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STATEMENT OF
ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES
BEFORE THE
SUBCOMMITTEE ON MILITARY OPERATIONS
COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES
ON H.R. 474 "TO ESTABLISH A COMMISSION ON GOVERNMENT PROCUREMENT"

HSE01510

Mr. Chairman and Members of the Subcommittee:

I appreciate your invitation to discuss H.R. 474 which would establish a Commission on Government Procurement.

By letter of February 17, 1967, we furnished the Chairman, House Government Operations Committee, our comments and suggestions on the specific provisions of H.R. 157, a bill similar to H.R. 474. We included with that report an appendix setting forth some of the problem areas in Government procurement which we recommended for consideration by the Commission.

Also, at the hearings on H.R. 157 before the Subcommittee on April 11, 1967, I stated the reasons why we felt that an overall study as proposed by the bill has merit. To reiterate, these reasons include:

-- the piecemeal evolution of Federal procurement law is generally designed to solve or alleviate specific and sometimes narrow problems as they arise,

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-- Federal procurement statutes are chiefly concerned with procurement authority and procedures and do not contain a clear expression of Government procurement policies,

-- implementing procurement regulations are voluminous, exceedingly complex and at times, difficult to apply,

-- these procurement regulations have great impact on the rights and obligations of contractors, and

-- the high level of spending for Government procurement. For fiscal year 1968 the Department of Defense alone awarded contracts totaling about $43 billion for supplies and services, representing about 80 percent of total Government procurement expenditures.

As in H.R. 157, the present bill, H.R. 474, would establish a Commission on Government Procurement and empower the proposed Commission to conduct a broad study of the current procurement statutes, regulations, policies and procedures.

In our statement of April 11, 1967, presented at the hearings on H.R. 157 we stated that our work in the procurement area indicates that there is room for improvement in Government procurement practices and procedures. We stated also that our work confirms the need for a broad across-the-board investigation and study; that in our opinion Government procurement is so burdened with complex statutes and regulations and has such an impact on other governmental, social and economic programs and policies that an expert commission with a broad mandate for study could achieve beneficial results; and finally, that we believe a broad study of this type could result in improvements in procurement procedures which would benefit both Government and business.

In our letter of February 26, 1969, to the Chairman, House Government Operations Committee, we reported and commented on H.R. 474. We stated

in that report that we endorse H.R 474 and recommend its favorable consideration. This continues to be our position.

My statement today is in two major parts: (a) a report on the status of major activities of the GAO during the 90th Congress relating to procurement matters, and (b) a summary of legal activities of the General Accounting Office in the procurement area. We believe both may be useful in identifying problem areas which might be of interest to a commission of the type proposed in H.R. 474.

BACKGROUND

A brief background statement as to the origin of GAO interest in this field and how we are organized to carry out our responsibilities may be helpful.

GAO's particular interest in Defense contract pricing began in the middle of the 1950's when attention was called to the fact that large numbers of contracts resulted in substantial cost underruns--and realized profits were high in relation to the prices negotiated. In the late 1950's and early 1960's, we directed extensive effort to the review of prices that had been negotiated on individual contracts and subcontracts in a noncompetitive environment.

Between 1957 and 1962 we reported to the Congress more than $61 million of overcharges on the individual Defense contracts audited by the GAO. The overcharges resulted principally from contractors' including in proposed prices cost estimates that were higher than indicated by available information. During this period many contracts were awarded without the benefit of preaward audits or other adequate evaluations by the contracting

officer of information supporting contractors' proposals. Although about $48 million ultimately was recovered the great bulk of the refunds were voluntary because at that time the Government, in most cases, did not have a legal right of recovery.

On October 1, 1959, the Department of Defense developed regulations providing for contractor certification of cost or pricing data in certain circumstances and for inclusion of rights in contracts to recover significant overpricing. These provisions subsequently found their way into what is now called "The Truth in Negotiation Act," enacted by Congress in late 1962. In 1965 the Secretary of Defense transferred the preaward contract review phase from the military services to the Defense Contract Audit Agency. In 1966 DCAA was assigned the responsibility for making post-award reviews that were similar in some respects to those that the GAO had made over the years. Since that time, DCAA has steadily increased its work in the post-award review area.

