from the AIA on its position regarding the 6-percent statutory limitation and a **joint** brief on the same subject from CEC, NSPE, and the American Society of Civil Engineers. Copies of these briefs are included as appendixes III and IV.

The AIA brief stated that the statutory limitation on A-E fees was no longer serving the best interests of the Government or the architectural and engineering professions and should be repealed. **The brief pointed out that:**

1. The 6-percent limitation was based on a 1939 standard, one that did not apply to today's complex buildings and did not reflect the cost of providing architectural services.
2. Architects were suffering losses on some types of Government **work** because of the limitation and were reluctant to accept future jobs unless fairly compensated.
3. The limitation may force a reduction in design and research effort which in turn may drive building costs higher.

The joint brief pointed out that more than three fourths of all engineering work done in the United States was by contract negotiated without a restriction as to maximum engineering fees and asserted that competent, responsible Federal negotiators who were concerned with economy were the public's best assurance of quality engineering from reputable and capable consulting firms.

The brief further claimed that contracting without the handicap of an unworkable percentage limitation, regardless of the amount of that percentage, would allow the maximum use of engineering talent and resource by the Government to develop superior solutions or facilities, with savings not only in initial cost but in operation and maintenance as well. Accordingly, the engineering profession believes that the existing statutory fee maximums should be repealed.

Agency comments on problems encountered  
in administering the limitation

In addition to the problems incident to cost exclusions, previously discussed, the agencies reported difficulty in varying degrees in determining the estimated construction cost of a project.

**The** statutory fee limitation requires that the agency determine the estimated construction cost of the project at the time of entering into an A-E contract. However, the estimated construction cost is **sometimes** unknown at that time because the agency may **know**

only the requirements for the facility, and information necessary to estimate the construction cost may not be available until after the A-E has done some preliminary work.

In other instances, the A-E may be engaged for engineering studies for the purpose of making recommendations as to the type or extent of construction to be undertaken. The estimated cost of construction work, or whether construction will be undertaken, is not known until after the studies are completed and evaluated by the agency. Even under such circumstances, the agency is required to determine whether the A-E fee complies with the statutory limitation at the time of awarding the contract.

Some agency officials stated that the construction of relatively small projects may present complex design problems calling for proportionately far more A-E effort than that for larger projects. They stated that there was no direct relation between a project's construction cost and its related A-E effort and that there was no satisfactory means of measuring the extent of A-E effort that should be applied to new work. They further pointed out that, historically, engineering design and related work for rehabilitation, repairs, and improvements to structures may run as high as 20 percent of the cost of on-site construction.

Agency officials have advised us that the agencies' ability to obtain A-E services will be seriously affected by discontinuance of the existing practice of excluding certain contract costs from the application of the fee limitation on the basis that such costs do not relate to the production and delivery of plans and specifications and, further, that the agencies will probably be forced in the future to discontinue contracting for at least part of the A-E services whenever a reasonable fee will exceed the 6-percent limitation.

Agency suggestions and our evaluation thereof

Some agency officials suggested that the percentage be increased. Since A-E fees vary from about 3 percent to over 20 percent of estimated construction cost, the present ceiling would have to be increased substantially over the present 6-percent maximum. Moreover, regardless of the percentage selected, the limitation would be ineffective because an agency could perform some of the A-E work with its in-house staff since the present limitation does not consider the scope of services to be rendered.

For example, assuming that the estimated construction cost is the same for two similar structures, each being constructed by a different agency, one agency may engage an A-E to do preliminary engineering work, prepare the plans, and supervise the construction, whereas the other agency may engage an A-E only to prepare the plans but may perform the other services itself. Although the scope of services rendered by the A-Es under their contracts would vary significantly, the fee limitation would apply equally even though a reasonable fee would be substantially different in each instance.

Another suggestion was to authorize the head of each agency or the Administrator of General Services to waive the fee limitation where he determined it to be inequitable and stated in writing his reasons for such determination. Considering the high percentage of contracts wherein the fee exceeded the limitation, the likely frequency of such determination would tend to negate the effectiveness of the fee limitation.

One agency suggested that the fee limitation be repealed. In this regard, it stated that use of a percentage limitation related to construction cost was objectionable from an engineering standpoint. This agency believed that inadequate A-E services induced

by low fees would tend to promote high construction costs. The agency claimed that experience indicated that an adequate investment in engineering investigations and studies preparatory for and during the design stages usually produced the lowest overall project cost.

Another agency suggestion was to amend the statute to make it applicable only to cost-plus-a-fixed-fee contracts, and then it would be applicable only to the fees for work related to the preparation and delivery of plans and specifications. It seems to us that such a narrow application would defeat the purpose of a limitation, because it would exclude fixed-price A-E contracts from application of the limitation.

#### Agency comments

We met with representatives of the Department of Defense (DOD), General Services Administration, National Aeronautics and Space Administration, and Veterans Administration on February 20, 1967, to discuss the findings and conclusions stated in our draft report. They agreed with our recommendation, stated below, to repeal the 6-percent statutory fee limitation.

Thereafter, in a letter dated March 3, 1967 (see app. VI), the Assistant Secretary of Defense (Installations and Logistics) stated that, should the limitation not be repealed, steps could be taken by DOD to ensure that future A-E contracts are negotiated by the Army and the Air Force, as well as the Navy, under authority of the 1939 statutes as codified at 10 U.S.C. 4540, 9540, and 7212, respectively. Since the limitations set forth in the 1939 statutes apply only to the costs involving the preparation and delivery of designs, plans, drawings, and specifications, DOD could continue to exclude all other costs in determining compliance with the fee-limitation statutes. Similar negotiation authority, however, would

not be available to NASA, Coast Guard, or any of the civilian agencies.

In a letter dated April 1, 1967, the Acting Director of the Bureau of the Budget advised us that the Bureau was in favor of repealing the statutory fee limitation.

#### Conclusion

In our opinion, the present statutory fee limitation is impractical and unsound principally because:

1. The limitation is governed by estimated construction costs which do not necessarily relate to the value of the A-E services rendered. (See further discussion at pp. 13 and 35.)
2. Estimated construction costs may not be known at the time the limitation must be applied.
3. Some A-E contracts do not involve programmed construction projects.
4. The limitation may be partially avoided by agencies having their in-house resources perform services that have generally been contracted to A-E firms.
5. A-E fees in terms of percentages of construction cost vary widely and thus render impracticable the establishment of a percentage at an appropriate level to effectively limit the fee for the majority of contracts.

#### Recommendation to the Congress

We recommend that the Congress repeal the 6-percent limitation imposed on A-E fees by 10 U.S.C. 2306(d), 4540, 7212, and 9540 and by section 304(b) of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 254(b)).

We believe that the present statutory requirements for competitive negotiation and the submission and certification of cost or pricing data discussed in the succeeding sections, if properly applied to contracts for A-E services, should provide adequate assurance of reasonable A-E fees.

REQUIREMENTS FOR SUBMISSION OF COST OR PRICING DATA  
BY PROFESSIONAL SERVICES CONTRACTORS

With certain exceptions the military departments are required by 10 U.S.C. 2306(f) to obtain cost or pricing data in negotiating contracts, and most civil agencies are subject to similar requirements included in the Federal Procurement Regulations (FPR).

Military procurement statute

To provide safeguards for the Government against inflated cost estimates in negotiated contracts and subcontracts, section 2306 of Title 10, U.S.C.,<sup>1</sup> was amended by Public Law 87-653 to add a new subsection (f), effective December 1, 1962. Section 2306(f) requires contracting officials to obtain from contractors and subcontractors cost or pricing data in support of cost estimates and a certificate that such data are accurate, complete, and current. Pertinent provisions concerning the applicability of these requirements are:

- "(1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed \$100,000;
- "(2) Prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the head of the agency;
- "(3) Prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed \$100,000; or

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<sup>1</sup>Agencies subject to provisions of 10 U.S.C. 2306(f) are Departments of the Air Force, Army, and Navy; the National Aeronautics and Space Administration; and the Coast Guard.

"(4) Prior to the pricing of any contract change or modification to a subcontract covered by (3) above, for which the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the head of the agency."

The statute also requires that these contracts contain a provision for adjustment of prices where defective data are furnished and for certain exceptions to the above requirements as follows:

"Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent: Provided, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination."

The legislative history of Public Law 87-653 is not indicative of any intent that contracts for professional services are to be exempted from the requirements of the law.

#### Federal Procurement Regulations

Although the Federal Property and Administrative Services Act of 1949 has not been amended to require cost or pricing data, the

second edition of the FPR<sup>1</sup> includes a revision of the regulations relating to the requirements for cost or pricing data similar to those established by Public Law 87-653 and its implementing provisions in the Armed Services Procurement Regulation (ASPR).<sup>2</sup> **How-**ever, the General Services Administration has determined that these revised FPR requirements should not be applied to A-E contracts because of their special unique characteristics even though such contracts are not excluded as such from the requirements of Public Law 87-653 or from the requirements of FPR.

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<sup>1</sup>Applicable to all agencies subject to provisions of the Federal Property and Administrative Services Act of 1949, as amended. The Coast Guard, although not subject to the FPR, has adopted it.

<sup>2</sup>Agencies subject to ASPR are the Departments of the Army, Navy, and Air Force.

Agency policies not in accordance with  
Federal Procurement-Regulations

The following agencies awarded contracts over \$100,000 each during calendar year 1965 for A-E services but, except as noted, did not require the contractors to submit and certify cost or pricing data.

	<u>Contracts over \$100,000 each</u>	
	<u>Number</u>	<u>Amount</u>
General Services Administration	24	\$9,269,981
Atomic Energy Commission	4 <sup>a</sup>	1,142,369
Veterans Administration	4	1,056,000
Department of Health, Education, and Welfare:		
National Institutes of Health	1	225,088
Department of the Interior:		
Bureau of Indian Affairs	1	110,000

<sup>a</sup>Fees determined on the basis of a percentage of estimated construction costs. In other A-E contracts of this agency where fee is determined on the basis of the A-E's estimated cost of services, agency procedures prescribe that A-Es submit and certify cost or pricing data.

Officials of the General Services Administration and the Veterans Administration informed us that they did not consider the cost or pricing provisions of the FPR as applicable to A-E contracts.

The National Institutes of Health has not considered the cost or pricing data requirement in the FPR as being applicable to A-E contracts; however, it receives a signed fee proposal from the A-E with data similar to that required in the FPR but it does not require a certification.

Officials of the Bureau of Indian Affairs stated that the Bureau did not require cost or pricing data because of advice

received from the General Services Administration that the FPR provisions did not apply to A-E contracts.

Agency policies consistent with law or Federal Procurement Regulations

Some agencies require that A-Es submit cost or pricing data for contracts over \$100,000; one agency requires that A-Es submit such data for **all** contracts, regardless of amount. Contracts for A-E services in excess of \$100,000 each, awarded by these agencies during the period indicated, are shown in the following table.

<u>Agency</u>	<u>Number</u>	<u>Amount</u>
Between January 1, 1964, and March 31, 1966:		
Department of the Army	112	\$32,457,338
Department of the Navy	87	17,398,437
Department of the Air Force (note a)	40	15,738,277
National Aeronautics and Space Administration (note b)	17	3,020,478
Treasury Department:		
Coast Guard (note c)	<u>19</u>	<u>1,198,070</u>
Total	<u>275</u>	<u>69,812,600</u>
Between October 1, 1964 (note d), and March 31, 1966:		
Department of the Interior:		
Bureau of Reclamation	5	854,931
Office of Saline Water	16	3,107,720
Atomic Energy Commission (note e)	<u>3</u>	<u>3,382,491</u>
Total	<u>24</u>	<u>7,345,142</u>
Total for both periods	<u>299</u>	<u>\$77,157,742</u>

<sup>a</sup>Includes 10 supplemental agreements totaling \$2,002,000.

<sup>b</sup>Includes contracts through May 31, 1966.

<sup>c</sup>Agency has advised us that it requires cost or pricing data on all A-E contract., regardless of amount.

<sup>d</sup>Effective date of subject provisions of FPR.

<sup>e</sup>Relates to A-E fees determined on the basis of the A-E's estimated cost of services. Includes two subcontracts totaling \$2,882,491.

The Federal Aviation Agency did not let. any A-E conrracts in excess of \$100,000 during the period October 1, 1964, to March 31, 1966; however, it subsequently negotiated a contract in the amount of \$297,000 for which it required the submission and certification of cost or pricing data in accordance with the FPR.

### Agency comments

We met with the representatives of the Department of Defense, General Services Administration, National Aeronautics and Space Administration, and Veterans Administration on February 20, 1967, to discuss the **findings** and **conclusions** stated in our draft report. Representatives of DOD noted that the cost or pricing requirements of the act as implemented by the ASPR were being appropriately applied in the negotiation and award of A-E contracts and that it was feasible to get such data. A representative of the GSA advised that, although the FPR requirements for cost or pricing data were not being applied in the case of A-E contracts, consideration would be given to revising the FPR to provide for such application.

The Bureau of the Budget advised us informally that it believed that cost or pricing data should be obtained for A-E contracts.

### Comments of the professional societies

The American Institute of Architects, the American Institute of Consulting Engineers, the American Society of Civil Engineers, the Consulting Engineers Council, the Engineering Division of the American Road Builders Association, and the National Society of Professional Engineers furnished us their comments on our draft report on February 24, 1967. (See app. V.)

The architectural and engineering societies stated that they subscribed to the philosophy of "truth in negotiation" underlying 10 U.S.C. 2306(f). However, they stated that the report, in recommending the application of section 2306(f) to A-E contracts, did not make certain distinctions which they believed were essential if the provision was to be workable and equitable. The professional societies were concerned that the agencies, when requiring the A-E to

certify the cost or pricing data, would make no distinction between those components of the contract price which were or could be known at the time of contracting and those components which could only be generally estimated. They stated that they would have no difficulty in certifying those A-E costs which were known at the time of contracting.

We believe that the Armed Services Procurement Regulation and the Federal Procurement Regulations recognize that the cost or pricing data subject to certification are limited to that data which are "factual." On October 16, 1964, the Department of Defense issued the following instructions defining cost or pricing data, which were incorporated in ASPR 3-807.3 on January 29, 1965:

"(e) 'Cost or pricing data' as used in this part refers to that portion of the contractor's submission which is factual. The requirement for 'cost or pricing data' subject to certification is satisfied when all facts reasonably available to the contractor up to the time of agreement on price and which might reasonably be expected to affect the price negotiations are accurately disclosed to the contracting officer or his representative. The definition of cost or pricing data embraces more than historical accounting data; it also includes, where applicable, such factors as vendor quotations, nonrecurring costs, changes in production methods and production or procurement volume, unit cost trends such as those associated with labor efficiency, and make-or-buy decisions or any other management decisions which could reasonably be expected to have a significant bearing on costs under the proposed contract. In short, cost or pricing data consist of all facts which can reasonably be expected to contribute to sound estimates of future costs as well as to the validity of costs already incurred. Cost or pricing data, being factual, is that type of information which can be verified. Because the contractor's certificate pertains to 'cost or pricing data', it does not make representations as to the accuracy of the contractor's judgment as to the

estimated **portion** of **future** costs or projections. It does, however, apply to the data upon which the contractor's judgment is based. This distinction between fact and judgment should be clearly understood."

The same provision has also been incorporated in subsection 1-3.807-3 of the Federal Procurement Regulations,

### Conclusion

It is our view that the requirements of Public Law 87-653 and the FPR for the submission and certification of cost or pricing data apply to A-E contracts. Although agencies use various methods for calculating A-E fees (see p. 34), the use of a particular method does not obviate compliance with Public Law 87-653 or the FPR .

The requirement for cost or pricing data is compatible with the position taken by our Office in reports dealing with consultant engineer fees that such fees should be based on the estimated value of these services. We believe that any other method of contract pricing, such as a percentage of estimated construction cost, does not have any necessary relationship to the value of the A-E services and therefore does not afford an adequate means of determining whether or not the fees are reasonable. The fact that some agencies negotiate A-E contracts on the basis of cost or pricing data would indicate that this method is feasible.

In our opinion, the concept of cost which is implicit in Public Law 87-653 and the FPR is sound and should be required of all agencies in contracting for A-E services. Furthermore, we believe **that**, with respect to significant requirements such as those pertaining to cost and pricing data and in the absence of compelling reasons to the contrary, the Government should **follow** uniform requirements in the negotiation of A-E contracts.

In view of the inherent merits of determining A-E fees on the basis of the estimated value of services to be rendered, as described heretofore, and since the ASPR does not provide for exceptions beyond the scope of Public Law 87-653, it is our opinion that appropriate action should be taken by the General Services Administration to ensure compliance with the cost or pricing requirements in the negotiation of A-E contracts. We believe that such action would ensure uniform application of these requirements to A-E procurements generally.

REQUIREMENT THAT PROPOSALS BE SOLICITED  
FROM THE MAXIMUM NUMBER OF QUALIFIED SOURCES

Public Law 87-653 (section 2304(g) of Title 10, U.S.C.) and the Federal Procurement Regulations require, with certain exceptions, that, in all negotiated procurements in excess of \$2,500, **proposals be** solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be rendered and that written or oral discussions be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. However, the agencies subject to this requirement generally solicit a proposal only from the A-E firm selected on the basis of technical ability. In our opinion this negotiation procedure does not comply with the above requirement. (See pp. 55 through 65.)

Agency procedures for selecting A-Es

Each Federal agency generally establishes a selection board to aid in the selection of contractors for A-E services in connection with its construction projects. This board, comprising key personnel within the design and construction units of an agency, usually collects and maintains data on various A-E firms. When A-E services are required, the selection board reviews and evaluates the qualifications of individual firms by considering such factors as **the** special requirements of the job and the firms' capacity to do the proposed work, past record in other Government work, geographical location, and familiarity with the area where the project is to be located. The board usually recommends, in order of preference and without consideration of price, a minimum of three firms considered best qualified to perform the required services.

The agency contacts its first selection to ascertain if that firm is interested in doing the work. If the firm responds

affirmatively, the agency requests the firm to submit its proposed fee terms. The agency also develops its estimate of a fee and compares it with the A-E firm's proposal to determine if the fee is fair and reasonable. If a satisfactory fee cannot be agreed upon, negotiations are terminated and the agency's second choice is invited to enter into negotiations. This procedure is followed until a satisfactory agreement is reached.

Agency comments

We met with representatives of the Department of Defense, General Services Administration, National Aeronautics and Space Administration, and Veterans Administration on February 20, 1967, to discuss the findings and conclusions stated in our draft report. All of these agencies were opposed to the concept of soliciting multiple proposals. They expressed the belief that price would become the determining factor in the final selection because of the lack of other tangible factors to justify selecting a more costly proposal.

The agencies also claimed that, under the present system of negotiating A-E contracts, reasonable fees are assured by their fee-estimating capability and by the fact that the A-E is competing with the Government's estimate. The agencies believed that any change in the present procedures would tend to lower the quality of A-E services.

