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

B-200558

December 5, 1980

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The Honorable William S. Cohen
United States Senate

[Comments on S. 3051]

Dear Senator Cohen:

This letter is in reference to S. 3051, the Government Management and Year-End Procurement Control Act of 1980. In view of our interest in the subject matter of the bill, we offer the following comments.

S. 3051 represents an attempt to reform Government management and practices relating to Government contracts essentially by establishing a mechanism that permits the marketplace, rather than contracting personnel, to determine the propriety of a noncompetitive contract award. Before awarding a noncompetitive contract, the bill would require a demonstration based on a real effort to attract competition that no other capable, responsible and interested suppliers are available. We expect that in many instances this mandated effort to attract competitors will be fruitful. In this connection, over the years we have received numerous complaints by individuals directly and through their representatives in the Congress that they are not given sufficient time to prepare proposals in response to announcements that appear in the Commerce Business Daily; we believe that the bill is responsive to this type of complaint.

Nevertheless, we note that the bill requires that before awarding a sole-source contract (or one based on an unsolicited proposal) the agency determine that the selected firm (or the unsolicited offeror) has an "exclusive ability to perform" the required work. In contrast, current law allows negotiated purchases of property or services where it is "impracticable to obtain competition," 10 U.S.C. § 2304(a) (10) (1976); 41 U.S.C. § 252(c)(10), and the implementing regulations authorize negotiation under that provision "when supplies or services can be obtained from only one person

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or firm." Defense Acquisition Regulation § 3-210.2(i) (1976 ed.); Federal Procurement Regulations § 1-3.210.2(i) (1964 ed.). In the bid protest context, we have sanctioned sole-source awards under that criterion where the record reasonably establishes that the awardee was the only known source with the capability to satisfy the procuring activity's requirements within the necessary time frame.

We agree that the propriety of a proposed sole-source contract should involve consideration of factors generated by recourse to the marketplace. However, we believe that the noted requirement in S. 3051 might be viewed as an undue impediment to sole-source contracting, since as a practical matter there are few firms with the "exclusive ability to perform." Under that view, the requirement could impose an unreasonable condition on the responsible contracting official; while there may be no firm with exclusive ability, there certainly may be only one firm which can perform in the time and manner necessary.

On the other hand, if the phrase "exclusive ability to perform" only reflects the current law and regulations described above, we would have no objection to S. 3051. However, if that is the case, we see no reason why the present guidelines with respect to sole-source contracting could not simply be retained with the addition of the notice requirements contemplated by S. 3051. In this respect, we believe that notice requirements of that type could be imposed by regulation rather than statute.

We also point out for your consideration that the Commission on Government Procurement recommended in its 1972 report that in appropriate circumstances (presumably dependent on the amount of money involved) the issue of whether competition can be obtained should by regulation be decided at a level within the agency higher than the procuring office, which is perceived to be the most likely to be biased.

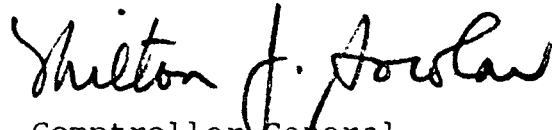
Finally, S. 3051 requires agencies to submit (1) plans to assure competition in the future for goods and services which have been procured through noncompetitive procedures; (2) certain information regarding all contract awards over \$50,000 to allow for centralized monitoring; and (3) "procurement agendas" for the next fiscal years. While the institution of a requirement

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for these submissions in itself may serve as a deterrent to non-competitive selections, in our view the effectiveness and overall value/cost of the requirement would be difficult to ascertain. Also, we suspect that like any other substantial reporting requirement it may be expensive, inconsistently implemented and applied, and not readily accepted by the Executive agencies.

We would be pleased to discuss these comments with your staff. Our Legislative Advisor handling the matter is M. Thomas Hagenstad (275-6305).

Sincerely yours,

A handwritten signature in cursive script that reads "Shelton J. Fowler".

For the Comptroller General
of the United States

cc: The Honorable Abraham A. Ribicoff
Chairman, Committee on Governmental
Affairs
United States Senate