The actions taken and the improvements made placed us in a position to reduce our effort in this area and direct more effort to other important procurement activities that appear to warrant attention.

One of the overriding considerations in our planning has been to determine how we could best organize our efforts with our limited staff in such a way as to identify current problem areas faced by both Government and industry. We have developed an approach which we believe provides balance and flexibility in covering the significant activities within the Defense procurement and contracting field. For example, in developing our audit program we considered the improvements that had been made by

DOD as a result of P.L. 87-653 and its implementing regulations. Our plans include a program to review the effectiveness of the post-award audits made by DCAA. Our plans also include a program for reviewing a limited number of selected contracts on a continuous basis to evaluate the reasonableness of the prices negotiated.

We now have audit work underway in the following areas of procurement:

Research Management and Support
Major Weapons
Procurement Systems
Pricing of Negotiated Contracts
Contract Incentives
Contract Administration
Procurement Career Development Program
Construction Contracts

Although this statement relates mostly to work in the Department of Defense, we are, of course, actively reviewing procurement matters in the civilian agencies, such as the Atomic Energy Commission, the National Aeronautics and Space Administration, and the General Services Administration.

Of our total professional audit staff of 2,400 in Washington and the field, approximately 330, or about 14 percent, are presently engaged in matters relating to Government procurement. Of the 330 staff members, about 250 are currently assigned to the Defense procurement and contracting area.

In addition, approximately one-third of our legal staff is concerned with procurement matters. Decisions are rendered on the legality of agency procurement actions and contract claims, rulings are issued on bid protests, and legal reviews are made of our audit reports and proposed procurement regulations.

I. REQUESTS RECEIVED FROM AND REPORTS ISSUED DURING THE 90th CONGRESS

During the 90th Congress we received 131 requests for information from the Chairman of Committees and Subcommittees or from individual members of the Congress on matters relating to Government procurement. As of March 31, 1969, we had completed reports on 108 of the requests.

For this two-year period we issued 68 reports to the Congress and 68 reports to Executive Departments and Agencies on matters involving Government procurement. We also participated in 20 hearings that were concerned principally or in large part with some aspect of Government procurement.

UNIFORM COST ACCOUNTING STANDARDS

An amendment to the Defense Production Act of 1950, effective July 1, 1968, provides that

> "***the Comptroller General, in cooperation with the Secretary of Defense and the Director of the Bureau of the Budget, shall undertake a study to determine the feasibility of applying uniform cost accounting standards to be used in all negotiated prime contract and subcontract defense procurements of $100,000 or more."

It provides further that

> "***in carrying out such study the Comptroller General shall consult with representatives of the accounting profession and with representatives of that segment of American industry which is actively engaged in defense contracting."

A number of specialists on our Washington headquarters staff are working on this assignment. Our regional offices are also participating in various aspects of this study, and will increase as we approach the December 31, 1969, reporting deadline.

INDIRECT COSTS OF RESEARCH
CONTRACTS AND GRANTS

House Report 1970 on the Department of Defense appropriations bill for fiscal year 1969 contained a recommendation that we make studies to assist the Appropriation Committee in achieving a realistic and uniform formula for determining indirect costs applicable to research grants based upon sound accounting principles. The formal request was received from the Chairman, House Committee on Appropriations, in a letter dated October 11, 1968.

The work is being performed at 13 colleges and universities, two hospitals, and two independent not-for-profit research institutions. A draft of our report was furnished to the staffs of the Appropriations Committee and other interested Committees in March. We have been asked to testify on April 22 on our study in hearings before the Subcommittee on Government Research, Senate Committee on Government Operations. We expect to release a report to the Congress following the hearings.