Thereafter, in a letter dated March 3, 1967 (see app. VI), the Assistant Secretary of Defense (Installations and Logistics) stated that DOD believed that its present A-E selection procedures (ASPR, section XVIII) constituted the maximum competition consistent with the nature and requirements of the services being procured. Therefore, DOD remains of the view that its procedures comply with the

competitive negotiation requirements of Public Law 87-653. **DOD** further believes that the legislative history of Public Law 87-653 fails to provide any basis for denying discretion to DOD to determine that the particular market conditions may compel selection on the basis of technical ability of members of a profession who profess to reject price competition. DOD stated that the enactment of Public Law 87-653 did not change the conditions of the market place and that it was unlikely that the A-Es would now be prepared to offer competitive price proposals. **DOD** stated further that:

"\*\*\* In the event the architect-engineer community should evidence its professional willingness to engage in price competition, the **DOD** is prepared to undertake a re-assessment of its present procedures in the light of the resulting new climate and considering the varying nature of A-E requirements. \*\*\* Until it is demonstrated that the A-E community is prepared to countenance competition on price, the **DOD**, believing that it is complying with P.L. 87-653, would intend to proceed as before. \*\*\*"

In our meetings with representatives of the professional societies, we inquired whether their members would be willing to conduct negotiations with the Government in accordance with the requirements of Public Law 87-653. They advised us that they were not prepared at that time to state their position on this matter,

The standards of the AIA are set forth in the Institute's Standards of Professional Practice which provide, in part, that "An architect shall not enter into competitive bidding against another architect on the basis of compensation." The following provisions of the bylaws of the Institute form the basis for the enforcement of the code.

"Any deviation by a corporate member from any of the Standards of Professional Practice of the Institute or from any of the rules of the Board supplemental thereto, or any action by him that is detrimental to

the best interests of the profession and The Institute shall be deemed to be unprofessional conduct on his part, and ipso facto he shall be subject to discipline by The Institute."

The Coordinating Committee on Relations of Engineers in Private Practice with Government, a joint committee created by five professional engineering organizations of national scope, adopted a guide for the selections of engineers in private practice on September **28**, 1961. With respect to competition, the guide stated in pertinent part:

"No ethical Engineer in Private Practice will submit a bid or quote a price which is to serve as a basis for its selection, because quality--and not price--is the only true measure of the worth of professional services. This holds for Lawyers and Physicians, as well as for Engineers. Selection, influenced by price, leads to the possible employment of an inexperienced Engineer whose services may cause an unwarranted increase in construction cost."

#### Comments of professional societies

Representatives of the American Institute of Architects, the American Institute of Consulting Engineers, the American Society of Civil Engineers, the Consulting Engineers Council, the Engineering Division of the American Road Builders Association and the National Society of Professional Engineers in their comments on our draft report on February 24, 1967 (see app. V), expressed their belief that the legislative history of Public Law 87-653 constituted substantial ground for concluding that the competitive negotiation requirements of the act were not intended to apply to A-E services.

Additionally, they maintained that, even if A-E services were subject to Public Law 87-653, the existing agency procedures were

fully consistent with the spirit and purpose of the statutory requirement that proposals be solicited from the maximum number of qualified sources consistent with the nature and requirements of the services to be procured. Moreover, they advised that, in view of the expertise inherent in contracts for professional A-E services and the individualized character of the services rendered, it would be incompatible with the nature of the services to apply the requirements of the statute in securing A-E services.

They also indicated concern about the administrative burden that would be imposed by the necessity for evaluating many A-E proposals, the pressures upon the agencies to pay attention only to the lowest offer, and the reluctance of outstanding A-E firms to incur the cost of formulating proposals because the chances of being retained would be reduced.

We believe that the nature and requirements of the A-E services to be procured will determine in large measure the number of proposals solicited for a particular procurement. The maximum number of sources solicited may be properly influenced by both the scope and complexity of the contemplated services and the contracting agency's judgment as to the firms qualified to perform these services. Once this determination has been made, proposals can be solicited from all qualified sources.

The professional societies claimed that our draft report erroneously gave the impression that existing agency procedures had been formulated in deference to the ethical requirements of the architectural and engineering professions. They believed that the professional standards and the agency procedures had been derived from the same policy considerations in that both recognized the unique relationship between A-E and client and that an undue

concern for price could only lead to a lessening in the quality of performance, to the serious detriment of the client.

### Conclusion

We recognize that there is some basis for the argument that the language of the statute which requires that competitive negotiations "shall be consistent with the nature and requirements of the supplies or services to be procured" justifies the procedures presently being followed in the negotiation of A-E contracts and that the present methods of negotiating A-E contracts are based on well-established traditional methods of doing business with A-Es.

We find no present statutory basis, however, which would exempt A-E contracts from compliance with the requirements of Public Law 87-653 to solicit proposals from the maximum number of qualified sources, as explained in the preceding section of the report, and to conduct discussions with all responsible offerors whose proposals are within a competitive range, price and other factors considered. Therefore, we are of the opinion that the present negotiation procedures and practices do not conform with these requirements.

We believe that compliance with the requirements of Public Law 87-653 could be accomplished under procedures which might be likened, in a limited sense, to the current two-step procedures prescribed in ASPR 2-501, et seq. Such procedures could provide for the submission of unpriced technical or design-competition proposals by qualified professional firms. Thereafter, those responding firms which, in the opinion of the agency, had submitted the best proposals could be requested to submit priced quotations on their acceptable technical or design-competition proposals. Negotiations could then be conducted under procedures which would

result in an award to that offeror whose total proposal was most advantageous to the Government, price and other factors considered.

Recognizing, however, that the problem of how A-E services can best be obtained is a complex one, we have advised the agencies that present procedures may be followed until the Congress has had an opportunity to consider the matter.

Matter for consideration by the Congress

Although we are of the opinion that the procurement of A-E services is and should be subject to the competitive negotiation requirements of Public Law 87-653, we think that, in view of past administrative practices in the procurement of such services, it is important that the Congress clarify its intent as to whether the competitive negotiation requirements of the law are to apply to such procurements. Should the Congress determine that it is not so intended, we believe that the law should be amended to specifically provide for an exemption for this type of procurement.

Absent a clarification of congressional intent, we are of the opinion that DOD should appropriately revise the ASPR to reflect a proper implementation of Public Law 87-653. Also, GSA should similarly revise the FPR so as to provide uniform selection procedures for A-E services among the agencies subject to these regulations.

METHODS OF COMPUTING A-E FEES  
AS A BASIS FOR NEGOTIATION

Federal agencies employ one or more of several methods in determining and negotiating a reasonable fee for A-E services; however, the most commonly used are the detailed analysis method and the percentage-of-estimated-construction-cost method. The fixed-price type of contract is predominantly used by agencies in contracting for A-E services.

Under the detailed analysis method, the agency estimates the man-hour requirements and types of services or personnel--architectural, mechanical, draftsmen, engineers--for each phase of the services to be required of the A-E, such as site investigation, design services, and shop-drawing reviews. Estimated hourly rates are applied to the estimated number of man-hours and allowances are made for the A-E's overhead and profit to arrive at the total estimated fee which is the basis for negotiation with the selected A-E.

Under the percentage-of-estimated-construction-cost method, the basic A-E fee is estimated by applying a certain percentage--shown in a table or curve--to the agency's estimated construction cost and may be adjusted for such factors as complex or repetitive type of projects, to arrive at a maximum A-E fee. Percentages vary in inverse proportion to construction costs; i.e., the higher the estimated construction cost, the lower the percentage.

Both methods are used by various agencies of the Departments of Agriculture, Commerce, Defense, and the Interior and by the Atomic Energy Commission and the National Aeronautics and Space Administration. The Federal Aviation Agency uses only the detailed analysis method. The General Services Administration; the National Institutes of Health of the Department of Health, Education, and Welfare; the Post Office Department; the Department of State; and

the United States Coast Guard of the Treasury Department generally use only the percentage-of-estimated-construction-cost method. The Veterans Administration uses neither of the aforesaid methods and has advised us that it generally relies on its past experience and on guides of professional societies and practices and policies of the Department of Defense.

#### Background of the percentage-of-construction-cost method

An article by a member of the AIA recites the history of the percentage-of-construction-cost method and points out how, from the architect's standpoint, technical advances have invalidated any merit which that method may have had. According to this article, most architectural services in the latter part of the 19th century and the early part of this century were performed in connection with residences. Structural systems were almost uniform prior to the general usage of structural steel and reinforced concrete; and heating, plumbing, and electrical systems were either nonexistent or in accordance with some manufacturers' standard installation. The article states that, because of this uniformity, a fee based on a percentage of construction cost was sound.

The article points out, however, that--with the infinite variety of building materials, structural systems, and air-conditioning systems presently available--the architect is expected to design a structure which can be built to satisfy requirements at the lowest possible cost and that present-day usage of the percentage-of-construction-cost fee systems, without recognizing an infinite number of exceptions, is not realistic.

#### Views of professional societies

Several members of the American Institute of Architects in various writings have criticized the traditional percentage-of-

construction-cost method on several grounds, principally its nonrelation to the value of architect services. The AIA informed us of a survey made by one of its local State chapters which indicated that engineering costs in that State had risen more rapidly than construction costs. We were informed by a representative of the AIA that there was a movement among certain members of the AIA to discontinue the percentage-of-construction-cost method and that some of the larger firms had discontinued it.

The Manual of Engineering Practice of the American Society of Civil Engineers states that, over the years, engineering experience has established some approximate correlations between engineering costs and construction costs for certain types of engineering design where design procedures and construction materials are more or less standardized.

The Manual states, however, that the validity of the percentage-of-construction-cost method rests upon the assumption that engineering costs vary in direct proportion to construction costs irrespective of the location or type of construction undertaken. It points out, however, that this is a questionable assumption because modern materials, methods, and automatic devices usually require greater engineering effort than that required previously, whereas modern mechanization of construction operations has resulted in a slower rate of increase in construction costs.

The Manual states further that, in view of this disparity, there is now a tendency to negotiate compensation on the basis of detailed man-hour costs rather than to negotiate by rigid adherence to published schedules and curves which are based on a percentage-of-construction costs. The Manual concludes that, with due consideration of the ranges within which engineering scope may vary, the percentage-of-construction-cost method is, when judiciously

applied, still a valuable tool for general comparison with other methods of fee computation.

A report, issued in 1960 by the National Society of Professional Engineers, contains the following statement:

"Engineering fees are dependent on many uncontrollable variables and it is impossible and impractical to generalize on an engineering fee as a function of construction cost for a specific project."

A joint brief of the Consulting Engineers Council, the National Society of Professional Engineers, and the American Society of Civil Engineers to the Comptroller General concerning the problem of statutory fee maximums for engineering services states that, although there is some correlation between engineering and construction costs, the validity of the percentage-of-construction-cost method of determining A-E fees rests upon the questionable premise that engineering costs vary in direct proportion to construction costs. The brief notes that engineering costs have risen, and will continue to rise, nearly twice as fast as construction costs in general.

### Conclusion

As previously stated it has been the position of our Office that consultant engineer fees should be based on the estimated value of the services to be rendered. This position appears to be substantially affirmed by the expression of the professional societies of architects and engineers as recited above.

We believe that the requirement for the submission and certification of cost or pricing data by A-E firms (see p. 25) implicitly calls for the negotiation of A-E fees in terms of the estimated value of the A-E services based upon due consideration of cost or pricing data submitted by the negotiating A-E firm. We

believe further that this same concept is the underlying principle of negotiated contracting and should **be** followed in the negotiation of all contracts for A-E services which are subject to the competitive negotiation requirements of Public Law 87-653 and the FPR as stated on page 33.

## SCOPE OF REVIEW

Our review of the administration by major Federal construction agencies was directed to certain statutory and regulatory requirements relating to A-E fees and to the methods by which agencies determine and negotiate A-E fees. Our review included an examination of the statutes and legislative history relative to these requirements, the prescribed policies and procedures of the agencies for implementing such requirements, and a selected number of A-E contracts to ascertain the general practices and interpretations of the agencies in administering these requirements. We also met on several occasions with representatives of the American Institute of Architects, the Consulting Engineers Council, the National Society of Professional Engineers, the American Society of Civil Engineers, and the Engineering Division of the American Road Builders Association and obtained their comments on certain matters discussed in this report. The Society of American Registered Architects and the National Constructors Association also furnished us with their comments on our draft report.

Our review was made at the headquarters in Washington, D.C., and at certain field locations, as necessary, of the following agencies which contract for A-E services.

- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Health, Education, and Welfare
- Department of the Interior
- Department of State
- Post Office Department
- Treasury Department
- Atomic Energy Commission
- Federal Aviation Agency
- General Services Administration
- National Aeronautics and Space Administration
- Veterans Administration

Consideration of the reasonableness of the fees paid to A-Es and of the cost or pricing data furnished to some agencies by the A-Es was not within the scope of our review.

**APPENDIXES**



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D C 20549

B-152306

December 12, 1966

Dear Mr. Secretary:

By letter dated November 5, 1966, the Assistant Secretary of Defense (Installations and Logistics) furnished us with replies to certain questions which we raised in a letter dated September 9, 1966, with reference to our current Government-wide study on the applications and interpretations of the fee limitations imposed by four statutes codified in title 10 of the United States Code.

In our letter of September 9 we asked the following five questions:

"1. Whether the 6-percent fee limitations imposed by the various statutes on the three military departments are applicable to both fixed-price and cost-type contracts. In this connection, we held in decision B-152306 dated August 31, 1966, copy herewith, that the fee limitation in 41 U.S.C. 254(b) should not be administratively restricted to cost-type contracting only.

"2. What is the legal basis for excluding certain contract costs in applying the various statutory fee limitations? We have taken the position that all costs--without exception--incurred in rendering architectural or engineering services in connection with public works projects are technically subject to the statutory 6-percent fee limitation imposed by 41 U.S.C. 254(b).

"3. Under what circumstances is the authority in 10 U.S.C. 2304(a)(4); id. 2304(a)(17); 4540; 7212; and 9540 invoked in negotiating architect-engineer contracts?

"4. What is the justification for negotiating contracts under 10 U.S.C. 4540; 7212; and 9540 in view of the broad authority of 10 U.S.C. 2304(a)(4)? Is the architect-engineer contract entered into by a particular military department considered to be subject to 10 U.S.C. 2306(d) or to the limitation in the above-referenced sections?

"5. Are architect-engineer contracts negotiated in accordance with 10 U.S.C. 2304(g) and 2306(f) as implemented by the pertinent provisions of the Armed Services

B-152306

Procurement Regulation? If the requirements of these sections are not considered to be applicable in the negotiation of architect-engineer contracts please explain the basis of such position."

The responsee of the Assistant Secretary to these questions were as follows:

"1. The six percent fee limitation applies to all architect-engineer contracts. 10 U.S.C. 2306(d) applies to cost-plus-fixed-fee contracts; 10 U.S.C. 4540, 7212 and 9540 apply to fixed-price and cost-type contracts.

"2. In accordance with the above statutory provisions, costs incurred in the production and delivery of designs, plans, drawings and specifications are considered to be subject to the 6% fee limitation, **However, it** is understood **that** certain costs need not be treated as being within the 6% fee limitation. These include, for example, reimbursement of travel expenses, expenditures for expert technical assistance and amounts representing payments for technical supervision of the construction **work**. See 21 Comp. Gen. 580; 22 Comp. Gen. 464. In addition, **we** have considered that certain preliminary costs such as field surveys and investigations are not subject to the six percent limitation.

"3. and 4. Both the Army and the Air Force utilize the authority of 10 U.S.C. 2304(a)(4) to negotiate domestic architect-engineer contracts. As you **are** aware, 10 U.S.C. 7212, applying only to the Navy, provides for contracts 'without advertising.' Therefore, since the use of 10 U.S.C. 2304(a)(4) is limited by the Armed Services Procurement Regulation to situations in which no other negotiation exception is available, Navy architect-engineer contracts cite 10 U.S.C. 2304(a)(17) as negotiation 'otherwise authorized by **law**.'

"It is considered that 10 U.S.C. 2306(d) applies to cost-plus-fixed-fee contracts only. The fee limitations of 10 U.S.C. 4540, 7212 and 9540 apply to both fixed-price **and** cost-type contracts **and**, whether or not used **as** authority to

B-152306

negotiate, the fee limitations therein are considered applicable to **all** architect-engineer contracts.

"5. Concerning the requirement of 10 U.S.C. 2304(g) for competition, the provisions of section XVIII of the Armed Services Procurement Regulation are followed with respect to the solicitations and award of architect-engineer contracts. Since the standards of professional practice for architects and engineers do not permit **them** to compete for contracts on a price basis, the selection of a contractor is based on technical ability. As set forth in ASPR 18-402.2, a **minimum** of three **firms** are selected. Negotiations are then conducted with the first-selected firm. In the event that a fair and reasonable price not in excess of the Government estimate cannot be obtained, negotiations are then conducted with the firm next in order of preference. See ASPR 18-306.2. **We** believe that this procedure requires the maximum competition consistent with the nature and requirements of the services being procured. With respect to 10 U.S.C. 2306(f), the provisions of the Armed Services Procurement Regulation are followed in that cost or pricing data together with the appropriate certificate **is** obtained **as** required under ASPR 3-807.3."

The concept of limiting to 6 percent the fee payable to architect-engineers was derived from Public Law 43, approved April 25, 1939, and Public Law 309, approved August 7, 1939. Sections 3 and 2 of Public Laws 43 and 309, respectively, provided:

"Sec. 3. Whenever deemed by him to be advantageous to the national defense, and providing that in the opinion of the Secretary of the Navy the existing facilities of the Naval Establishment are inadequate, the Secretary of the Navy is hereby authorized to employ, by contract or otherwise, outside architectural or engineering corporations, firms, or individuals for the production and delivery of the designs, plans, drawings, and specifications required for the accomplishment of any naval public works or utilities project or the construction of any naval vessel, aircraft, or part thereof, without reference to the

B-152306

Classification Act of 1923 (42 Stat. 1488), as amended (5 U. S. C., Ch. 13), or to section 3709 of the Revised Statutes of the United States (41 U. S. C. 5). In no case shall the fee paid for any service authorized by this section exceed 6 per centum of the estimated cost, as determined by the Secretary of the Navy, of the project to which such fee is applicable."

"Sec. 2. Whenever deemed by him to be advantageous to the national defense, and providing that in the opinion of the Secretary of War the existing facilities of the War Department are inadequate, the Secretary of War is hereby authorized to employ, by contract or otherwise, outside architectural or engineering corporations, firms, or individuals for the production and delivery of the designs, plans, drawings, and specifications required for the accomplishment of any public works or utilities project of the War Department without reference to the Classification Act of 1923 (42 Stat. 1488), as amended (5 U. S. C., ch. 13), or to section 3709 of the Revised Statutes of the United States (41 U. S. C. 5). In no case shall the fee paid for any service authorized by this section exceed 6 per centum of the estimated cost, as determined by the Secretary of War, of the project to which such fee is applicable."

