



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

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RELEASED

February 26, 1986

The Honorable William S. Cohen
Chairman, Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs

Dear Mr. Chairman:

Your February 13, 1986 letter, submitted jointly with Senator Carl Levin, asks five questions concerning the extent of General Accounting Office involvement pursuant to the Anti-Kickback Act, 41 U.S.C. 51-54, in reviews of kickbacks paid by defense subcontractors to employees of prime contractors.

Your first two questions request specific information on GAO kickback investigations, including investigations of defense subcontractor kickbacks within the last 10 years. This information has been supplied to members of the subcommittee staff.

Your other questions request the definition of "kickback" used by GAO, including how non-cash items should be treated, as well as a discussion of problems encountered in conducting subcontractor kickback reviews and a comment as to the adequacy of the Act, "particularly as to those provisions that identify specific GAO responsibilities."

As you know, the Act defines "kickback" as including the payment of "any fee, commission, or compensation of any kind" (emphasis supplied) to an employee of a higher tier subcontractor or to an employee of a prime contractor holding a negotiated contract with the Government. The Act also prohibits such payments directly to higher tier subcontractors or to prime contractors. It must be demonstrated, however, that payments were made "either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractors, or as an acknowledgement of a subcontract or order previously awarded." Proof that such an intent existed can frequently be difficult to demonstrate conclusively. Nevertheless, the definition clearly encompasses the provision of non-cash items such as trips, cars, and tickets to sporting events.

When prohibited payments have been found, the Act authorizes the GAO or the procuring agency to direct a prime contractor to withhold the amounts of kickbacks found to have been paid by a subcontractor to the prime contractor or to a higher tier subcontractor or to their employees from amounts otherwise due the subcontractor. The Act authorizes GAO "to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract." The Act also provides for criminal prosecution of individuals who make or receive kickbacks.

The legislative history of the 1946 Anti-Kickback Act, which was proposed by GAO, suggests that in the absence of "patent evidence of fraud" an active role for GAO in detecting subcontractor kickbacks was not contemplated. See Hearings on H.R. 131 Before the House Comm. on Expenditures in the Executive Departments, 79th Cong., 1st Sess. 39.

Our experience in conducting audits aimed at discovering kickbacks has demonstrated the difficulty of detecting kickbacks by use of traditional audit techniques. This is because kickbacks are conspiratorial in nature and thus frequently are not provable by an inspection of contractor books and records. The chances of success are particularly small where there have been no prior indications or allegations of improprieties.

While GAO considers the prevention of any kind of fraud, including kickbacks, to be of first importance, it historically has recognized that the primary responsibility for its prevention rests with executive agency management. Thus, GAO's Fraud Task Force ordinarily refers allegations of fraud to agency Inspectors General. The same procedure is generally followed where indications of fraud are found during routine audits.

GAO is currently considering establishment of an investigations unit that will increase our capability to investigate allegations of fraud, including subcontractor kickbacks. In our view, consideration of whether GAO's authority under the Anti-Kickback Act should be strengthened (for example, to provide subpoena authority, access to banking records, or the authority to grant immunity in return for information concerning kickbacks) should be deferred until such a unit is established and it has had some experience in conducting anti-kickback investigations under the current Act.

We trust this letter serves the purpose of your inquiry.

Sincerely yours,

for *Milton J. Arosen*
Comptroller General
of the United States