EFFECT OF GSA DISCOUNT POLICY
ON SMALL BUSINESS CONCERNS

House Report 1975, entitled "The Position of Small Business in Government Procurement," the House Select Committee on Small Business requested us to make a review to determine the effect of a General Services Administration discount policy upon small business in the instruments and laboratory equipment industry. The GSA policy requires that, absent a cost justification to the contrary, a prospective supplier must grant a discount from the list price as a condition for being placed on the Federal Supply Schedule. The formal request was received in a letter dated October 30, 1968, from the Chairman of the Subcommittee.

We are still gathering information and reporting arrangements have not been finalized with the Subcommittee.

EFFECT ON SMALL BUSINESS OF DSA POLICY OF PROCURING FRESH PRODUCE IN SINGLE AND MIXED CARLOTS DIRECTLY FROM PRODUCERS

The same report included a recommendation that GAO examine into the procurement of fresh fruits and vegetables in single and mixed carlots directly from producers, and the effect of this Defense Supply Agency policy upon small business segments of the industry. A formal request for the review dated October 30, 1968, was received from the Chairman of the Subcommittee.

The work is being done at the Defense Personnel Support Center, Philadelphia, Pennsylvania, and at three DSA regional offices in Los Angeles, New Orleans and New York. We plan to issue a report to the Subcommittee by June 1, 1969.

RESEARCH MANAGEMENT AND SUPPORT

Our work in the research management and support area has been directed at activities affecting the overall management and support of research and development activities, many of which are directly applicable to procurement effectiveness. For example, we recently issued a report to the Congress concerning a major study of the policies of various Government agencies in the payment of management fees under contracts with sponsored nonprofit organizations. Our report points out the need for improved guidelines in contracting for research with such contractors and recommends that a Presidential-directed interagency or commission study be conducted as a follow-up to the Bell Report of 1962, to consider what types of organizations could best assist the Government in fulfilling its research and development missions.

We are presently developing a report to the Congress on our Government-wide review of contractors' independent research and development programs. This report will discuss the Government's participation in the costs of these programs, the differences in agencies' policies, the probable effects of proposed changes in policies, and the need for a Government-wide policy in this area.

MAJOR WEAPONS

Procurement of major weapons such as the Air Force Short-Range Attack Missile, the Air Force Maverick missile, the Navy Condor missile, the Navy F-14 aircraft, and the Army SENTINEL Anti-Ballistic Missile, Sheridan Tank, and TOW missile, falls into three broad phases: advanced procurement planning, acquisition, and management control. Our initial efforts in this area have identified specific subjects which we believe should be reviewed.

Due to the size of the weapons programs, our reviews are being directed primarily at policies, directives, or practices that have application to more than one system. Currently we have work underway to:

-- Review how the services satisfy requirements for major weapons under six broad criteria established by DOD. We have indications that the services interpret and apply these criteria differently because they do not have uniform guidance as to how the criteria should be applied. Uniformity in the interpretation and application of the criteria is important since it forms the basis for the decisions as to whether or not to proceed with the procurement of the weapons system.

-- Review the extent of competition obtained in the acquisition of new major weapons including source selection procedures and the feasibility of increasing competition through the use of techniques such as parallel development or licensing arrangements.

-- Examine into how effectively contractors' management control systems identify cost, schedule, and performance problems and the extent to which these systems are being or could be used by the agency to provide an adequate basis for responsible decision making. In some cases, on the basis of information currently being obtained under the present system, DOD is not aware of cost increases and schedule slippages.

PROCUREMENT SYSTEMS

Single-bid responses in formally advertised procurements are being reviewed at several procurement offices to find out why more responses are not received and to consider possible alternate procedures that could be used to increase competition.

We plan to review the reasonableness of prices paid for small purchases at 11 DOD procurement offices. This is a follow-up review to evaluate the effectiveness of the procedures instituted by Defense as a result of hearings on this matter conducted by the House Armed Services Committee.