The two statutes are substantially similar; however, section 3 applied not only to public works or utilities but also to the construction of any naval vessel, aircraft or part thereof, whereas, section 2 was applicable to only public works or utilities projects. These two statutes were codified by the act of August 10, 1956, as 10 U.S.C. 7212 and 4540, and the corresponding provision for the Air Force, derived from section 2, supra, is codified at 10 U.S.C. 9540. Both the original statutes and the codifications refer to contracts for "producing and delivering designs, plans, drawings, and specifications." In 21 Comp. Gen. 580, we considered the legal effect of the 6-percent fee limitation in section 2, supra, on a cost-plus-a-fixed-fee contract for architect-engineer services and stated at pages 586-587:

"Summarizing, I find nothing in the act of August 7, 1939, or in the legislative history of

B-152306

that act, or in the general practice obtaining with respect to Government or private contracts for architectural or engineering services which serves to establish that the six-percent limitation imposed on the fees payable under contracts authorized by section 2 of the act was intended to relate to fixed fees under cost-plus-a-fixed-fee contracts. On the contrary, an examination of each of the factors which it is permissible to consider in aid of statutory construction discloses many indications that the Congress, in imposing the limitation, contemplated that the fee which was limited to six percent should include everything ordinarily covered by the fee in percentage-fee contracts for services of the type here involved."

Our **decision** at 22 Comp. Gen. 464, 466, amplified the **above** decision **and** held :

"\* \* \* In other words, where contracts cover both the preparation and **delivery** of designs, **plans**, etc., and the furnishing of supervisory services, the provision in the act of August 7, 1939, limiting fees of architect-engineers to 6 percent of the estimated cost of the project involved, applies to that part of said contracts which covers the 'production and delivery of the designs, plans, drawings, and specifications.' Accordingly, in determining whether the statutory limitation **has** been exceeded there need be considered only the question **as** to whether the total of the amounts **paid** to the contractors **as** reimbursement of expenses **and** as fees for the preparation and delivery of designs, etc., exceeds 6 percent of the estimated cost of the project; and there **need** not be included in the computation any amounts paid to the contractor **as** reimbursement of expenses or as compensation for technical supervision of the work."

We therefore agree that the codifications of the 1939 statutes **apply to all** types of contracts **and** that costs which do not relate to the preparation of designs, plans, drawings, and specifications **may be** regarded as not subject to the 6-percent limitation imposed by those statutes.

B-152306

However, we do not agree that the codification at 13 U.S.C. 2306(d) applies **only** to cost-plus-a-fixed-fee contracts. Section 2306(d) provides, in pertinent part, that "The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public **work** or utility **plus** the cost of those services to the contractor **may** not be **more** than 6 percent of the estimated cost of that **work** or project, not including fees."

The foregoing **is** a codification of a portion of section 4(b) of the **Armed Services Procurement Act** of 1947 which reads:

"\* \* \* and that a fee inclusive of **the contractor's** costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, **as** determined by the **agency head** at the time of entering **into** the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public **works** or utility project). \* \* \*"

Public **Law** 1028, 84th **Congress**, 2d session, approved August 10, 1956, 70A Stat. 1-685, revised, codified and enacted into law title 10 of the United States Code, entitled "**Armed Forces**." Section 53 of **that Law** specifically repealed section 4(b) of the **Armed Services Procurement Act** of 1947, but **it was** provided in section 49(a) thereof that:

"\* \* \* **it** is the legislative purpose to restate, without substantive change, the **law** replaced by those sections on the effective date of this Act. \* \* \*"

Senate Report No. 2484, 84th Congress, 2d session, on H.R. 7049-- which was enacted **as** Public **Law** 1028--**contains** an explanation of this provision on **pages** 19-21:

"5. Restatement of substance

"The objective of the new titles **has** been to restate existing law, not to make new law. Consistently with **the** general plan of the United States Code, the pertinent provisions of law **have** been freely reworded and **rearranged**, subject to every precaution against disturbing existing rights, privileges, duties, or **functions**. Adherence to the **substance** of existing law,

B-152306

however, **has** not always meant adherence to the **letter** of the statute. Where court decisions, opinions of officials such as the Attorney General or the Comptroller General, executive orders, regulations, or well-established administrative practice have established authoritative interpretations clarifying ambiguities in the law, the text **has** been reworded to express those interpretations. These changes have been explained in the applicable revision notes.

"6. Revision of language: style

"Codification involves the apparent paradox that laws must be changed in form that they may remain unchanged in substance. Not to reword the statutes **that** are being consolidated would result in obscurity, ambiguity, prolixity, and inconsistency. Problems of construction that do not exist when inconsistencies in language appear in independent enactments necessarily arise when they are juxtaposed in a single reenactment.

\* \* \* \* \*

"It is sometimes feared **that** mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight were this the usual kind of amendatory legislation, where it can be inferred that a change in language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: **the law is intended to remain substantively unchanged.** \* \* \*

"The presumption that the substance of the law is intended to remain unchanged is strongly buttressed by the inclusion of section 49 (a), providing that 'In sections 1-48 of this Act, it is the legislative **purpose** to restate, without substantive change, the law replaced by those sections on the effective date of this Act. '"

It is thus imperative to consider the intent and meaning of section 4(b) of the Armed Services Procurement Act of 1947 since

B-152306

the legal effect of this section would govern, in large measure, the interpretation of 10 U.S.C. 2306(d) from which it was derived.

The fee limitation in section 4(b) is couched in language indicative of an intention to accomplish the same legislative purpose of the 1939 statutes. The 1939 statutory Limitation broadly applies "to contracts for architect-engineer services" without any reference to, or any indication of, an intention to restrict its applications to a specific type of contracting. This is reasonably supported by the fact that cost-plus-a-fixed-fee type of contracting was not generally used until authorized by the act of June 28, 1940, 54 Stat. 676, 677. Hence, it may be said that the Congress was not legislating solely in the area of cost-plus-a-fixed-fee contracting. Moreover, the 1947 fee limitation, like the 1939 fee limitations, is one on the total compensation of an architect-engineer as distinguished from the other "fixed" fee or profit limitations imposed by the 1947 statute.

We recognize that the legislative history references quoted in our decision of August 31, 1966, 46 Comp. Gen. \_\_\_\_\_, to the Administrator of Veterans Affairs, might support the position of your Department in the matter. However, we believe it more reasonable to impute to the Congress an intention to fix a limitation on fees payable to architect-engineers regardless of whether they be "fixed fees" for determining profit or fees measuring the total compensation, however computed under contract, payable to professional architects or engineers.

There remains, however, for consideration the weight to be given to the language used in the codification at 10 U.S.C. 2306(d) which refers only to the "fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services." (Emphasis supplied.)

As stated above, section 4(b) of the Armed Services Procurement Act of 1947 was codified by the act of August 10, 1956, Public Law 1028. While the historical and revision notes to 10 U.S.C. 2306 reference section 4 of the 1947 statute as the source statute, they do not indicate the legislative purpose and intent of the language changes of the codification. However, both the Senate and House Reports on the codification legislation state that: "For each section of the new titles a revision note has been written showing the source law and explaining significant changes and omissions." (Emphasis supplied.) It therefore is reasonable to conclude that no change

B-152306

Turning now to the codification of section 4(b) of the 1947 act, it is quite apparent that fixed-price architect-engineer contracts are not mentioned as subject to the 6-percent fee limitation. It is equally apparent that to give effect to such silence could produce an absurd result since, under the language of the codification, the fee limitation could be avoided by contracting on a fixed-price basis. It therefore would seem to follow that the apparent exclusion of fixed-price contracts from the fee limitation resulted from inadvertent error since, as **we stated above**, there was no legislative intent to change the law. In that connection, we think there can be no doubt that section 4(b) of the 1947 act applied to all architect-engineer contracts regardless of type. See B-152306, cited above. ASPR 18-306.2(b) restricts the fee of fixed-price architect-engineer contracts to 6 percent of the estimated construction cost of the project to which such architect-engineer services apply. Also compare ASPR 3-405.5(c)(2) which refers to "contracts for architectural or engineering services" not to cost-plus-a-fixed-fee contracts for such services.

It is therefore our view that the fee limitations of 10 U.S.C. 2306(d) should not be considered as legally restricted to one type or class of contracting.

There is next for consideration the reply of the Assistant Secretary to our second query; that is, the legal basis for excluding certain contract costs in applying the 6-percent fee limitation. It is stated in the November 5 response that certain costs, exemplified by specific categories of costs, need not be treated as being within the statutory fee limitation, citing in support thereof our decisions at 21 Comp. Gen. 580, and 22 id. 464. Additionally, it is pointed out that certain preliminary costs (field surveys and investigations) are not subject to the limitation. The current provisions of the Armed Services Procurement Regulation (ASPR) reflect the above-stated position. ASPR 18-306.2(b) and 18-306.3 provide with respect to firm fixed-price type architect-engineer contracts and cost-reimbursement contracts for architect-engineer services that:

"\* \* \* If, however, the contract also covers any type services other than the preparation of designs, plans, drawings and specifications, that part of the contract price for such other services shall not be subject to the six percent (6%) limitation."

B-152306

in meaning was intended by the Congress from the scope of the 1947 act. See, also, pages 19-21 of Senate Report No. 2484, referred to above, where it is stated that "These changes have been explained in the applicable revision notes."

In the foregoing regard, the courts will presume that a change in phraseology or the addition or omission of words was not intended to change the meaning of a particular statute unless a contrary intent is clearly expressed. 82 C.J.S., Statutes, section 276(b); Sutherland (Horack, 3rd ed.), Statutory Construction, section 3709. Moreover, it has been judicially recognized that, in proper cases, it is permissible to supply omitted words in legislation if to do so would avoid absurd or unintended results. 50 Am. Jur., Statutes, sections 234 and 447; Sutherland (Horack, 3rd ed.), Statutory Construction, section 4924, et seq.

We are aware of the rules of statutory construction which preclude resort to legislative history of statutes in the absence of ambiguity. This "plain meaning" rule of construction was applied in early Supreme Court decisions dealing with revisions and codifications to preclude examination of prior statutes to determine whether errors of omission, etc., had been made. United States v. Brown, 100 U.S. 508; Cambria Iron Company v. Ashburn, 118 U.S. 54; United States v. Lacher, 134 U.S. 624. But more recent decisions make it clear that, in addition to considering the express language of a statute, it is proper to also consider the original statute as well as contemporaneous legislation on the same subject. Association of Westinghouse Salaried Employees v. Westinghouse Electric Core., 348 U.S. 437; Puerto Rico v. Shell Co., 302 U.S. 253, 258; Harrison v. Northern Trust Co., 317 U.S. 476, 479; District of Columbia v. Murphy, 314 U.S. 441, 449. It also has been said that when the natural significance of the words used in a statute would produce an unseasonable result, it is not only proper, but necessary) to examine the legislative history of the enactments. Ozawa v. United States, 260 U.S. 178, 194.

Although it cannot be said that the Language of 10 U.S.C. 2306(d) is ambiguous, there is authority for concluding "ambiguity" when a literal interpretation of the statute would lead to an unreasonable, unjust, or impracticable result such as would compel the belief that the Congress did not intend such result. 82 C.J.S., Statutes, section 322b(3); 50 Am. Jur., Statutes, section 226. Cf. Glenn v. United States, 129 F. Supp, 914, 920, reversed on other grounds 231 F. 2d 884, certiorari denied 352 U.S. 926.

B-152306

We have already agreed that only the contract costs attributable to the production and delivery of designs, plans, drawings, etc., are subject to the fee limitation imposed by the 1939 statutes as codified. We adhere to our conclusion in 21 Comp. Gen. 580 and 22 *id.* 464 with reference to certain cost items that may be excluded from operation of the 1939 limitation. However, we believe application of those decisions in the broad sense to the fee limitation prescribed by 10 U.S.C. 2306(d) is not justified.

It is necessary again to consider the legal import of section 4(b) of the 1947 act from which the codification of section 2306(d) was derived.

House Report No. 109, 80th Congress, 1st session, on H.R. 1366, which was enacted as the Armed Services Procurement Act of 1947, contains an analysis of the legislation prepared by the then War Department which, together with the Department of the Navy, drafted the legislation. Page 33 of that report dealing with section 4 of H.R. 1366 reads in pertinent part:

"It is also directed that agreements for the furnishing of architectural or engineering services relating to any public works or utility project shall not provide for the payment of a fee in excess of 6 percent of the estimated cost of the project. In this instance it should be noted that the limitation of the fee to the contractor is inclusive of all costs incurred by him in the performance of the contract. This provision follows section 3 of the act of April 25, 1939, above referred to (54 Stat. 591; 34 U.S.C. 556)." (Emphasis supplied.)

In contrast to the 1939 statutes, the 1947 statute fixed a maximum fee "in contracts for architectural or engineering services." The limitation in section 4(b) therefore relates to the maximum fee payable under such contracts and is not related to the "cost" of professional services involved in furnishing designs, plans, etc. In fact, it is significant that the 1947 statute, as distinguished from the 1939 statutes, makes no reference to the "production and delivery of the designs, plans, drawings, and specifications." Rather, the codification limits the fee for "performing" a contract for "architectural or engineering services." Further, unlike the 1947 act, the 1939 statutes limit the fee which may be paid for "any service authorized" by the statutes, that is, services relating to the preparation and delivery of designs, plans, etc. We regard the 1947 limitation as codified as

B-152306

one upon the total contract price for "architectural or engineering services" **and** not a limitation upon the fee for a portion of the contract services. **In** our opinion, section 2306(d) limits the total amounts (cost plus profit) that Legally may be paid under a contract for these professional services irrespective of whether particular contract costs relate to the production and delivery of designs, plans, etc., or whether they represent travel expenses, **costs** of expert technical assistance or for supervision of construction, or the like. Moreover, contract costs categorized as engineering services are **also** subject to the fee limitation since section 2306(d) refers to "engineering" services as **well as** to "architectural" services.

We are aware of the long-established administrative practice of excluding certain contract costs from application of the fee limitation because they do not relate to the production **and** delivery of designs, plans, etc. However, **as** stated above, such exclusions are bottomed on the particular language of the 1939 statutes as codified. The language of section 2306(d) is not susceptible to the same interpretation, and **our** decisions in 21 **and** 22 Comp. Gen. do not constitute overriding precedents since those decisions were concerned with the 1939 statutes and not with section 4(b) of the 1947 act **as** codified in 10 U.S.C. 2306(d).

While we are of the opinion that section 2306(d) permits no exclusions of costs from application of the 6-percent fee limitation, no action in **cases** involving this question will be taken by our Office since **we** are currently conducting a Government-wide review of architect-engineer contracting procedures generally with the view to **submitting** appropriate recommendations to the Congress early **next year**.

The Assistant Secretary advises **that** both the Army and the Air Force utilize the authority of 10 U.S.C. 2304(a)(4) to negotiate domestic architect-engineer contracts, and that since 10 U.S.C. 7212, specifically applicable to the Navy, authorizes such contracts without advertising, **Navy** architect contracts are negotiated under 10 U.S.C. 2304(a)(17) as "otherwise authorized by law." In this regard, it is pointed out that ASPR 3-204.3 limits the use of 10 U.S.C. 2304(a)(4)-- the negotiation exception relating to personal or professional services-- to situations wherein no other negotiation exception is available. We are further advised that the fee limitations of the 1939 statutes as codified **are** considered to be applicable to all architect-engineer contracts whether or not such statutes are used as the authority to negotiate the contracts.

B-152306

We are of the opinion that the 1939 statutes as codified, as well as 10 U.S.C. 2304(d), constitute basic authority to negotiate architect-engineer contracts. While only 10 U.S.C. 7212 specifically authorizes the Navy to procure these professional services without advertising, both the Army and the Air Force would appear to have the equivalent authority under 10 U.S.C. 4540 and 9540, respectively. The 1939 statutes upon which all three codifications are based excepted the procurement of architect-engineer services from the advertising statute. However, Public Law 1028, which codified the pertinent portions of the 1939 statutes, did not carry forward the advertising exemption with respect to the Army as it did specifically in the case of the Navy. See pages 308 and 524 of Senate Report No. 2484, 84th Congress, 2d session, on the codification legislation. The basis for the omission in the case of the Army is not explained in the legislative history of the codification statute or in the historical and revision notes to the applicable code sections. However, since section 49 of the codification statute provided that it was the legislative purpose to "restate, without substantive change," the law superseded by the codification, we feel that the omission of the advertising exemption was inadvertent. For this reason, and in the light of the principles of statutory construction discussed above, we believe that sections 4540 and 9540 of title 10 should be regarded as a basis for authorizing the negotiation of architect-engineering contracts pursuant to 10 U.S.C. 2304(a)(17).

We do not, however, believe that the codifications of the 1939 statutes are self-executing. Under these statutes, the head of the military department must determine that it is advantageous to the national defense and that existing military facilities are inadequate before the procurement authority of those statutes may be invoked. See Senate Report No. 263, 76th Congress, 1st session, on H.R. 4278 which was enacted as Public Law 43, approved April 25, 1939, and companion House Report No. 1312, 76th Congress, 1st session. We assume that sufficient statutory bases exist for a delegation of authority to make the determinations required by the codifications. See 10 U.S.C. 133(d), and section 5 of Reorganization Plan No. 6 of 1953, 67 Stat. 639.

The 6-percent limitation of the 1939 codifications has reference only to those architect-engineer contracts negotiated under those codifications. Hence, the permissive exclusions of costs from application of that fee limitation may be reflected only in contracts executed pursuant to those codifications and not in contracts executed pursuant to the negotiation authority of 10 U.S.C. 2304(a)(4). In the latter respect, we point out again that the fee limitation of section 2306(d)--

B-152306

applicable to contracts negotiated under section 2304(a)(4)--should not be restricted to costs involving only the preparation and **delivery** of designs, plans, etc., such as is the case under the 1939 codifications.

We **are** further advised in the November 5 letter that, with reference to the requirements of 10 U.S.C. 2304(g) for competitive negotiation, the provisions of section XVIII, ASPR, are **followed** in the solicitation and award of architect-engineer contracts. In this regard, it is pointed out that since the standards of professional practice of architects and engineers do not permit price competition for award of a contract, the selection of the contractor is based on technical ability. The selection **and** negotiation procedures as set out in ASPR 18-402.2 and in ASPR 18-306.2(a), respectively, reflect the foregoing principle,

ASPR 3-805.1 which prescribes the negotiation procedures to be **applied** in the selection of offerors for negotiation **and** award is an implementation of 10 U.S.C. 2304(g). **That** provision of law reads **as** follows:

"(g) In all negotiated procurements in excess of \$2,500 in which rates or prices **are** not fixed by law or regulation **and** in which time of delivery will permit, **proposals** shall be solicited from the **maximum** number of qualified sources consistent with the **nature and** requirements of the supplies or services to be procured, and written or oral discussions **shall** be conducted **with all** responsible offerors who submit proposals within a competitive range, price, and other factors considered; Provided, however, **"hat** the requirements of this **subsection** with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate **competition** or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion **would** result in fair and reasonable prices and where the request **for** proposals notifies all offerors **of** the possibility that award may be made without discussion." (Emphasis supplied.)

B-152306

The pertinent provisions of part 8--Price Negotiation Policies and Techniques--of section III, ASPR, which are particularly for consideration here are as follows:

"3-804 **Conduct** of Negotiations. Evaluation of offerors' or contractors' proposals, including price revision proposals, by all personnel concerned, with the procurement, as well as subsequent negotiations with the offeror or contractor, shall be completed expeditiously. Complete agreement of the parties on all basic issues shall be the objective of the contract negotiations. Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid. \* \*

\* \* \* \* \*

"3-805.1 General.

"(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered, except that this requirement need not necessarily be applied to:

(i) procurements not in excess of \$2,500;

(ii) procurements in which prices or rates are fixed by law or regulations;

(iii) procurements in which time of delivery will not permit such discussions;

(iv) procurements of the set-aside portion of partial set-asides or by small business restricted advertising;

(v) procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal

B-152306

without discussion would result in a fair and reasonable price. (Provided, however, that in such procurements, the **request** for proposals **shall** notify all offerors of the possibility **that** award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government. In any **case** where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not **make** award without further exploration and discussion prior to **award**. Also, when the proposal most advantageous to the Government involves a **material** departure from the stated requirements, consideration shall be given to offering the other firms which submitted proposals an opportunity to submit new **proposals** on a technical basis which is comparable to that of the most advantageous proposal \* \* \*

"(b) Whenever negotiations **are** conducted with **more** than one offeror, no indication shall be **made** to any offeror of a price which must be met to obtain further consideration since such practice constitutes an auction technique which must be avoided. After receipt of proposals, no information regarding the number or identity of the offerors participating in the negotiations **shall** be made available to the public or to any one **whose** official duties **do** not require such **knowledge**, Whenever negotiations **are** conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see (a) above) shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as **may** result from the negotiations. \* \* \*

"(c) Except where cost-reimbursement type contracts are to be used (**see 3-805.2**), **e.** request for proposals may provide that after receipt of **initial** technical proposals, such proposals will be evaluated to determine those which

a-152306

are acceptable to the Government or which, after discussion, can be made acceptable, and upon submission of prices thereafter, award shall be made to that offeror of an acceptable proposal who is the low responsible offeror.

"(d) The procedures set forth in (a), (b) and (c) above may not be applicable in appropriate cases when procuring research and development, or special services (such as architect-engineer services) or when cost-reimbursement type contracting is anticipated. Award of a contract may be properly influenced by the proposal which promises the greatest value to the Government in terms of possible performance, ultimate producibility, growth potential and other factors rather than the proposal offering the lowest price or probable cost and fixed fee.

"(e) When, during negotiations, a substantial change occurs in the Government's requirements, or a decision is reached to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposal or request for quotations, and a copy shall be furnished to each prospective contractor.  
\* \* \*"

While subsection (d) provides that architect-engineer contracts may be excluded from the above procedures, ASPR 3-102(c) provides:

"Negotiated procurements shall be on a competitive basis to the maximum practical extent. \* \* \*"

The procedures followed in obtaining architect-engineer services in essence result in "sole source" procurement in that once a prospective contractor is "selected" on the basis of technical ability, negotiations are conducted with him alone to the exclusion of other equally qualified architect-engineers. An examination of part 4 of ASPR XVIII reveals that the procedures for the "selection" of architect-engineer firms for the award of contracts do not conform strictly to the requirements of ASPR 3-500, et seq., respecting the preparation of requests for proposals or requests for quotations. Under current procedures, architect-engineers are selected from those firms which, after filing GSA Standard

B-152306

Form 251, "U.S. Government Architect-Engineer Questionnaire," are listed in an architect-engineer qualifications data **file**. **These** provisions of ASPR XVIII are somewhat inconsistent with the provisions of **ASPR III** dealing with procurements by negotiation generally. These provisions in ASPR III which, in the main, are implementations of the negotiation authorizations **and** limitations prescribed in title 10 of the United States Code substantially reflect the long-established administrative practices employed in securing architect-engineer services. ASPR 18-402.1 is illustrative of the practices followed:

"Selection Policy. The selection of architect-engineer firms for professional services contracts shall be accomplished in accordance with the **procedures** set forth in this part. Such selection shall not be based upon competitive bidding procedures, but rather upon the professional qualifications necessary for the satisfactory performance of the services required, subject to the following additional considerations:

- (i) specialized experience of the **firm** in the type of work required;
- (ii) capacity of the firm to accomplish the work in the required time;
- (iii) past experience, if any, of the firm with respect to performance on Department of Defense contracts;
- (iv) location of the firm in the general geographical area of the project, provided that there is an appropriate number of qualified firms therein for consideration; and
- (v) volume of work previously awarded to the firm by the Department of Defense, with **the** object of effecting an equitable distribution of Department of Defense architect-engineer contracts among qualified architect-engineer **firms**."

B-152306

Department of Defense Directive No. 4105.45 prescribing uniform **standards** for the employment and **payment** of architect-engineer **services** further exemplifies these practices.

In our opinion, the present practices **followed** in the negotiation of architect-engineer contracts represent a deviation from the statutory requirements expressed in 10 U.S.C. 2304(g) that **proposals from a maximum** number of qualified sources shall be solicited **and** that written or oral discussions be conducted with **all** responsible offerors **who** submit proposals within a competitive range, price **and** other factors considered.

In this regard 43 Comp. Gen. 353, 370-371, held in pertinent part:

"\* \* \* it would appear to be especially pertinent to note that H.R. 1366, 80th Congress, which subsequently was enacted as the Armed Services Procurement Act of 1947, 41 U.S.C. 151 note (1952 Ed.), originally included, as Section 1(xii), a request for authority to negotiate under the following circumstances:

"'(xii) for supplies or services as to which the agency head determines that advertising and competitive bidding would not **secure** supplies or services of a quality **shown** to be necessary in the interest of the Government.'

"As passed by the House of Representatives, H. R. 1366 included this authority, and the necessity and justification **for** its enactment **by** the Senate was presented to the Senate Committee on Armed Services by the Assistant Secretary of **the Navy** during hearings on **June 24, 1947**, with the following concluding statement:

"'Where quality is a matter of critical—in many cases **life-and-death--importance**, discretion **must** reside in the services to select sources where experience, **expertness**, **know-how**, facilities **and** capacities **are** believed to **assure** products of the requisite quality. Where national security or the safety and health of personnel of the services are involved, any compromise of quality dictated by mandatory considerations of price would be indefensible. (See **page 15, Hearings before the Committee on Armed Services, United States Senate, on H. R. 1366, 80th Congress.**)'

B-152306

"Notwithstanding the above, the Senate Armed Services Committee deleted this provision from the bill and explained its action at page 3, S. Rept. No. 571, 80th Congress, as follows:

"The bill was amended by deleting the authority to negotiate contracts for the purpose of securing a particular quality of materials. Your Committee is of the opinion that this section is open to considerable administrative abuse and would be extremely difficult to control. For this reason it has been eliminated."

\* \* \* \* \*

"The rejection by the Congress of this request for negotiation authority must therefore be construed as a prohibition against the negotiation of contracts without price competition, where the failure to obtain price competition is based solely upon a determination by the contracting agency that a particular prospective contractor will deliver supplies and/or services of a higher quality than any other contractor. 41 Comp. Gen. 484."

In a detailed analysis of the provisions of H.R. 1366, referred to above, contained in House Report No. 109, 80th Congress, 1st session, it was stated:

"Procurement by negotiation as practiced by the services and industry consists of first securing informal quotations from as many sources as practicable, usually accompanied by break-downs of elements of cost. Separate negotiations then usually begin with the lower bidders, in order to reduce the price by eliminating unnecessary or unjustified charges. When the best possible agreement has been reached, an appropriate contract is awarded the successful firm. Experience has shown that by careful negotiation and by drafting a suitable contract it is frequently possible to secure substantial savings for the Government. Negotiation, properly employed, can promote and intensify competition.

B-152306

"The chief difference between the two methods of procurement lies in the fact that the advertising system is largely mechanical in requiring award to the responsible bidder offering the Lowest original bid. In contrast, negotiation allows the use of discretion and provides the opportunity to arrive at better terms."

See, also, pages 16 and 17 of House Report No. 1959, 86th Congress, 2d session, of a Special Subcommittee of the Committee on Armed Services, House of Representatives, on Procurement Practices of the Department of Defense.

Therefore, it would appear that "negotiation" as contemplated by section 2(c) of the Armed Services Procurement Act of 1947 (10 U.S.C. 2304(a)) was intended to mean "competitive negotiation" whereby all qualified firms are to be given an opportunity to submit priced proposals which, if truly competitive, ordinarily would be the subject of oral or written discussions with procurement personnel.

The term "negotiation" was defined in Public Law 87-653 which added a new subsection "g" to 10 U.S.C. 2304. Senate Report No. 1884 87th Congress, 2d session, on H.R. 5532, which was enacted as Public Law 87-653, stated in pertinent part:

"Existing procurement law does not define the word 'negotiation' except to indicate that it means 'make without formal advertising.' Section (c) of the bill would add a new section to procurement law requiring, with certain exceptions, that oral or written discussions be had in negotiated procurements with all responsible offerors who submit proposals within a competitive range. Excepted from this requirement would be procurements involving not more than \$2,500, those in which prices or rates are fixed by Law or regulations, those in which time of delivery will not permit such discussions, those involving authorized set-aside programs, and those in which it can be clearly shown that adequate competition or prior cost experience is likely to produce reasonable prices without such discussions. In the latter exception the request for proposals should notify all offerors of the possibility that the award may be made without discussions.

B-152306

"If discussions are unnecessary in the ordinary case, it is difficult to understand that the procurement could not have been accomplished by formal advertising. At the same time, an inflexible requirement for discussions with all offerors could encourage the offerors to pad their initial proposals and not to quote their best prices first."

House Report No. 1638 on H.R. 5532 contains the following observations as to "negotiation":

"Section (e) contains both direction and mandate with respect to negotiated procurement and the method by which it shall be conducted,

"The Armed Services Procurement Act of 1947 did not define what should constitute negotiation. In the codification of 1958, the act was reworded to state that there were two categories of procurement, by method:  
(1) Formal advertised sealed competitive bidding, and  
(2) negotiated procurement.

"The problem has usually been one of interpreting what was meant by 'negotiation.'

"This word is not defined in the statute. But the word does have a meaning in common parlance. It is that when negotiations are invited and proposals for negotiations are offered, there should be written or oral discussions.

"The Military Establishment have not always been ready to grant that discussions should take place. This section provides (and it is not objected to by the Department of Defense and it was proposed by the Comptroller General) to emphasize not only the value but the necessity for written or oral discussions before final pricing and award of contracts when the proposers are within a competitive range, price and other factors considered.

"This section likewise recognizes that where unilateral set-asides have been made, discussions are not necessary to the final determination. Competition as to price has already occurred, and the qualification of

B-152306

the concern is under one of the three set-aside programs already defined. Award, therefore, does not require discussions either as to price or performance. Discussions would be futile.

"The section, however, gives authority, now being exercised with fewer restrictions in 3-805 of the Armed Services Procurement Regulations. Awards are now made without discussion, when the offerors have been notified in advance that final and firm proposals are to be made. Under this provision, such invitations may be issued only when there is a clear evidence of adequate competition or where there is accurate, prior cost experience with the product. This must be determined before award. The Comptroller General supported in principle and the Department of Defense supports this section.

"It is a salutary and workable law which meets almost all requirements for negotiation; if not in language, at least by definition."

The then General Counsel of the Department of Defense further testified with reference to subsection "e," which was enacted as 10 U.S.C. 2304(g), that:

"Subsection (e) would amend section 2304 by adding a new subsection (g) which would prescribe the following requirements as to all negotiated procurements in excess of \$2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit:

"(1) It would require that proposals be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured; and

"(2) It would require that written or oral discussions be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered, with the exception of procurements in implementation of authorized set-aside programs, or of procurements where it can be clearly demonstrated from the existence of adequate competition

B-152306

or accurate prior cost experience that acceptance of an initial proposal without discussions would result in fair and reasonable prices.

"With respect to the first requirement, it has always been the policy of the Department of Defense, and our regulations so provide, that in negotiated procurement, proposals will be solicited from the maximum number of qualified sources of supplies or services consistent with the nature of, and requirements for, the supplies or services to be procured."

The foregoing would seem to present an incongruous situation where a strict, literal interpretation of the statute would produce a result in contravention of the long-standing standard of professional practice of architects and engineers which precludes price competition between members of these professions.

Even recognizing the all-inclusive effect of 10 U.S.C. 2304(g) on the negotiation of contracts, it is also recognized that the statute provides that "competitive" negotiation shall be "consistent with the nature and requirements" of the services to be procured. We are not prepared to say that the standard of professional practice constitutes, in and of itself, a sufficient basis for concluding that the "competitive" negotiation of architect-engineer contracts would not be "consistent with the nature and requirements" of the services to be procured. However, in view of the long-standing administrative practice, we will not raise any objection to the negotiation procedures presently being utilized. We believe it appropriate for our Office to fully inform the Congress of the matter in our report on the Government-wide review of the interpretations and applications of the statutory 6-percent fee limitation imposed on architect-engineer contracts.

We note that the cost or pricing and the certification requirements of 10 U.S.C. 2306(f), as implemented by ASPR 3-807.3, et seq., are being followed in the case of such procurements. We will, of course, recognize in our report the views and comments of your Department as expressed in the November 5, 1966, letter.

B-152306

We wish to express our appreciation for the assistance rendered to us in connection with our current review.

Sincerely yours,

/s/ FRANK E WEITZEL

Assistant Comptroller General  
of the United States

The Honorable  
The Secretary of Defense



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

B-152306

December 19, 1966

Dear Mr. Knott:

We refer to a letter dated November 8, 1966, with enclosures, from the Commissioner, Public Buildings Service, in response to our request for comments on certain matters pertinent to our current Government-wide review of the applications and interpretations of the statutory fee limitation on architect-engineer (A-E) contracts.

The statutory fee limitation applicable to the procurement of A-E services by the General Services Administration (GSA) is contained in section 304(b) of the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. 254(b). That subsection provides, in pertinent part, as follows:

"\* \* a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). \* \*"

An examination of the legislative history of that act reveals an intent to extend to the General Services Administration the same flexible procurement principles of the Armed Services Procurement Act of 1947. See Senate Report No. 475, 81st Congress, 1st session, page 5; House Report No. 670, 81st Congress, 1st session, page 6. In conformity with that intent, section 304(b) was enacted using the exact language of section 4(b) of the 1947 act.

The Commissioner's letter recognizes that the statutory limitations contained in sections 4(b) and 304(b) apply to all types of contracts and are not restricted solely to contracts on a cost-plus-fixed-fee basis. It is maintained, however, that since section 4(b) of the 1947 act is based on the act of April 25, 1939, 53 Stat. 590, and the act of August 7, 1939, 53 Stat. 1240 (now codified as 10 U.S.C. 7212 and 4540, respectively), A-E services not related to the "production and delivery of the designs, plans, drawings, and specifications" are not subject to the fee limitation. On this basis, it is indicated that it is the practice of GSA to exclude the following types of A-E services from the fee limitation prescribed by section 304(b) of the 1949 act:

B-152306

"a. Investigative services including, but not limited to the following:

Determination of program of requirements  
Determination of feasibility of proposed project  
Preparation of measured drawings of existing facility  
Subsurface investigation  
Structural, electrical and mechanical investigations of existing facility  
Surveys: topographic, boundary utilities

"b. Special consultant services not normally available in organizations of architects or architect/engineers. Such services are occasionally needed in functional areas which are unusual to typical building design.

"c. Other

Reproduction of approved designs through models, color renderings, photographs or other presentation media.  
Travel, per diem  
Supervision of construction  
All services that are not integrally a part of the production and delivery of plans, designs, drawings and specifications."

In our decision to the Secretary of Defense, B-152306, December 12, 1966, 46 Comp. Gen. \_\_\_\_\_, copy herewith, we held that the original 1939 statutes and the codifications thereof "apply to all types of contracts and that costs which do not relate to the preparation of designs, plans, drawings, and specifications may be regarded as not subject to the 6-percent limitation imposed by those statutes.\*'

However, we do not feel that this conclusion should be reached with regard to the limitation contained in section 304(b). This section establishes a maximum fee "in contracts for architectural or engineering services" without limitation or reference to the "production and delivery of the designs, plans, drawings and specifications." Apart from the broad language of that section, the omission of the

B-152306

specific language contained in the 1939 act is itself a significant indication that no exclusions from application of the fee limitation **were** intended by the Congress. Moreover, an analysis of section 4(b) prepared by the then War Department which, together with the Department of the Navy, drafted the legislation states that "the limitation of the fee to the contractor is inclusive of all costs incurred by him in the performance of the contract." (Emphasis supplied.) See page 33 of House Report No. 109, 80th Congress, 1st session.

In our opinion, section 304(b) of the Federal Property and Administrative Services Act is not limited solely to the costs of professional services incurred in that segment of the contract requiring the preparation of designs, plans, etc. Rather, it imposes a limitation on the total compensation payable for all services performed under the architect-engineer contract, regardless of whether the cost of these services represents travel expenses, consultant fees, reproduction expenses, supervision of construction, preliminary engineering effort, or the like. Furthermore, it is quite clear that the explicit language of the statutory limitation requires the inclusion of all costs categorized as engineering services in computing compliance with the fee limitation. Therefore, the holding in our decision to the Secretary of Defense that 10 U.S.C. 2306(d) permits no cost exclusions from application of the 6-percent fee limitation is equally applicable here in the case of 41 U.S.C. 254(b).

The Commissioner makes reference to our decisions in 21 Comp. Gen. 580 and 22 id. 464 as supporting the cost exclusion practice. But these decisions, like the administrative practice of excluding certain contract costs, were based solely on the restrictive language of the 1939 acts. While **we** affirm these decisions insofar as the codifications of **the** 1939 acts are concerned, they are not dispositive of the question whether cost exclusions are permissible under the all-inclusive language of section 254(b).

Although we are of the opinion that section 254(b) of the Property Act permits no exclusions of costs in determining compliance with the 6-percent fee limitation, no present action with reference thereto will be taken by our Office. The views and comments of the Commissioner as expressed in his letter and enclosures thereto will be appropriately recognized in our proposed report to the Congress.

B-152306

We wish to **express** our appreciation **for** the assistance rendered to **us** in connection with our current review.

Sincerely yours,

/s/ Frank H. Weitzel

Assistant Comptroller General  
of the United States

Enclosure

The Honorable Lawson B. Knott, Jr.  
Administrator, General **S**ervices Administration

STATEMENT  
BY  
THE AMERICAN INSTITUTE OF ARCHITECTS  
ON  
STATUTORY ARCHITECT-ENGINEER FEE LIMITATIONS  
PRESENTED TO  
THE  
GENERAL ACCOUNTING OFFICE  
ON  
OCTOBER 28, 1966

## I. Introduction

This paper is submitted to assist the General Accounting Office in its Government-wide study of interpretations and applications of architect-engineer (A-E) statutory fee limitations.<sup>1</sup> We describe below the legislative history of the 6 percent A-E fee limitations, the experience of architects working under the limitations, and conclude that such limitations no longer serve a useful purpose and should be repealed.

## II. Legislative History

Congress originally established a 6 percent limitation on A-E services in 1939 on the basis of 1939 needs, practice and economic conditions. Although several laws enacted since that time contain the fee limitation, no review of the rationale for the statutory 6 percent maximum fee proviso has been undertaken since 1939.