DOD policies and procedures relating to planned producer agreements and qualified products are being examined to determine their effect on small business participation in Defense procurement. In addition, we are reviewing DOD's policies for partial set-asides under which a small business may receive an award of the set-aside portion at a price higher than the price it successfully bid on the nonset-aside portion.

In the area of negotiated procurements we plan to examine into emergency procurements to determine whether it is possible and practical to increase the extent of competition. In fiscal year 1968 emergency procurements totaled about $5 billion of which about 72 percent consisted of awards made without competition.

PRICING OF NEGOTIATED CONTRACTS

We have underway several broad reviews of contract pricing as well as examinations of the pricing of individual contracts. We are examining into the reasonableness, as indicated by cost information, of the pricing of 33 procurements negotiated by the Navy for 250 and 500-pound bomb bodies. We are also making an examination of 68 negotiated contracts awarded on the basis of catalog or market prices which are exempt from the requirement for submission of cost or pricing data.

We are also looking into the pricing of contracts awarded during 1968 on the basis of cost or pricing data to evaluate the effectiveness of recent changes in the regulations. Further, we are attempting to identify problems being encountered by agency officials and contractors in complying with the regulations, to consider whether or not the problem areas are the result of requirements not essential to the negotiation of fair and reasonable prices, and to identify further problem areas that appear to require our further attention.

CONTRACT INCENTIVES

The use of performance and delivery incentives in major procurements is a relatively recent innovation of DOD. We are conducting a review of 24 contracts containing multiple incentives. The contracts were awarded to 18 contractors by major procurement centers in the Army, Navy, and Air Force and have a value of about $1.17 billion.

Generally, we are finding that there is insufficient guidance to contracting officials as to when incentives should be used, or procedures for determining their effectiveness as a guide for future use. Indications

of some of the problems we are identifying in this review are illustrated by the following examples.

-- A contractor was given an incentive for meeting the quality control specifications set forth in the contract whereas the intent of the incentive should be to motivate the contractor to exceed the contract specifications.

-- An incentive was included in a current contract for a level of performance that the contractor has consistently achieved under earlier contracts that contained no such incentives.

-- Incentives were included in a contract for early delivery of a component when it was known at the time that the end item on which the component was to be mounted would not be available until some time later.

CONTRACT ADMINISTRATION

As part of our audit effort in the contract administration area we have underway or plan assignments covering two major areas. In the area of quality assurance and production surveillance the Army, Navy, Air Force and Defense Supply Agency have 21,000 people responsible for some $30 billion of material coming into the supply system each year. The items range from "nuts and bolts" to complex "major weapon systems." Another area is the review of prime contractor procurement systems involving the award of subcontracts and purchases orders totaling $20 billion a year or about 50 cents out of every prime contract dollar.

PROCUREMENT CAREER DEVELOPMENT PROGRAM

The DOD-wide Procurement Career Development Program began in August 1966. Since the success of the procurement function depends to a large degree on the success of the Career program, we plan to make a study to evaluate the program's capability to:

-- Attract well-qualified personnel with potential for development.

-- Develop both the present personnel and those newly recruited, and

-- Retain the personnel through offering opportunities for proper Career Development and advancement to higher levels, including Procurement Management and policy making positions.

CONSTRUCTION CONTRACTS

Our reviews of construction contracts in Southeast Asia currently in process include one dealing with the construction of an airfield at Tuy Hoa, Vietnam, a follow-up review dealing with the management practices and system of materials controls of construction activities in Vietnam; and a survey of the award and administration of contracts totaling about $250 million for the construction of communications networks in Thailand and Vietnam. In March we started a multi-agency Government-wide review of "Buy America" policies and procedures.

We are also reviewing the administration of the Davis Bacon Act, an act which requires the payment of minimum wages and fringe benefits to workers employed in the performance of contracts for the construction of public buildings and public works. The minimum wages and fringe benefits payable are those determined by the Department of Labor to be prevailing in the area involved for the classes of laborers and mechanics currently employed on projects of a character similar to the contract work in the area.

Currently, we are completing several reviews of wage determinations for Federally financed housing construction projects and are also preparing an overall report on the Department's administration of wage determinations under the Davis Bacon Act.

While not involving construction contracts as such, I would like to note at this point that we also plan to make a survey of the procedures being used in determining minimum wage rates and fringe benefits under the Service Contract Act of 1965.

II. LEGAL PROBLEM AREAS IN GOVERNMENT CONTRACT CASES

BID PROTESTS

As you know, a large part of our legal work in the procurement area involves the handling of bid protests. As a general rule bid protests are submitted to our Office by bidders for Government contracts in situations where they feel that the applicable procurement statutes and regulations have not been followed and to their detriment.

The General Accounting Office under our basic statute has authority to review all Government expenditures and in most cases to disallow payments if the expenditures are not legally proper. Bid protest cases come to our Office for this reason. If a contract is not awarded in accordance with the applicable statutory and regulatory requirements it is considered to be an illegal contract and, therefore, the payments made under the contract are subject to disallowance. It is most important that by accepting jurisdiction of bid protests we provide an independent forum for bidders and a procedure for correcting errors and abuses in the award of Government contracts.

A protest may be filed with our Office either before or after award. If the award has already been made or is made after the receipt of a protest by us and any substantial amount of work has been done this leaves the protestant with little, if any, chance of remedial action. It follows that, if the protest procedure is to be really effective, protests must be processed and decided with all possible speed. The Subcommittee on Government Procurement of the Senate Select Committee on

Small Business held hearings last spring at which this problem was given major consideration. Your attention is invited to the Committee's report of December 3, 1968 (Senate Report No. 1671).

The time within which a decision can be reached in bid protest cases has continued to be a serious problem to us. Several aspects of this problem were not adequately emphasized at last spring's hearings.

We believe that in many cases contracting officers in the field know when a protest is filed in our Office and also know the basis of the protest. Furthermore, we think it is a matter of common knowledge that GAO would welcome direct submissions from the contracting officers on any doubtful questions which come before them prior to an award. As far back as January 17, 1957, in an effort to alleviate the problem of delay in developing bid protest cases, GAO published a decision (36 Comp. Gen. 513) which, in effect encouraged contracting officers to submit for advance decision of the Comptroller General any such questions. We have received only a small number of such direct submissions to the Comptroller General. This results from internal procedures ,described below, established within the contracting agencies and we think corrective procedures may be called for.

The present provisions of ASPR 2-407.9 and FPR 1-2.407-8 permit an agency to make an award, notwithstanding that a protest has been filed with GAO, without awaiting a decision by GAO, if a determination is made that:

1. Items are urgently required, or

2. Delivery or performance will be unduly delayed, or

3. A prompt award will otherwise be advantageous to the Government.

Under the regulations this authority may not be used until after a notice of intent to make the award is furnished the Comptroller General and formal or informal advice concerning the current status of the case before GAO is obtained. We believe the authority should be more restrictive since it is used rather frequently and, as already explained, an award necessarily adversely hinders effective consideration of the protest by GAO. Use of such authority might be lessened, and reports to GAO expedited if awards after protest, and prior to decision by GAO, were only permitted:

1. Five days after the contracting agency has submitted a report to GAO and agency representatives have at least discussed the case with the GAO attorneys handling it,
2. Or, in the alternative, when a determination is made at the secretarial or agency head level, based upon written findings, that immediate award is necessary in the national interest and a copy of such findings is furnished GAO.

FORMAL ADVERTISING

Today it is not unusual to hear that formal advertising is an antiquated and outmoded method of Government procurement. As you know, GAO has consistently taken the position that, as a general proposition, formal advertising should be the preferred method of Government procurement because, in our view, it is the method best designed to obtain the

most advantageous contract for the Government and to give all interested parties an opportunity to compete for the Government's business on an equal basis. We have so reported to and testified before several committees of the Congress over the years.