The original legislation<sup>2</sup> which created the 6 percent fee limitation on A-E services was passed in 1939,<sup>3</sup> during urgent Congressional consideration of vitally needed naval and military construction. It was part of major appropriations bills designed to bring our armed services to a readiness status, and authorized the utilization of outside architectural and engineering services by the armed forces, without regard to competitive bidding statutes,<sup>4</sup> because they did not possess and could not economically maintain in-house capabilities in these areas. During hearings' on the legislation. Government witnesses stated that -

- . A-E's were urgently needed to accomplish a more vigorous military construction program;
- . contracting for outside services would reduce the cost to the Government of providing office space and training technical personnel;
- . enactment of the measure would enable the Government to obtain the skill and experience of the country's outstanding architects and engineers; and

*Statutory* Architect-Engineer Fee Limitations  
Page two

- the 6 percent limitation was modeled on the then maximum fee paid in the private sector of the economy for comparable work.

The Armed Services Procurement Act of 1947<sup>6</sup> continued the authority of the military to use outside architectural and engineering services, and retained the 6 percent fee limitation without any apparent review of the necessity or propriety of the limitation which had been created some eight years before.

Two years later, in 1949, Congress created the General Services Administration under the terms of the Federal Property and Administrative Services Act.<sup>7</sup> It is clear from the legislative history of this Act that Congress intended to apply the principles and much of the text of the Armed Services Procurement Act to G.S.A.,<sup>8</sup> which, of course, included the 6 percent fee limitation. Yet nowhere in the legislative history does it appear that Congress re-examined the rationale of the arbitrary fee limitation.

In 1956, seventeen years after the original limitation had been enacted, the laws relating to the armed forces were repealed, revised, and codified.<sup>9</sup> Again, with minor editorial changes, the 6 percent limitation on A-E fees was retained. Despite the fact that the Congressional reports and related materials on the codification legislation comprised two large volumes,<sup>10</sup> there was not even passing mention of the 6 percent limitation, or any intimation that the provision had been thoroughly studied.

Thus, for almost three decades, a fee limitation which was intended at the time of its adoption to compensate architects and engineers

Statutory Architect-Engineer Fee Limitations  
Page three

in a fair manner<sup>11</sup>--comparable to the compensation prevailing in private industry--has been mechanically retained in succeeding military and civilian legislation, despite the fact that it no longer fulfills its original purpose.

At the time of the adoption of the 6 percent limitation in 1939, the Federal Government had had little or no experience in the use of **A-E's** on a fee basis for Government construction. Prior to that time, it had relied principally upon in-house capability, usually of service personnel, but to some extent on per diem consultants, and to a lesser extent upon independently operating per diem consultants. Therefore, the establishment of the limitation represented part of an unsophisticated approach to a new type of procurement of services. Subsequent experience has shown, we submit, that under modern conditions this limitation, when measured by both the interests of the Government and of the professions, works to the disadvantage of both.

### III. Applying a 1939 Standard to a 1966 World

The 6 percent limitation on architectural services, enacted on the basis of the depression experience, no longer reflects today's cost of doing business.

One might assume that, since the limitation is based upon estimated construction cost,<sup>12</sup> as the construction cost goes up, the architect's fee increases proportionately. Unfortunately, this assumption is fallacious for two reasons: first, the cost of providing architectural services has risen faster than the cost of construction<sup>13</sup> (due primarily to the complexity of today's buildings) and; second, the limitation has no bearing on the nature of services rendered (e.g.,

## Statutory Architect-Engineer Fee Limitations

Page four

a \$1,000,000 renovation job with a maximum allowable fee of \$60,000 may require more design effort than a \$1,000,000 office building with the same maximum allowable fee).<sup>14</sup>

The 6 percent limitation on architectural fees was not intended to apply to the types of structures now required by the military and civilian construction agencies.

During hearings on the 1939 legislation, a Government witness noted that "the fees paid for architectural...services on works similar to those contemplated by the War Department vary from 4 to 6 percent."<sup>15</sup> But the contemplated works were barracks, office buildings, military support facilities and other repetitive structures, not nuclear rocket development stations, to which the limitation still applies.<sup>16</sup>

It almost goes without saying that today's buildings are more complex than those of a generation past and that tomorrow's buildings will be even more complex. Advanced systems of heating, air conditioning and lighting, new structural concepts spawned by nuclear and electronic developments, plus many other related and vital functional elements, such as public health and safety requirements, require careful study and integration on the basis of the most up-to-date technology.

The limitation is completely unrealistic for laboratories, electronic facilities, technical structures, remodeling work, small projects or those requiring special efforts, e.g., nuclear facilities.

A typical experience is expressed by an architect who writes:

"Our basic problem was to design housing for a very elaborate system of emergency standby equipment to protect and maintain a highly complex computer system.

Statutory Architect-Engineer Fee Limitations  
Page five

The cost of the air conditioning and electrical systems is approximately \$300,000 and the building is approximately \$60,000...The project is further complicated by being an addition to an existing facility.

"When we initially negotiated with the military service we were told about the 6 percent fee limit. We immediately countered with the AIA minimum fee of 15 percent for remodeling and addition work. The negotiating officer fairly evaluated the disparity and agreed with us that the project warranted more than a 6 percent fee. He felt that he needed very competent services (for which we apparently qualified) and asked us to proceed with negotiations on a piecemeal basis. This would allow us to acquaint ourselves with the project and put us in a better position to quote a fee for the working drawings at a later date. We are sure the officer was trying to be fair in dealing with us, but he kept running a cropper of the 6 percent maximum. We are trying to do the job for a 6 percent fee but cannot possibly compensate ourselves for the work involved. The officer is struggling with his paper work to bury some additional fee somewhere else so it can still show a 6 percent maximum...He has repeatedly stated that the fee maximum has forced him to obtain services from firms he did not feel were thoroughly qualified to perform the job he required."

The 6 percent fee limitation is inflicting such losses on many architectural firms that they refrain from doing Government work or will only take such jobs when their offices are slack.

Excerpts from letters in our Files express typical and growing concern over losses associated with Government work:

"Approximately 90 percent of our architectural services over the past twenty years have been on Government projects. This work was performed predominately for the Army, Navy, Air Force and Defense Department. During the past several years compliance with the statutory limitation on A-E fees under \$20,000 has led, in most instances, to financial losses or to our request for withdrawal during negotiations..."

Another architect writes:

"...we have been called upon by the Bureau of Yards and Docks for a number of complex projects involving architecture, electrical, mechanical and structural engineering. We like jobs of this nature since we have an integrated type of office. However, we have

Statutory Architect-Engineer Fee Limitations  
Page six

decided to refuse this kind of work in the future.  
We have found that we have lost money...It is obvious  
that fees must be adjusted...if the Navy wishes these  
projects to be done by competent people."

Thus the limitation has a punitive effect on both the Government  
and the profession; the Government may not be able to obtain the  
best architectural talent because the architect is not always  
compensated on a quantum meruit basis.

But the obvious question is: why do some architects continue to  
accept Government work if it is financially unrewarding? Part  
of the answer is supplied by an architect who specializes in  
military projects in the Far East:

"...only through the inclusion of substantial civil  
engineering projects involving lesser design effort  
per dollar of construction is the A-E able to escape  
the disastrous effects of applying the statutory limit  
to projects of a more complex nature, which includes  
nearly all buildings and structures containing interior  
and electrical systems and projects of a special char-  
acter..."

Because of the limitation, an architect frequently cannot allow as  
much time for research and design as he normally would; therefore,  
building costs often rise.

In many instances, an additional amount allotted to the design phase  
of a project would be rewarded by a reduction in total building cost.<sup>17</sup>  
Wise private investors accept and understand the fact that good design  
saves far more than it costs.

"Estimated cost" of construction is a false yardstick to determine  
the architect's fee.

This is a universal comment by architects. The inadequacy of this  
method of determining the fee is illustrated by the following case  
in point:

"...we have a job which the Government agency estimated to cost \$2 million. The fee was established on that basis.. . A; early as the 20% review, we informed the agency that the estimated cost figure was not adequate and that the inadequacy was of such a magnitude that the only corrections to be made were to either raise the budget or cut the scope. At any rate, there was no response. At the 40% review, the cost had further escalated - still no response. Finally, at the 75% review, our estimate of the cost of the work had climbed to over \$3 million and they (the agency) finally got worried and suspended the job. This being a remodeling job, progressive escalation is common inasmuch as problems continue to be revealed as the work progresses. It has now been terminated. Needless to say, we lost money on the job. In one sense, we were relieved to have the job terminated because it limited our loss. We were doing a \$3.7 million project for a fee based on \$2 million."

The Government's cost estimate is frequently unstudied and unrealistic. Often projects are negotiated on the basis of a proposed expenditure a year or two old, and more often than not the basis for the budget was an estimate of cost per square foot allowances. Not only is an architect forced to accept a budget established some time before negotiations, but a year or two of drafting and design might be required before the project goes out for bids. Thus, some projects remain under active contract for several years through no fault of the architect, during which time there may be sizable increases in both construction and design costs.<sup>18</sup> Yet the architect remains bound by the estimated cost of the project at the time the contract was executed.

#### IV. Conclusion: AIA's Recommendations

The American Institute of Architects believes that statutory limitations on A-E fees are no longer serving the best interests of the Government or the architectural and engineering professions, and should be repealed.

As has been noted above -

- . the 6 percent limitation is based on a 1939 standard, one that does not apply to today's complex buildings and does not reflect the cost of providing architectural services;
- . architects are suffering losses on some types of Government work because of the limitation and are reluctant to accept future jobs unless fairly compensated;
- . because of the limitation, the Government is losing some of the best talent -- a situation which is likely to become aggravated;
- . the limitation may force a reduction in design and research effort which in turn may drive building costs higher.

An architect's fee should be negotiated on the basis of size, nature and complexity of the project.

This procedure is followed in the private sector and is satisfactory to the client and the profession. A survey by the Texas Research League on construction administration in Texas supports this assertion by noting that the most successful method for employing an architect has been "to negotiate on an individual basis using the fees paid by private industry and those recognized by the various professional associations as guidelines."<sup>19</sup>

It is worth noting, too, that the 1939 statute was enacted on the basis of fees then recommended by the ATA and other professional societies. But unlike such recommended fees, which are constantly reviewed and updated to reflect current costs, the Federal limitation on A-E fees has remained static for 27 years.

No doubt the establishment of a maximum fee limitation on A-E services had considerable appeal to those concerned with the

Statutory Architect-Engineer Fee Limitations  
Page nine

possibility that the Government might be overcharged. But there is little likelihood of this for several reasons -

- charging excessive fees is against an architect's code of ethics;<sup>20</sup>
- Government negotiators are familiar with prevailing fees for comparable work and an attempt to demand larger fees would be unsuccessful in view of competitive conditions;
- Federal law requires "truth in negotiating" with the right of the Government (in contracts expected to exceed \$100,000) to adjust the fee downward if cost or pricing data furnished at the time of contracting was inaccurate;<sup>21</sup>
- post audit provisions of Federal law<sup>22</sup> would quickly spot excessive fees.

The Government should review construction practices, including methods of negotiating A-E fees, and provide for uniform procedures throughout all agencies.

Rigid Government standards and complex reporting requirements add to the cost of providing architectural services and reduce the time that can be spent on proper design and technical production. To further complicate things, each agency has its own modus operandi,

A uniform government construction policy would eliminate many of the non-productive hours and out-dated practices now associated with Government work. Thorough study by an independent consulting organization, a Congressional committee, or special task force (representing Government construction agencies, the architectural and engineering professions and contractors) should be undertaken to explore present practices and the problems associated therewith. Recommendations could then be made reflecting public and private

Statutory Architect-Engineer Fee Limitations  
Page ten

interests. Only after such an in-depth review will the Congress  
be able to establish an "intelligible standard" on Federal con-  
struction policy.

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Statutory Architect-Engineer Fee Limitations

V. Footnotes

<sup>1</sup> See H.Rept. 1748 (to accompany H.R. 14324), 89th Cong., 2nd Sess., wherein House-Senate Conferees directed the GAO to undertake "a comprehensive analysis...on a Government-wide basis of interpretations and applications of architect-engineer contracting limitations" and report recommendations for legislative action by January 1, 1967.

<sup>2</sup> H.R. 4278 (Navy) and S. 2562 (Army), 76th Cong. 1st Sess.

<sup>3</sup> 53 Stat. 591 (Navy), 34 U.S.C. 556 (Rev.T. 101, April 25, 1939.  
53 Stat. 1240 (Army), 5 U.S.C. 221 (Rev.T. 10), Aug. 7, 1939.

<sup>4</sup> See S.Rept. No. 263 (to accompany H.R. 4278) wherein the Senate Committee on Naval Affairs states: "It is desired to eliminate advertising for engineering and architectural services, as is required by section 3079 of the Revised Statutes, for two reasons: (1) because such advertising would delay the initiation of the **work** and, (2) because responding to advertising for professional services of this character is considered to be unethical.

"Furthermore, it is as illogical to advertise for the services of a shipbuilding or other engineering specialist as it would be to advertise for the services of a medical specialist. Standard fees have been established by reputable professional societies for various kinds of engineering works, so that the question of the magnitude of the fee does not enter into the selection of an engineering or architectural firm. The question in each case should be decided upon the special qualifications of the firms under consideration."

<sup>5</sup> Hrg. on S.2562, U. S. Sen. Comm. on Mil. Affs., "Construction **Work** for the Army Outside the Continental Limits of the U.S.," 76th Cong., 1st Sess. June 23, 1939.

<sup>6</sup> 62 Stat. 21, Viz. 10 USC 2306 (d)

<sup>7</sup> 63 Stat. 377

<sup>8</sup> See H.Rept. No 670 (to accompany H.R. 4754) 81st Cong. , 1st Sess., May 24, 1949.

<sup>9</sup> See 10 USC 2306 (Armed Forces generally and NASA); 10 USC 4540 (Army); 10 USC 7212 (Navy) and; 10 USC 9540 (Air Force).

<sup>10</sup> See H.Rept. No 970 (to accompany H. R. 70491, June 28, 1955; and S.Rept. No 2484 (to accompany H.R. 7049), July 9, 1956.

<sup>11</sup> Hrg., S. 2562, June 23, 1939, p. 4: "We want to be just as fair and square with the contractors as we are with the Government."

Statutory Architect-Engineer Fee Limitations  
Footnotes - page two

<sup>12</sup> For example, 41 USC 254 (applicable to GSA and civilian construction agencies) reads: "...a fee inclusive of the contractor's and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract...is authorized in contracts for architectural or engineering services..."

<sup>13</sup> A survey of architectural firms in North Carolina conducted by the North Carolina Chapter of the AIA, and transmitted to that State's Director of the Department of Administration on September 12, 1966, indicates that overhead and personnel *costs* have climbed nearly 50% since 1960. A review of statistics published by DODGE REPORTS, ENGINEERING NEWS RECORD and the Associated General Contractors of America shows that from June 1960 through June 1966, the cost of construction in North Carolina increased from a minimum of 5 percent to a maximum of 29 percent, depending on type and location of construction. Comparing the maximum 29 percent increase in *cost* of construction to a nearly 50 percent increase in cost of providing architectural services still leaves a gap of over 20 percent which, when translated into dollars, must be borne by the architect.

<sup>14</sup> This distinction is clearly noted by recommended fee schedules. The North Carolina Chapter of the AIA recommends a minimum fee of 15 percent on a \$1,000,000 alteration while a minimum fee of 5.5 percent is recommended on a \$1,000,000 office building.

<sup>15</sup> Hrg. S. 2562, June 23, 1939, when Quartermaster Corps witness testified: "It will be noted that in the bill the maximum fee is set at 6 percent of the estimated cost of the project. This would be an absolute maximum and is not intended to set a standard. The fees paid for architectural and engineering services on works similar to those contemplated by the War Department vary from 4 to 6 percent. There is no danger that the War Department will pay exorbitant fees for this work as definite standards have been established by the American Institute of Architects...and other reputable professional societies."

<sup>16</sup> See Comp. Gen. Rept. B-152306, June 16, 1965, wherein the Comptroller General states that the construction of an unusual facility (nuclear rocket development station) involving highly technical standards and considerations does not afford any basis for avoiding the statutory limitation on A-E services.

<sup>17</sup> An architect, writing about his experience on a Government job, states: "Part of our loss is due to our taking the time to study comprehensive architectural solutions which simplified construction and reduced the total cost of the building."

Statutory Architect-Engineer Fee Limitations  
Footnotes - page three

<sup>18</sup> Commenting on a GSA project, an architect writes: "As to the cost of this office, we were assured that the time required for review by the New York Office (of GSA) at each stage of the work would be about three weeks. Actually, the time at each stage was three months or more, totalling 360 days during the time we were working on the drawings."

<sup>19</sup> Tex. Rsch. League, "Blueprint for State Construction Administration," Dec. 1964, p. 26

<sup>20</sup> See AIA "Standards of Professional Practice" and Doc. 5330.

<sup>21</sup> 10 USC 2306 (f)

<sup>22</sup> 10 USC 2313

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JOINT BRIEF  
of  
CONSULTING ENGINEERS COUNCIL  
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS  
and  
AMERICAN SOCIETY OF CIVIL ENGINEERS  
to the  
COMPTROLLER GENERAL  
UNITED STATES OF AMERICA  
on the problem of  
STATUTORY FEE MAXIMUMS  
for  
ENGINEERING SERVICES

INTRODUCTION

This brief deals with the problems encountered by Federal agencies, as well as the engineering profession, in providing engineering services to the government under existing laws, and interpretations thereof, which impose a maximum fee limitation on the basis of estimated construction costs. Experience with this problem, since the adoption of such restrictions by Congress in 1939, shows that the fee limitation-maximum for engineering services imposes unnecessary restrictions and difficulties.

The contents will demonstrate that the interests of the government would best be served by legislative elimination of the fee maximum control, and adoption instead of administrative means to provide desired flexibility in engineering contract negotiations and procedures. More specifically, it is the joint belief of the organizations submitting this brief that the interests of the public would be as well, or better, served if professional fees on government engineering were negotiated openly and without the handicap or interference of inflexible percent maximums.

11 INTERPRETATION OF PRESENT STATUTES GOVERNING A-E FEES

There are presently five statutes which prescribe a limitation on fees which may be paid by Federal agencies for architectural or engineering services:

- 10 U.S.C. 2306(d) The fee for performing a cost-plus-a-fixed fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work project, not including fees. (applicable to all military agencies)
- 10 U.S.C. 4540(b) The fee for any service under this section (architectural and engineering services) may not be more than 6 percent of the estimated cost, as determined by the Secretary, of the project to which it applies. (Army)
- 10 U.S.C. 7212(b) The fee for any service under this section (employment of outside architects and engineers) may not exceed 6 percent of the estimated cost, as determined by the Secretary, of the project to which the fee applies. (Navy)
- 10 U.S.C. 9540(b) The fee for any service under this section (architectural and engineering services) may not be more than 6 percent of the estimated cost, as determined by the Secretary, of the project to which it applies. (Air Force)
- 41 U.S.C. 254(b) ...and that a fee exclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of

the project to which such fee *is* applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project. (civilian agencies)

Superficially it would seem that these statutes are similar. All appear to establish a limit for A-E fees of 6 percent of the estimated cost of the project. However, both in law and in fact, there is a real question as to their uniformity. The statute applicable to all military agencies (10 U.S.C. 2306(d)) refers to both "cost-plus-a-fixed-fee" and "percent" contracts and hence, on its face, is not applicable to lump sum contracts. The statutes specifically applicable to the three military departments, on the other hand, apply to A-E fees for "any service", the necessary implication being that the 6 percent limitation is applicable to "lump sum" and "percent" as well as "cost-plus" contracts;

A complicating factor is that the three military statutes, while dictating percent maximum for "any service under this section," fail to define services to which they apply. Any maximum fee is unrealistic unless extent of services and type of work are specifically set forth, defined and limited. This is virtually impossible in a field such as engineering where complexity, scope, research and unknowns vary widely within a given project, as well as between projects. Normally, a typical engineering project can involve any or all of the following:

- (a.) Advice regarding investigations required to determine feasibility of proposed projects.
- (b.) Preliminary investigations and studies; and preparation of analyses, cost estimates and reports.
- (c.) Collection of design data such as topographic surveys, characteristics of subsurface materials, traffic census, origin and destination studies, manufacturing processes and related information.

- (d.) Investigation of existing conditions where alterations or additions are involved.
- (e.) Preparation of construction contract plans, specifications and final cost estimates.
- (f.) Assistance in advertising for construction bids and advice regarding award of contract.
- (g.) Assistance during construction with interpretation of plans and specifications.
- (h.) Checking shop drawings.
- (i.) Approval of periodic and final payments to construction contractor.
- (j.) Resident engineering service during construction.
- (k.) Inspection of completed construction, supervision of performance tests, etc., to determine conformance with plans and specifications.
- (l.) Preparation of "as-built" drawings for record.
- (m.) Assistance during initial operation.
- (n.) Consultation and other related technical and professional services.

The above list reflects only principal services of consulting engineers. Many other services are also regularly available.

Statutory references to both "cost-plus-a-fixed-fee" as well as "percentage-type" contracts further illustrate the need for clarification of the fee limitation question. If, in fact, "cost-plus" agreements are acceptable then it is necessary to recognize what constitutes "cost." Most engineers agree that in addition to the usual direct costs, the

following types of indirect costs, represent a significant portion of the cost of conducting a business and directly influence total compensation:

- |   |  |
|---|--|
| (a.) Taxes  | (k.) Telephone and telegraph                         |
| (b.) Insurance, including accident, liability, group life, valuable papers              | (l.) Fees, dues, publications, professional meetings |
| (c.) Administration, including supervision, secretarial, clerical, bookkeeping, library | (m.) Employee relations                              |
| (d.) Unassignable staff time  | (n.) Rent  |
| (e.) Interest   | (o.) Office miscellaneous expenses                   |
| (f.) Depreciation and amortization  | (p.) Travel expenses not assigned to client          |
| (g.) Employee-established pension plans and related allocations                         | (q.) Personnel procurement                           |
| (h.) Printing, stationery, printing supplies  | (r.) Utilities and maintenance                       |
| (i.) Uncollectible accounts receivable  | (s.) Rental of equipment                             |
| (j.) Professional services including specialists, legal, auditing                       | (t.) Project development and public relations        |

Some of these costs are recognized and accepted by military and civilian agencies as a part of the engineer's overhead and hence are included in the compensation on "cost-plus" agreements. Others, however, may not be allowed; further illustrating the need for clarification.

The report of the Comptroller General in the "Vitro Case", (6.152306) dated June 16, 1965, brings into sharp focus the basic question of the interpretation of the fee limitation in terms of cost of A-E services which are subject to the limitation. In that opinion the Comptroller General determined that costs for nuclear engineering, special engineering, engineering work related to future equipment and facilities, and the increased cost of the design effort, because of nuclear considerations, (in addition to the cost of the customary engineering design service), should have been included in the 6 percent limitation. Apparently the agency involved (NASA) justified its exceeding the limitation on the pragmatic ground that it had excluded from the fee limitation costs which did not reflect "customary or ordinary architectural-engineering services and/or services closely related to the actual preparation of designs, plans, drawings, and specifications.. ."

It is of the utmost significance that in rejecting the NASA contention, the Comptroller General stated "our decisions have consistently held that the limitation applies to amounts payable to architect-engineers for any service performed under contracts for the production and delivery of designs plans, drawings and specifications." (emphasis in original)

This same opinion has been expressed more recently in response to inquiry by the Veterans Administration. On August 31, 1966, Comptroller General Frank H. Weitzel advised the VA that "...Congress included, within section 4 of the Armed Services Procurement Act of 1947 and section 304(b) of the 1949 act, a limitation on 'fee' payments whether they be 'fixed fees' for measuring profit, or 'fees' measuring

the total compensation (costs plus profit) payable to professional architects or engineers whose fees cover everything ordinarily covered by the fee in traditional percentage-fee contracts for such professional services."

#### PROBLEMS INHERENT IN PERCENT LIMITATIONS

The Comptroller General's statements bring into focus the need to define and delimit the term "architectural and engineering services" or to remove the unworkable restriction on A-E fees. In today's complex technology, when it is often difficult to distinguish between the traditional A-E services and services requiring research and the application of related scientific disciplines (the latter being subject to different limitations, if any), the 6 percent limitation, conceived in a time of simpler technology, is bound to cause confusion and doubt among the Federal agencies.

The lack of uniform understanding and interpretation among the agencies is illustrated by the Veterans Administration inquiry, and by comparing the statements of the Comptroller General that all services related to the preparation of plans and specifications are subject to the 6 percent limitation, and by the Armed Services Procurement Regulations, Sec. 18-306.2(b), which refer only to those services involving preparation of designs, plans, drawings and specifications:

"(b) In no event shall a firm fixed-price type contract for architect-engineer services for the preparation of designs, plans, drawings and specifications exceed the statutory limitation of six percent (6%) of the estimated construction costs of the project to which the architect-engineer services apply. If, however, the contract also covers any type services other than the preparation of designs, plans, drawings and specifications, that part of the contract price for such other services shall not be subject to the six percent (6%) limitation."

Thus the three major problems inherent in the federal government's percent limitation on A/E fees are:

1. Confusion caused by conflicting and contrasting statutes.
2. Absence of any definition of services or costs covered by the statutes.
3. Gross inequities caused by rigid interpretation and/or enforcement.

Additional problems which reflect upon the fallacy of a percent-of-estimated-construction-cost maximum which may be paid for engineering services, are outlined in the following:

1. Nowhere in the original (1939) legislative history of the laws providing for the employment of outside architectural or engineering services by the armed forces or other government agencies does there appear any direct or indirect information to indicate there was every any consideration of the desirability of limiting A-E fees for services to an arbitrary percent. Nowhere, in fact. Is there any reference to the source or author of the limitation provisions; and nowhere is there shown any rationale for the limitations, much less tenable support for them.
2. Many of the engineering services required by Federal agencies involve no construction, hence, it is impossible to employ a percentage-of-estimated-construction-cost as a criteria for limiting fee. it is self-contradictory to require compliance with such a maximum on agreements involving construction of a given facility while contracts for work of equal engineering skill and competence are being negotiated satisfactorily ~~U-~~ out a percentage restriction for the simple reason that no construction is involved. Feasibility studies, economic reports, structural analyses, research and testing, etc., are examples of engineering services wherein a "percent of construction cost" is not applicable; yet, this engineering is no less technical or complicated than work involving the production of designs and plans.

3. While years of experience have provided **some** correlation **between** engineering and construction costs, the validity of **the percentage-of-construction-cost method** of determining A-E fees rests upon the **questionable** premise that engineering costs vary in **direct proportion** to cost of construction. There is **serious** question **that such** a consistent relationship exists. On **projects** involving **relatively** minor facilities, **the engineering percentage of total cost** may **rise** in sharp contrast to construction cost. **This** was recently **exemplified** in a rather **extreme** case involving **four** maintenance and repair **projects** by the 12th Naval District. These projects had estimated **construction** costs of **\$469, \$700, \$900 and \$900** respectively. **Maximum** A-E fees, **based** on **6%**, would have been \$28.02. **\$42.00, \$54.00 and \$54.00** respectively. Similar problems arise on highly sophisticated projects **which** require **considerable** investigation, study and testing prior to authority to proceed **with** design.

4. Further complicating and contradicting the government's present adherence to a percentage **maximum** on engineering fees is the fact that such percentage is based upon **estimated**, as **compared** to **actual**, cost of construction, in hundreds of cases the government's **preconstruction** estimates have **later** proven to have been well **below** the **actual construction costs**. Thus, the engineer **is** frequently forced to accept payment based **upon what** **is** later revealed as an erroneous evaluation. In one such **instance** the General Services Administration insisted that the engineer accept a fee based upon that agency's **estimate** of **\$2,400,000** total project cost. Although the engineer was apprehensive that project **cost** would exceed **\$3** million, he accepted. Despite everyone's best efforts, the project has been bid at **\$3,813,000**. **This** is **60%** over the estimate upon which the engineer **was** required to base his fee. **The** engineer stands to lose nearly **\$49,000** on the job due **to** need for redesign and other **complications**.

5. The engineering profession strongly questions Federal government insistence upon restricting fees to be paid for engineering services while imposing few, if any, limitations on similar services rendered to the government by other professionals, such as attorneys and physicians. Further, there is no limitation on the cost of nontechnical services such as teaching and educational training services which may be rendered on a contract basis to the government. (for more on subject of fees paid other professionals see pages 14 & 15 ).

6. From a practical standpoint, the statutory maximums have occasionally forced Federal agencies to circumvent the laws in order to obtain needed technical services. This has been done by interpreting the law as applying to only a portion of the consulting engineer's services, or by separating the project into units and negotiating with different firms for each unit, or by negotiating separate contracts with the same firm. It has also been accomplished by contracting with an engineering firm for an additional "report" or "survey", thereby establishing a total remuneration which may exceed the limitation but is recognized by both the engineer and the negotiator as reasonable and appropriate.

7. An anomaly is created by apparent insistence upon fee limitations on engineering services provided direct to the Federal government, whereas the same services on Federally financed, but locally administered, projects (which involve allocations estimated at 3 to 5 times those of Federally supervised work) are not subject to any fee limitation. The Interstate Highway and Community Development programs are typical examples.

8. Also incongruous to private consultants is the fact that the Federal government, while limiting fees with statutory maximums, creates additional costs through special requirements and policies which are seldom encountered on non-federal projects. These include requirements for two and three times

as many duplicates of plans, repetitive detailing in drawings, frequent reviews, change orders and alternate redesigns, pre-conceived solutions that make no allowance for unfamiliar (to agency) methods, considerable and excessive records, standards manuals which are obsolete or inappropriate, insistence upon special design to incorporate certain government-furnished equipment, and frequent changes in scope of project.

9. Particularly disturbing to the engineer in private practice is the decision of some Federal agencies, whose programs involve engineering projects which cannot be provided within statutory maximums, to establish or expend "in house" engineering capabilities. Such agencies may then proceed to perform engineering services with no limitation as to percent of estimated project cost, and with no regard for internal cost accounting. One example of this is the Mount Hebo AFS Station in Oregon which was eventually accomplished "in staff" when no consulting firm could be found willing to suffer a loss by providing engineering services within the 6% limitation. There is considerable evidence that costs to the government of performing "in house" engineering greatly exceeds costs of identical services from outside private enterprise sources.

10. Imposition of present fee restrictions upon engineering firms fails to take into account the growing complexity of modern science and technology. Demand for engineering "know how" is outdistancing virtually every other field. The cost of meeting this demand has risen, and is continuing to rise, nearly twice as fast as construction costs in general. It is unsound and improper to assume that engineering fee limitations adopted in 1939 can continue to serve as today's statutory maximum. No other industry or profession has been required to endure 27 years of unchanged fee restriction.

11. Serious consequences to the government may develop from an arbitrary fee limitation when the government negotiator is forced to select firms with minimal qualifications or experience because recognized and qualified firms are unwilling to attempt the work within prescribed fee limitations and thereby run the risk of significant loss. With no flexibility, negotiators are prevented from contracting for engineering solutions which may result in total project savings. For example, a California consulting firm determined that it was able to reduce construction costs on one government project by approximately 20 percent after receiving authorization to exceed the Federal percent maximum in providing a substantial redesign. Despite the increase in engineering cost, the 20 percent reduction in construction cost resulted in a net savings of 16 percent of the total project cost had the government proceeded with original designs and plans.

The value of professional services cannot be measured by the engineer's fee. The preceding statements conclusively illustrate the inapplicability and error of imposing a percent limitation on engineer compensation. Negotiation of a fee which allows for more comprehensive research and study, may save many thousands of dollars in the cost of construction. Furthermore, throughout the life of the property, the continuing cost of operation and maintenance of a properly designed facility can be considerably less than facilities which are "budget-planned".

#### IV NEGOTIATION WITHOUT PERCENT LIMITATION

Although contracts relating to Federal projects, involving expenditure of public monies, are normally entered into after due process of advertising and competitive bidding, an exception exists when the contract involves the performance of professional services which require the exercise of special skills and aptitudes. This exception to competitive bidding procedures has been recognized and applied to contracts calling for the skill and technical knowledge of architects, engineers, attorneys and other professionals.

Waiver of responsibility to solicit bids, however, in no way relieves Federal agencies of substantial responsibility for restraint and control of expenditures involving architectural and engineering work performed for the public. Such responsibility is impossible to legislate; it involves judgement, honesty, intelligence and understanding. Without these, no legislation, regardless of its restrictions, can be totally effective.

It is interesting to note that the Federal government is virtually the only client of consulting engineers to employ an inflexible maximum on engineering fees. Hundreds of local and state agencies annually contract for engineering services with no omnipresent statutory provision to dictate terms of negotiation. Likewise, millions of dollars of engineering fees are openly negotiated each year with private industries. As a matter of fact, a 1964 "Survey of the Profession" by Consulting Engineer magazine reveals that, of 1,458 firms polled, only 4.6 percent of all consulting engineer income was derived from projects performed directly for the Federal government. More than four times that amount, or 19.9 percent, comprised income from services provided for state and local agencies. And more than 50 percent came from Industrial, foreign, and private clients.

By and large, the state and local agencies and the industrial, foreign and private clients cited above are satisfied with the results of such negotiations for engineering services. The long and successful history of such negotiations also bears out our contention that the client's interest is not endangered and, in fact in many cases, may be enhanced by fee negotiations which are not restricted by an inflexible "protective" maximum. The success of such negotiations can be verified by such agencies as State Building Commissions, State Highway Departments, Departments of Public Works and Boards of Education, for example of the City of New York. Satisfaction with such negotiation can also be confirmed by almost any of the nation's large industrial concerns,

Admittedly, most such clients have some schedule or formula—either their own or one developed by some segment of the profession—as a guide during negotiation, but rarely, if ever, do such schedules or formulae contain a mandatory maximum similar to the Federal limitation. On the other hand, most such schedules or formulae do contain provisions

to vary the fee to meet the conditions of a particular project.

The history of such negotiations also indicates fees ranging in order of magnitude from 1 percent to 15 percent of construction costs depending on the scope of services furnished, the site and complexity of the projects involved and many other factors. The cost of engineering for small projects, renovation and alteration projects, complex projects and projects involving a broad scope of services is on the upper side of these limits; whereas the cost of engineering for large projects, those with repetitive features, and those in which the engineering services are limited in scope, are nearer the lower limit. Sizeable projects in which the engineering services are limited to preparation of plans and specifications are usually within the 6 percent Federal limitations. The difficulty with such a limitation occurs primarily with the small project, the alteration or renovation project, the complex project or the project on which the scope of services provided is broader than the preparation of plans and specifications.

It is our earnest conviction that repeal of the statutory limitations will not result in "runaway" fees for engineering services on Federal projects and that the public's interest will in no way be endangered by such action by the Congress.

The prospects of removing statutory fee limitations for professional services is supported by pending legislation to remove arbitrary limitations upon attorney's fees for services rendered in proceedings before administrative agencies of the United States (S. 5152, 89th Congress). This bill, which has been approved by the Senate, proposes to eliminate an inequitable situation under which the fees for attorneys are limited in some cases to the point that the intended beneficiary of the limitation is injured by being unable to retain competent counsel to represent his interests.

Although the circumstances are different than the case of A-E fee limitations, experience has shown that the result is the same-- an arbitrary fee limitation is so rigid that it does not and cannot reflect changed economic conditions. Also, of significant comparability

is the *statement* in the Senate Committee Report (No. 1233, 89th Congress) that:

"The legislative history of the various fee limitations which S. 1522, as amended, would remove is significant only by the almost total absence of attention given to the problem in congressional hearings and reports. No doubt, many fee limitation clauses were added as an ad hoc response to evils, or imagined evils, which may not necessarily have existed in the bulk of cases to which the clauses apply..."

We also subscribe to the philosophy expressed by the Senate Committee on the Judiciary when it commented:

"Determination of a reasonable fee should be left in the first instance in the hands of the client and his attorney. This bill would preserve this traditional attorney-client relationship, subject only to review for reasonableness on the part of the administrative agency."

By substituting "architect-engineer" for "attorney," we believe that the above statement is fully applicable to this brief. If anything, the A-E case is a stronger one because the Client for an A-E in this context is not an uninformed individual with a claim against the Government, but the Government itself which is represented by experienced and competent negotiators. The "review for reasonableness," is inherent in the agency's initial opportunity when negotiating the contract with the A-E, hence an outside court review, as provided in the bill for attorney's fees is not necessary for A-E services.

Knowledgeable government agency negotiators, familiar with engineering detail and procedure, play an important role in defining a given project and in estimating its scope and probable cost. Such individuals can distinguish experienced, reputable engineering firms best qualified to handle the various projects for which they are responsible. They are also capable of recognizing and discussing technical alternatives suggested by such firms.

Negotiators of *this* caliber already serve in many positions of Federal responsibility. Virtually all recognize the futility and error of a statutory maximum which fails to allow appropriate increases in fee to cover additional engineering responsibility, study and/or ingenuity. There is no better argument for unencumbered negotiation than the fact that such procedure *is* presently being used by many, if not a majority, of all Federal agencies which regularly contract for A-E services. It is to their credit that many negotiating officers have, despite the fee limitations, found means for retaining the services necessary for given projects.

Unless the practice of professional engineering can be maintained on the highest of standards, the quality of work may inadvertently be lowered. It is more than a simple question of sound business principles, but of ethical procedures and standards of professional practice as well.

This fact is apparently recognized by virtually all of the Federal agencies which contract for A-E services. Many Rave guidelines similar to the following excerpt from "Instructions for Selection of Architects-Engineers" used by the Atomic Energy Commission:

"In evaluating capabilities of firm being considered, major consideration is given to the qualifications and experience of the key personnel proposed for the services, the firm's ability to furnish an adequate number of qualified personnel, the quality of the firm's past performance on comparable work...experience and technical competence of the firm...management capabilities of the firm, manpower reserve...and current work load."

(Please note the lack of reference to ability to perform services within a fee maximum.)

The Federal government, like any other client of a consulting engineer, is assured of dollar value *for* dollar spent by virtue of its own qualified staff negotiators.

Further assurance is provided by the recognized and tested "control" inherent in our nation's competitive private enterprise system. While the technical complexities and unknowns of engineering obviate the practice of bidding, engineers are, nevertheless, aware that a combination of superior services at reasonable cost is an absolute prerequisite for business and professional success.

Reputable engineers are unlikely to seek excessive fees when such fees may be considerably over those accepted and observed by the profession. Also, it is well known that recommended schedules of fees are available and familiar to public agency officials. Certainly attempts to overcharge or "pad" engineering costs would, in most cases, be recognized by competent government negotiators. Consulting engineers know that future jobs are dependent upon services rendered economically on present projects. Any proclivity to boost fees is certain to result in exemption from consideration for future Federal government work.

Besides the business aspects, consulting engineers are expected to assume a responsibility to their clients, and to society, which transcends personal gain. It is this responsibility, more frequently referred to as the engineer's "code of ethics", which demands faithful professional service, honestly rendered. This would certainly imply that an engineer will not charge his client an exorbitant fee. All engineers are subject to the same code of ethics, hence the engineer in Federal employ is patently aware of infractions and is, if necessary, in a position to request punitive action.

In the performance of Federal work the consultant is subject to additional "controls". Many of these are an integral part of Government contracts. They include: specific delineation of projects, required engineering recordskeeping procedures, quality control and inspection of

work, regular progress reports, review and approval of plans, responsibility in case of engineering negligence, and payment deferment in cases involving inadequate or improper work.

**V CONCLUSION AND RECOMMENDATION OF THE PROFESSION**

The benefits of open, unencumbered negotiation are obvious. They have been proven in practice. More than three-fourths of all engineering work done in the United States is by contract negotiated without a restriction as to maximum engineering fees. Competent, responsible Federal negotiators do not require a statutory maximum. They are already concerned with economy as it relates to appropriate fees for services rendered. They are the public's best assurance of quality engineering from reputable and capable consulting firms.

Contracting without the handicap of an unworkable percentage limitation, regardless of the amount of that percentage, allows the Government maximum use of engineering talent and resource to develop superior solutions or facilities, with savings not only in initial cost but in operation and maintenance as well. Engineering costs are largely technical brain power costs. Existence of a statutory maximum is an admission of government desire to limit and restrict that invaluable resource.

It is respectfully suggested that this brief amply demonstrates the basis and justification for the Comptroller General to recommend to Congress that the present Federal statutes imposing percent limitations on A-E fees should be repealed. Accordingly, the engineering profession is jointly agreed that existing statutory maximums should be removed from the cited laws. The profession further suggests that a substitutive "control" is unnecessary, impracticable and likely to create more problems than may already be evident under present laws.

COMMENTS ON THE COST AND PRICING LAW

It has been suggested that if the fee limitations for A-E services were to be repealed the government's interests might be served by reliance upon the Act of September 10, 1962, P. L. 87-653, Sec. 1 (d), (e), 76 Stat. 526.

This Act (10 U.S.C. 2306 (a) (f)) provides, in applicable part, that on negotiated contracts the prime contractors and subcontractors must certify that to the best of their knowledge and belief the cost and pricing data they submit at the time of the negotiation for contracts and subcontracts of more than \$100,000 (or less as determined by each agency) is current, accurate and complete. Such contracts would contain a provision that the price to the Government shall be adjusted to exclude any significant amounts by which the head of the agency determines that the price was increased because the cost and pricing data furnished was inaccurate, incomplete or not current.

Senate Report No. 1884, 87th Congress, declared that "The objective of these provisions is to require truth in negotiating." To this statement we wholeheartedly subscribe and see no problem for A-E services application of that principle. The ethics of the engineering profession requires no less than the statement of the Senate Committee on Armed Services, quoted above.

However, upon a close examination of the "truth in negotiating" law we believe that it is not suitable or appropriate as a method of protecting the Government's interests for A-E contracts. It is readily apparent from the law itself, as well as the legislative history, that Congress was directing its attention to production-type contracts in which equipment and materials are the basic ingredient. The average or usual A-E contract, on the other hand, involves very little in the way of materials, supplies or

equipment. The main price and cost date applicable to an A-E contract are for manpower and overhead.

In commenting upon the cost and pricing date to be supplied at the time of negotiation, Senate Report No. 1864 noted:

"Although not all elements of cost are ascertainable at the time a contract is entered into, those costs that can be known should be furnished currently, accurately and completely."

At the time of negotiation or of entering into a contract, an A-E firm knows and can furnish accurate information on the salary rates it is paying and expects to continue to pay to its staff personnel who will be employed in the performance of the contract. It also knows, within reasonable limits, what costs will be involved for miscellaneous supplies, such as drafting paper, blueprinting or reproduction services and similar minor items of cost directly related to the contract. However, the primary cost involves estimates of the man hours and indirect costs (overhead) required for the completion of the work.

Because such a relatively small portion of an A-E contract involves costs which would be susceptible of definite and specific listing at the time of negotiation, we believe that the "truth in negotiating" law is not a practical substitute to be used in lieu of fee limitations.

**COMMENTS OF THE PROFESSIONAL SOCIETIES  
CONCERNING THE GAO DRAFT REPORT**

**Introduction**

This memorandum sets forth the views of the undersigned professional societies of architects and engineers\* concerning the GAO Draft Report to Congress entitled "Government-Wide Review of the Administration of Certain Statutory and Regulatory Requirements Relating to Architect-Engineer Fees."

We start from the premise, concurred in by the GAO, that the 6% fee limitations are inappropriate for A-E services and should be repealed. Although it could be argued that these statutory limitations are not now applicable to **all** classes of A-E contracts, there is no need to discuss this matter since the Draft Report contains a persuasive case for repeal.

We accept the further premise--also fundamental to the **GAO** Report--that the public interest is best served if the government obtains the best possible A-E services **for** a reasonable fee. We believe that the professional codes of ethics of architects and engineers, and 10 U. S. C. Sec. 2304(g), **2306(f)** as now applied **by** the procuring agencies, insure the achievement of these goals.

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\* American Institute of Architects; American Institute of Consulting Engineers; American Society of Civil Engineers; Consulting Engineers Council; Engineering Division, American Road Builders Association; National Society of Professional Engineers.

It is our view that the public interest is best served by unfettered negotiating procedures conducted by competent contracting officers. The public interest will not be served by an inflexible interpretation of statutory provisions as apparently recommended in the Draft Report. We will show in this memorandum that a flexible application of 10 U. S. C. Sec. 2304(g), 2306(f) is required by the language **and** legislative history of these statutes and by the realities of A - E services procurement.

While this memorandum will focus on the provisions of U. S. C. title 10, chapter 137, the need for flexibility in procurement of A-E services is also applicable to those agencies not within the scope of title 10.

At the outset, it should be remembered that the Congress, the GAO and the purchasing agencies have long recognized that rules of contract negotiations appropriate for procurements of goods are usually inappropriate where professional services are involved. For example, 10 U. S. C. Sec. 2304(a)(4), 41 U. S. C. Sec. 5 and 41 U. S. C. Sec. 252 each exempt professional services from formal advertising requirements. The legislative history of these procurement acts is replete with express recognition of the unique status of such services.\*

\*  
Illustrative is the reply of Senator Saltonstall to a statement by Mr. Paul H. Robbins, Executive Director of the National Society of Professional Engineers, who, in testimony on a predecessor bill to what is now Sec. 2304(g), had raised the question whether the legislation would require competitive bidding in the procurement of A-E services. Senator Saltonstall said:

"Mr. Robbins, certainly as the author of S. 500, the Senator **who** filed it, I had not the slightest intention, and until you said it this morning, I did not conceive that this bill would cover the question of competing for personal services." (Hearings on S. 500, S. 1383, S. 1875, Before the **Sub-**committee on Procurement of the Senate Armed Services committee, 86th Congress, 1st Sess. 423 (1959)).

See also, S. **Rep.** No. 2201, 85th Cong., 2d Sess. (1958).

A-E services are distinguished from goods-and-materials contracts because the A-E--like the attorney and doctor--is a professional whose "product" is his skill, ingenuity, training, and integrity. The A-E client relationship is a fiduciary one, in which trust, creativity and quality of service--not price--are of paramount importance. There is, after all, a crucial difference between a vendor of nuts and bolts, and a professional who is retained to devise an imaginative economic solution to a technical problem. We respectfully submit that this difference must be borne in mind in interpreting and applying statutes. Rigid interpretations which restrict the full use of the A-E's professional talent **could** save a small amount in design expenditures but cost the taxpayers substantial sums in a more expensive and less efficient facility.

We know that the GAO will give serious consideration to the points discussed below, and respectfully **ask** that the Draft Report be modified to reflect these points.

I

**A-E'S ARE NOT, AND SHOULD NOT  
BE, REQUIRED TO CERTIFY COSTS  
WHICH CANNOT BE KNOWN AT THE  
TIME OF CONTRACTING\***

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We totally subscribe to the philosophy underlying 10 U. S. C.  
Sec. 2306(f), as set out in the Senate Report:

"The objective of these provisions is to require truth in negotiating. " (S. Rep. No. 1884, 87th Cong., 2d Sess. (1962))

This principle is incumbent upon **A-E's**, as professionals, even in the absence of a statutory requirement, and is a constantly recurring theme in the **A-E** codes of ethics.

We do not here dispute the present applicability of **Sec. 2306(f)** to **A-E** contracts where the price is expected to exceed \$100,000. However, in recommending the application of **Sec. 2306(f)** to **A-E** contract negotiations, the Draft Report has failed to make certain distinctions which are essential if the provision is to be workable and equitable. In particular, the Draft Report draws no distinction between those components of a contract price which are or can be known at the time of contracting, and those components which can only be generally estimated. Although not explicit, the Draft Report suggests **that Sec. 2306(f)** requires a certification of **all costs, regardless** of whether or not they are known at the time of contracting. We submit that this position is unsound both as a matter of legislative history and public policy.

Senate Report 1884, commenting upon **Sec. 2306(f)**, **makes** it clear that only those costs which are known at the time of contracting should be certified:

"Although not all elements of cost are ascertainable at the time a contract **is** entered into, **those** costs that can be known should be furnished currently, accurately, and completely. " (emphasis supplied. )

We do not here take issue with the Draft Report's discussion of the "detailed analysis method" of determining A-E fees. \* Under this method, all components of cost should be estimated. Nevertheless, there is a vast difference between merely estimating all components of cost, on the one hand, and requiring, on the other, A-E's to certify all components (including those which cannot reasonably be known), and then permitting only a downward adjustment in fee should such certifications prove inaccurate or incomplete.

We see no difficulty in certifying those A-E costs which are known at the time of the contracting. Such costs would include current data on salary rates for technical and nontechnical personnel, and such items as overhead rate, rent, insurance, equipment, supplies, etc.

However, certain components of cost, such as number of hours and fees of outside experts, can at best be only generally estimated, and there may be wide variations between the estimate and the actual cost. To interpret the statute as requiring certification of inponderable cost factors would undercut its philosophy and purpose: it is not possible to certify the truth of that which is unknown,

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\* For reasons given below, we do object to the suggestion at page 32 of the Draft Report (which deals with the "detailed analysis method") that all contracts for A-E services may be "subject to the competitive negotiation requirements of Public Law 87-653 and the FPR. . . ." We note that, the term "competitive negotiations" appears nowhere in Public Law 87-653.

Department of Defense, **Bo** not comply with the requirements of Sec, 2304(g). The Report implicitly **urges** that a more rigid application of the section be instituted. We believe that the section's language and legislative history compel, at the very least, the conclusion that present agency procedures fully conform with the section and the intent of Congress.

**A - The Language of the Statute.**

Unlike the rigid position apparently taken in the Draft Report **that** solicitations must **always** be made from the maximum number of sources, and that discussions must **always** be had with all responsible offerors, the language of Sec. 2304(g) is the language of flexibility. The section requires that the negotiation procedure be "consistent with the nature **and** requirements of the . . . , services to be procured . . . ." **The** clear meaning of this is that rules for nuts and bolts should not be applied when it is not in the public interest to apply them--such as in negotiating for the expertise inherent in professional service contracts.

**A** brief analysis of "the nature and requirements of the . . . , services to be procured" through an A-E contract indicates that a rigid application of Sec. 2304(g) simply **cannot work** effectively. Very frequently, the scope of the project is not agreed upon until negotiations have been virtually concluded. **All** too often, the problem cannot even be defined with any precision until negotiations are **well** under way. Under these circumstances the solicitation of proposals, including price quotations, **from**

Moreover, such an interpretation would be most inequitable.

Under Sec. 2306(f), if the A-E's certified figures prove to be inaccurate and too high the agency may reduce the fee. There is, however, no comparable provision authorizing an increase in fee if the A-E'S certification of costs proves to be inaccurate and too low. For this reason alone, if for no other, A-E's should not be required to certify cost or price components which cannot be reasonably known at the time of the negotiation.

We urge that the distinction, between those elements of cost which can be subject to the certification requirements of Sec. 2306(f) and those which cannot, be fully recognized in the Final Report. While it may not be feasible for the Report to spell out this distinction with precision, we will be glad to cooperate in any endeavor to establish uniform guidelines for distinguishing between certifiable and noncertifiable A-E costs.

## II

EXISTING PROCEDURES FOR NEGOTIATING A-E  
CONTRACTS ARE CONSISTENT WITH THE NATURE  
AND REQUIREMENTS OF THE SERVICES TO BE  
PROCURED, AND FULLY COMPLY WITH SECTION  
2304(g).

In our view, the legislative history hereinafter set forth constitutes substantial ground for concluding that Sec. 2304(g) was not intended to apply at all to A-E services. However, for the purposes of this memorandum, we assume, without conceding, the present applicability of Sec. 2304(g) to A-E contracts. We do take issue with the Draft Report's conclusion that existing agency procedures, particularly those of the

multiple A-E firms would result in an emphasis on price that would be contrary to the best interests of the government.

Multiple solicitation of proposals and price quotations is undesirable for at least three reasons:

First, it will impose an unnecessarily onerous administrative burden upon government procurement agencies. To waste time and money attempting to evaluate dozens or even hundreds of A-E proposals--particularly on a unique facility (such as the new National Fisheries Center) which requires original concepts and design--makes no sense if a "responsible offeror" is to mean, as Congress intended it to mean, a firm clearly qualified in terms of available specialists and experience to undertake within a specified time period a specific project, once its size, style and usage have been defined.

Second, if price quotations are required, procurement agencies will be under great pressure to pay attention only to the lowest offer. Tangible goods can be tested against specifications and given a relatively fixed market value; but no specification can ever be written to cover the creative intellectual product of an architect or engineer. Thus, in order to obtain a facility which will be less costly to build, operate and maintain it will frequently be in the interest of government economy to pay higher design costs initially.

Third, whenever the formulation of proposals is costly--as it frequently is in A-E contracts--outstanding and busy A-E firms may be reluctant to assume this cost because the chances of being retained for a

professionally satisfactory assignment will be substantially reduced.

Consequently, the majority of offerors anxious to obtain the work may be firms less qualified to do the job.

Solicitation of numerous proposals including price quotations, then, is no substitute for a detailed and thorough examination of the qualifications of A-E firms and for extensive discussions with the most qualified firms on the nature and scope of the problem. The statute itself, in recognition of this, only requires solicitation from the "maximum number of qualified sources consistent with the nature and requirement of the . . . services to be procured." Existing agency procedures are wholly consistent with this statutory requirement.

This is not to suggest that price is not an important factor in A-E negotiations. Under the existing procedures, if an agency is unable to reach what it regards, upon its own analysis, as a fair and reasonable contract price, negotiations with the **most** qualified A-E source are broken off and the agency negotiates with other firms successively until a reasonable price is reached. The agencies thus balance the various factors which must be taken into account in negotiating an A-E contract.

Since these agencies conduct the day-to-day negotiations of A-E contracts, they are best able to determine the procedure most "consistent with the nature and requirements of the . . . services to be procured. . . ." There is no reason to believe that the agencies have abused their discretion in applying the statute.

**B - Legislative History.**

An overall view of the legislative history of Sec. 2304(g) supports the procuring agencies' interpretation of that section as expressed in **ASPR 3-805**, and related regulations.

In the hearings concerning H. R. **12299** (the predecessor of Sec. 2304(g) which is virtually identical in all relevant particulars), the Defense Department suggested that the **bill** be revised to specifically enable the agencies to conduct negotiations without written or oral discussions in certain cases. The Department felt that discussions **would** serve no **useful** purpose in negotiations relating to perishables, educational institutions, and professional services. There **was** general agreement in the Special Subcommittee that the **bill** did not require written or oral discussion in these instances. The following colloquy provides **one** example of this agreement:

"Mr. Courtney /staff member of Subcommittee/:  
Mr. Chairman, there was a further question raised in the discussions with the Department /of Defense/ as to whether or **not** certain categories of purchases ought **not** to be excepted from the provision /requiring written or oral discussions/.

"Mr. Vinson /Chairman of Subcommittee-, I think **there** is no dispute that perishables, number (9) **of the** regulations /sic/\* should be excluded from this section.

"Mr. Courtney: Perishables, number (9).

"Mr. Vinson: That is right.

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\* The reference is, obviously, to the statutory provision, 10 U. S. C. Sec. 2304(a)(9).

"Mr. Bates: I think that should be clarified here.

"Mr. Lankford: You can stick in the word 'practicable'.

"Mr. Welch: Oh, in the language, itself, we have this provision already.

"Consistent with the nature and requirements of the supplies or services to be procured."

"Mr. Bates: Well, what does that mean.?"

"Mr. Welch: Reasonable, under the circumstances." (Hearings on H.R. 12299, op. cit. supra at 716.); (emphasis supplied).

Further, the GAO, in a letter, dated July 17, 1962, to the Chairman of the Senate Armed Services Committee, stated that Sec. 2304(g) represented nothing more than a codification of the then existing agency procedures, in particular ASPR 3-805;

"The Department of Defense has also pointed out that the requirements of section (e) Adding Sec. 2304(g) have recently been incorporated into regulations, and has stated that the possibility of need for revision to meet changing conditions or potential abuses, and the difficulty of keeping a statute responsible to such need for change, make it preferable to regulate rather than legislate in this area. While it is true that ASPR 3-805, which currently imposes the requirements proposed by section (e) of H.R. 5532, has been subject to revision in the past, we see no reason to believe that there will be a need for revision of the basic requirements. . ." (emphasis supplied) The letter is reported, in fall, in S. Rep. No. 1884, 87th Cong., 2d Sess. (1962).

There has been no relevant change in ASPR 3-805 since this letter from the GAO; this provision is the one still followed by the agencies today. Yet, whereas in 1962 the GAO took the position that the agency procedures were fully consistent with the requirements of Sec. 2304(g), it now takes the position, in the Draft Report, that the same procedures do not

"Mr. Courtney: Which seemed to be by definite agreement - not within the scope of this proposed section.

"Mr. Kilday /member of the Subcommittee/: The language would not prohibit negotiations as to perishables, but would simply not require it.

"Mr. Courtney: This is right; and the other one had to do with professional services."

(Hearings on H. R. 12299 Before the Special Subcommittee on Procurement Practices of the House Committee on Armed Services, 86th Cong. 2d Sess. 723 (1960)); (emphasis supplied).

Moreover, the GAO itself recognized that there had to be flexibility in the statutory provision, and that the phrase "consistent with the nature and requirements of the supplies or services to be procured" injected such flexibility, and permitted the procuring agencies to waive solicitations where appropriate. The following colloquy, between members of the Subcommittee and J. Edward Welch, Esq., Deputy General Counsel of the GAO, illustrates this recognition:

"Mr. Bates: But the question I want to ask: Does this language here which requires the proposal shall be solicited from the maximum number of qualified sources prevent that type of offer /where the Department of Defense asks only a portion of the-qualified sources to submit a proposal/.

"Mr. Welch: We wouldn't construe it as preventing . . . /such a limited solicitation/. . . because we would feel, I believe, that you have to read into that language the implied provision, "the maximum which is reasonable under the circumstances of the particular procurement."

**comply** with the statute. We respectfully submit that the earlier position is the correct **one**, and that Sec. 2304(g) should be viewed **as a** codification of **ASPR 3-805**.

Given this legislative history, a flexible reading of Sec. 2304(g) **would** be required even if the section's language did not compel such a reading.

### III

#### **THE CODES OF ETHICS PRESENT NO PROBLEMS IN INTERPRETING THE STATUTES.**

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The Draft Report erroneously gives the impression **that** existing agency procedures were formulated in deference to the ethical requirements **of** the architectural and engineering professions. Rather, the professional standards and the agency procedures derive from the same policy considerations. Both recognize the unique nature of ~~the~~ relationship between **A - E and** client, and both recognize that an undue concern **for** price can only lead to a lessening in the quality of performance, to the serious detriment of the client. There is complete consistency between **ASPR 3-805, 10 U. S. C. 2304(g) and** our professional standards; and the references **on** pages **26-28** of the Draft Report to **these** professional standards and the Secretary of Defense's comment thereon **are** out of context, unnecessary and inappropriate and properly should be stricken.

CONCLUSION

We respectfully request that the final report be modified to reflect the points raised above, and we would welcome the opportunity to discuss this matter further.

February 24, 1967

American Institute of Architects

American Institute of Consulting  
Engineers

American Society of Civil Engineers

Consulting Engineers Council

Engineering Division, American  
Road Builders Association

National Society of Professional  
Engineers



ASSISTANT SECRETARY OF DEFENSE  
WASHINGTON, D.C. 20301

INSTALLATIONS AND LOGISTICS

3 MAR 1967

Mr. Robert F. Keller  
General Counsel  
General Accounting Office  
Washington, D. C. 20548

Dear Mr. Keller:

This response to your letter of February 10, 1967, confirms the views expressed on behalf of the Department of Defense at your February 20 meeting among the major Federal construction agencies concerning architect-engineer fees. I understand that at the meeting, in which the Comptroller General participated, the several agencies commented on your draft report (B-152306) entitled "Government-wide review of the administration of certain statutory and regulatory requirements relating to architect-engineer fees." Although you have not formally requested us to submit written commentary, we have agreed to provide our comments to you in this form.

The General Accounting Office (GAO) was requested during April, 1966, by the House Committee on Sciences and Astronautics to undertake a Government-wide review of the six percent statutory fee limitation on architect-engineer (A-E) fees and to make recommendations to the Congress. The present draft report provides certain findings and a single legislative recommendation to repeal the six percent limitation. GAO also discusses contractor selection and negotiation procedures which were the subject of a separate review initiated by GAO prior to the Committee's request.

During these reviews, the GAO requested comment by the Department of Defense on certain specific questions, replies to which were provided by my letter of November 5, 1966. The GAO responded in an opinion letter (B152306) of December 12, 1966, which disagreed with certain of our conclusions. The present draft report and the December 12 letter both criticize existing Department of Defense practices whereby A-E services are obtained by means of selective negotiation rather than by means of simultaneous discussions with several offerors (ASPR, Section XVIII). The draft report also expands upon the position taken by the GAO in the December 12 letter by concluding that the six percent limitation upon A-E fees is no longer meaningful, and undertakes a discussion of A-E procurement practices as followed by Federal agencies generally.

The comments in succeeding paragraphs; deal with the highlights of the GAO review as reflected both in the draft report and the December 12, 1966, Letter.

The Department of Defense concurs in the GAO legislative recommendation to repeal the six percent A-E fee ceiling. The DOD docs not, however, agree with the GAO finding that the Military Departments have failed to comply with pertinent law in excluding certain costs from the computations made to determine compliance with the six percent ceiling. The GAO list of illustrative excess fee cases assumes that all A-E costs must be calculated in the six percent computation, an assumption which, as the GAO recognizes, the construction agencies do not acknowledge. Since the GAO concedes the good faith posture of the Federal construction agencies (which in the case of the military agencies is consistent with prior Comptroller General opinions), the list does not appear to be relevant. This is especially clear in the case of Navy A-E contracts, in the light of GAO acknowledgement that the Navy has specifically cited the statute which permits exclusions.

It is agreed that the initial 1939 statutes which authorized procurement of A-E services by contract applied equally to fixed-price and cost-plus-a-fixed-fee contracts. The 1939 statutes are now codified at 10 USC 4540 (Army), 10 USC 7212 (Navy), and 10 USC 9540 (Air Force). These statutes authorize A-E contracts "to produce designs, plans, drawings, and specifications;" as codified, only the Navy statute explicitly provides that the procurements may be "without advertising." GAO acknowledges that Navy properly excludes certain costs by negotiating under 7212, but contends that Army and Air Force, by using the authority to negotiate under 10 USC 2304(a)(4), come within the six percent limitation of 10 USC 2306(d) (not to exceed six percent of the estimated cost of the work or project), and cannot therefore exclude any A-E costs in computing the six percent allowability. The DOD remains of the opinion that, notwithstanding what statute is cited as authority to negotiate, i.e., in the case of Army and Air Force, 10 USC 2304(a)(4), (contract for personal or professional services) the substantive provisions of the separate Army and Air Force authorizations permit the same exclusions as Navy obtains under its separate statute. The GAO disagrees and says that if negotiation is under 2304(a)(4), all costs are includable because 2306(d) so requires. Since, however, the Comptroller General concludes that the Army and Air Force statutes "should be regarded as a basis for authorizing the negotiations of architect-engineering contracts pursuant to 10 USC 2304(a)(17)" ("negotiation...otherwise authorized by law"), the substantive result is the same. In any event, should the repealer not be forthcoming, steps can be taken to assure that 10 USC 2304(a)(17) is cited in conjunction with underlying statutes which authorize the particular procurements.

It should be noted for clarity that the Department of Defense disagrees with the GAO contention that 2306(d) (all costs included in six percent

calculation) covers fixed-price as well as cost-plus procurement of A-E services. GAO's quotation (letter, p. 6) from the antecedent Armed Services Procurement Act is incomplete; a reading of the full text (sec. 4(b), P.L. 413, 80th Congress) would seem to make clear that the limitation to six percent of costs was in context of cost-plus contracting only.

GAO, upon concluding that the six percent fee limitation serves no useful purpose, suggests that existing statutory requirements for competitive negotiation and the submission and certification of cost and pricing data (10 USC 2304(g) and 2306(f) respectively, added by P.L. 87-653) "should provide adequate assurance of reasonable A-E fees." The Department of Defense concurs. As stated in paragraph five of my November 5, 1966, letter, the Department of Defense procedures are believed to satisfy the intent of P.L. 87-653.

The Department of Defense disagrees with the GAO contention that present A-E selection procedures in the DOD fail to follow 2304(g). Section 2304(g) requires that negotiated procurements involve solicitations of proposals "from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered."

The legislative history of P.L. 87-653 fails to provide any basis for denying discretion to the DOD to determine that the particular market conditions may compel selection on the basis of technical ability among members of a profession who profess to reject price competition.

Administrative difficulty would doubtless be encountered by altering the long established procedures, now set forth in ASPR 18-402.2, of selecting a minimum of three firms, and negotiating selectively (e.g., with the first selected of the three). Negotiations are conducted with the next preferred firm only if a fair and reasonable price not in excess of the Government estimate cannot be obtained from the previously selected firm. If this approach were changed to meet conventional competitive negotiation procedures, it is unlikely that the industry would now be prepared to offer competitive price proposals, especially in those cases where the work to be performed is undefined and the precise nature of the requirement depends in part upon the professional judgment being solicited. It is our understanding that the statutory injunction for competitive negotiation simply provided a premise for the proposition that discussions would be sought with responsive and responsible offerors, and that it was merely declarative of pre-existing DOD practices in maximizing competition to the greatest practicable extent. In testifying on a predecessor bill to P.L. 87-653, Assistant Secretary Perkins McGuire made this observation on May 31, 1960, to the House Armed Services Committee, Special Subcommittee on Procurement Practices of the Department of Defense (Hearings No. 67, pp. 6037 et seq.), 86th Congress, 2d Session, at page 6057):

"... it has always been **the** policy of the Department; of Defense, and our regulations so provided, that in negotiated procurements proposals will be solicited from **all** qualified sources necessary to assure full and free competition **consis-** tent with the nature and requirements of *the* supplies or services to be procured."

This viewpoint **was** reiterated in formal DOD statements of position on similar bills in 1961 (letter from Cyrus Vance, General Counsel, April 21, 1961, House Armed Services Committee Report No. 1638, 87th Congress, 2d Session (April 30, 1962)) and 1962 (letter from John T. McNaughton, General Counsel, July 13, 1962, Senate Armed Services Committee Report No. 1884, 87th Congress 2d Session (August 17, 1962)).

This Department has a firm policy requiring maximum practicable competition. The enactment of P.L. 87-653 however, **with** the requirement for competitive negotiations, did not **alter** the conditions of the market place. Rather, Congress **recognized** it was the nature of various procurements that there would at times be more, and at other times less, competitive force at work, and directed the Department to obtain as much competition as possible in the circumstances. In the event the architect-engineer community **should** evidence its professional willingness to engage in price competition, the DOD is prepared to undertake a re-assessment of its present procedures in the light of the resulting new climate and considering the varying nature of A-E requirements. In this connection, it is understood that the GAO, as evidenced by the discussions at the February 20 meeting, recognizes that selection pursuant to competitive negotiation need not depend on price, since price is rarely, if ever, the critical factor in obtaining a satisfactory A-E product (see, e.g., ASPR Section IV, esp. 4-205.5, Procurement of Research and Development). Until it is demonstrated that the A-E community is prepared to countenance competition on price, the DOD, believing that it is complying with P.L. 87-653, would intend to proceed as before. It should be noted, in this connection, that in every A-E procurement (1) the professional capabilities and suitability of each A-E are comparatively evaluated by the Government in the selection process, and (2) a Government price estimate is prepared and provides a yardstick against which the offeror's proposal is measured. The offeror knows in each case that if his price proposal is unreasonable, the Government will proceed to negotiate with the next selected A-E.

Finally, concerning the certification of cost and pricing data requirement introduced by P.L. 87-653 (10 USC 2306(f)), GAO notes favorably that the Department of Defense applies the implementing provisions set out in ASPR 3-807.3 et seq. without distinction as to whether or not A-E services are involved.

Sincerely,  


PAUL R. IGNATIUS

Assistant Secretary of Defense  
(Installations and Logistics)

EXECUTIVE OFFICE OF THE PRESIDENT  
BUREAU OF THE BUDGET  
WASHINGTON, D.C. 20503

APR 1 1967

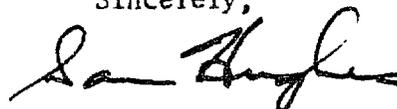
Honorable Elmer B, Staats  
Comptroller General of *the*  
United States  
General Accounting Office  
Washington, D. C. 20548

Dear Elmer:

Thank you for the opportunity to review your draft report on the "Government-wide Review of the Administration of Certain Statutory and Regulatory Requirements Relating to Architect-Engineer Fees."

The Bureau of the budget is in favor of your proposed recommendation to the Congress that the statutory limitation on Architect-engineer fees be repealed. Additionally, if you consider that current agency practice in the procurement of Architect-Engineering services is of doubtful legality, we would agree that a congressional review of this subject is in order.

Sincerely,



PHILLIP S. HUGHES  
Acting Director



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D C 20549

B- 152306

APR 20 1967

To the President of the Senate and the  
Speaker of the House of Representatives

The General Accounting Office has made a review of the interpretations and applications by Federal agencies of the statutory 6-percent fee limitations on architect-engineer fees under Government contracts and of certain related statutory and regulatory requirements. Our review was made in response to the request of the House Committee on Science and Astronautics and the Senate Committee on Aeronautical and Space Sciences. The accompanying report presents our findings, conclusions, and recommendations for legislative action.

We found that the major construction agencies contracted for architect-engineer services at fees in excess of the statutory provisions which limit the fees payable to architect-engineers to 6 percent of the estimated cost of construction. Generally, agencies have interpreted the limitation as applying only to that portion of the total fee relating to the production and delivery of designs, plans, drawings, and specifications. Under this interpretation, most of the architect-engineer contracts under which the total fee exceeded 6 percent would be in compliance with the limitation. However, in our opinion, the military procurement statute and the Federal Property and Administrative Services Act of 1949 impose the 6-percent fee limitation on all architect-engineer services.

In our opinion, the present statutory fee limitation is impractical and unsound, and we are recommending that the Congress repeal the 6-percent limitation imposed on architect-engineer fees by the United States Code (10 U.S.C. 2306(d), 4540, 7212, and 9540) and by section 304(b) of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 254(b)). Representatives of the Federal agencies, the architectural-engineering professional societies, and the Bureau of the Budget have advised us that they agree with this recommendation,

During our review, we examined into whether the agencies were requiring architect-engineer contractors to submit cost or pricing data

prior to the award of negotiated contracts as required by Public Law 87-653 which applies to the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard and by the Federal Procurement Regulations which apply to the remaining Federal agencies. Although the Federal Property and Administrative Services Act of 1949 has not **been** amended to require cost or pricing data, the General Services Administration has included a requirement for furnishing such data in the Federal Procurement Regulations similar to the requirement in Public Law 87-653. The General Services Administration has determined, however, that the requirement should not be applied to architect-engineer contracts because of their special characteristics.

Representatives of the Department of Defense have advised us that the cost or pricing data requirements of Public Law 87-653 are being applied without distinction as to whether or not architect-engineer services are involved. A representative of the General Services Administration has advised us that consideration will be given to revising the Federal Procurement Regulations to provide for such application. We believe that cost or pricing data should be required by all agencies in contracting ~~for~~ architect-engineer services. The Bureau of the **Bud-**get has advised us informally that it agrees with our views in the mat-  
ter,

We also examined into the requirement of Public **Law** 87-653 that, in **all** negotiated procurements in excess of \$2,500, proposals be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured **and** that discussions **be** conducted with all responsible offerors whose **pro-**posals are within a competitive range, price and other factors considered. The General Services Administration has included a similar requirement in the Federal Procurement Regulations. Although most of the construction agencies of the Government are subject to this requirement, they generally solicit a proposal **only** from the architect-engineer firm selected on the basis of technical ability. In our opinion, this negotiation procedure does not comply with the above statutory re-  
quirement.

Agency representatives have advised us that **they are opposed to** the concept of soliciting multiple competitive proposals. The Department of Defense has advised us that it believes that its present architect-engineer selection procedures constitute the maximum competition consistent with the nature and requirements of the services being procured. The Department of Defense has also stated that, until the architect-engineer community demonstrates that it is prepared to countenance competition on price as well as on other factors, the Department, believing that it is complying with Public Law 87-653, would intend to proceed as before.

Representatives of the architect-engineer professional societies have advised us of their belief that the legislative history of Public Law 87-653 constitutes substantial ground for concluding that the competitive negotiation requirements of the act were not intended to apply to architect-engineer services,

We find no present statutory basis which would exempt architect-engineer contracts from these requirements. Therefore, we are of the opinion that the present negotiation procedures and practices do not conform with these requirements. Recognizing, however, that the problem of **how** architect-engineer services can best be obtained is a **complex** one, we have advised the agencies that present procedures may be followed until the Congress has had an opportunity to consider the matter.

Although we are of the opinion that the procurement of architect-engineer services is and should be subject to the competitive negotiation requirements of Public Law 87-653, we think that, in view of past administrative practices in the procurement of such services, it is important that the Congress clarify its intent **as** to whether the competitive negotiation requirements of the law are to apply to such procurements. Should the Congress determine that it is not so intended, we believe that the law should be amended to specifically provide **for** an exemption for this type of procurement,

Absent a clarification of congressional intent, we are of the opinion that the Department of Defense should appropriately revise the

Armed Services Procurement Regulation to reflect a proper implementation of Public Law 87-653, Also, we are of the view that the General Services Administration should similarly revise the Federal Procurement Regulations so as to ensure uniform procedures with reference to the procurement of architect-engineer services.

Further, we examined into the methods employed by Federal agencies to compute an estimate of the architect-engineer fee for purposes of negotiation. The most commonly used methods are the detailed analysis method and the percentage-of-estimated-construction-cost method. We believe, however, that the detailed analysis method is more appropriate and should be used by all agencies in lieu of the percentage-of-estimated-construction-cost method.

Copies of this report are being sent to the Director, Bureau of the Budget, and to the agencies included in our review.



Comptroller General  
of the United States

C o n t e n t s

Page

INTRODUCTION

FINDINGS AND RECOMMENDATIONS	3
Requirement that A-E fees not exceed 5 percent of estimated construction cost	3
Statutes limiting A-E fees	4
Agencies <sup>s</sup> policies and procedures implementing compliance with statutes	5
Interpretation of the statutes	5
Fees paid in excess of statutory limitation	7
Types of A-E contracts subject to limitation	8
Agencies exempt from limitation	10
Comments of professional societies	11
Agency comments on problems encountered in administering the limitation	12
Agency suggestions and our evaluation thereof	14
Agency comments	15
Conclusion	16
Recommendation to the Congress	16
Requirements for submission of cost or pricing data by professional services contractors	17
Military procurement statute	17
Federal Procurement Regulations	18
Agency policies not in accordance with Federal Procurement Regulations	20
Agency policies consistent with law or Federal Procurement Regulations	21
Agency comments	23
Comments of the professional societies	23
Conclusion	25
Requirement that proposals be solicited from the maximum number of qualified sources	27
Agency procedures for selecting A-Es	27
Agency comments	28
Comments of professional societies	30
Conclusion	32
Matter for consideration by the Congress	33
Methods of computing A-E fees as a basis for negotiation	34
Background of the percentage-of-construction-cost method	35
Views of professional societies	35

	<u>Page</u>
Conclusion	37
SCOPE OF REVIEW	<b>39</b>
	<u>Appendix</u>
<b>APPENDIXES</b>	
Letter dated December 12, 1966, from the Assistant Comptroller General to the Secretary of Defense	I 42
Letter dated December 19, 1966, from the Assistant Comptroller General to the Administrator, General Services Administration	II 67
Statement by the American Institute of Architects on Statutory architect-engineer fee limitations presented to the General Accounting Office on October 28, 1966	III 71
Joint brief of Consulting Engineers Council,, National Society of Professional Engineers, and American Society of Civil Engineers to the Comptroller General, United States of America, on the problem of statutory fee maximums for engineering services, transmitted on September 22, 1966	IV 85
Comments of the professional societies concerning the GAO draft report dated February 24, 1967	V 106
Letter dated March 3, 1967, from the Assistant Secretary of Defense (Installations and Logistics) to the General Counsel, GAO	VI 120
Letter dated April 1, 1967, from the Acting Director of the Bureau of the Budget to the Comptroller General of the United States	VII 124