More than that, GAO was largely responsible for the legislation making formal advertising the required method of procurement "in all cases in which such method is feasible and practicable under existing conditions and circumstances." See Public Law 87-653 (10 U.S.C. 2304 et. seq.). Of course, Public Law 87-653, approved September 10, 1962, amended only the Armed Services Procurement Act but the requirements of that law after its enactment were written into the Federal Procurement Regulations and were thereby made applicable to the civilian agencies. See pertinent provisions of FPR 1-1.301 and 1-3.800.

We realize that formal advertising is not "feasible and practicable" in a major portion of defense and space procurement and in certain other types of procurement. Furthermore, we would be the first to concede that, if Government negotiation procedures were used on the basis of including full discussions with all offerors within a competitive range together with disclosure and comparison of prices and the terms offered by the interested competitors, such procedure could be expected to result in more advantageous contracts for the Government. But negotiation as set forth in the Armed Services Procurement Act, the Armed Services Procurement Regulation and the Federal Procurement Regulations falls far short of being that kind of negotiation. We have

never questioned the agencies' determinations that it would be inequitable for the Government to disclose prices in the negotiating process. However, we would like to make several observations concerning the negotiation procedures now permitted and being used by the Government.

In Government negotiation, price proposals are required to be solicited in cases "in which time of delivery will permit" and written or oral discussions are required with all responsible offerors who submit proposals within a competitive range, price and other factors considered, but there is an important exception to this latter requirement for discussions. That exception applies when the contracting officer determines that, based upon the existence of adequate competition or accurate prior cost experience acceptance of an initial proposal without discussions would result in a fair and reasonable price, and the request for proposals notifies all offerors in advance of the possibility that award may be made without discussions. Thus, no negotiations of any kind are conducted in some cases. Although this procedure is considered to be negotiation, it is actually quite close to formal advertising, yet it is unaccompanied by the usual safeguards required in formal advertising, such as the requirement for complete and definite specifications under which bidders and the Government can be assured of competition on an equal basis, unaccompanied by the requirement for public opening of bids, and unaccompanied by the requirement that to be acceptable a bid must be responsive to the advertised invitation. It should also be pointed out that where this exception is invoked the

usual negotiation procedures are not required to be followed either. Thus, the requirement for written or oral discussions and the requirement for obtaining cost and pricing data may be disregarded. In our view, these are serious deficiencies in using this method of so-called negotiation.

It is interesting to note from the legislative history of Public Law 87-653 that the Defense Department supported the statutory authority to make an award without discussions on the grounds that such procedure is necessary to induce offerors to submit their best price proposals, exclusive of contingencies, at the outset. We think the following questions are at once apparent:

1. Absent a public exigency, why should there be any effort or authority to avoid discussions under the negotiation procedure which is permitted to be used only when it is determined that formal advertising is not feasible?
2. How can the contracting agency accept an initial offer without discussions with any reasonable assurance that the lowest price quoted is fair and does not include any contingencies, if the solicitation was not accompanied by specifications sufficient to enable offerors to quote on an equal basis? (On this point we continue to hear that it is common knowledge that price leaks are not unusual in negotiated procurements and we are under the impression that, for this reason and because

offerors can never be certain that negotiations will not be conducted, many sophisticated offerors consider they cannot take the risk of submitting their best prices initially.)

3. Absent a public exigency, if the situation really is such that the procurement can properly be conducted on the basis of accepting the lowest initial offer without negotiation, how can the contracting agency properly make the determination required by law that it would not be feasible and practicable to formally advertise?

We see no clear answers to these questions.

An additional important distinction between true negotiation, as we would define the term generally and Government-type negotiation, is that under ASPR and the FPR "auction techniques" may not be used by the Government contracting agencies. As previously indicated, this means that no information whatever with regard to the proposals received pursuant to a solicitation may be disclosed. There can be no public opening of proposals nor can information regarding prices submitted by the various offerors be disclosed. No offeror can be advised of his relative standing or be furnished any information regarding prices quoted by other offerors and not even the number or identity of the participating offerors can be furnished any of the interested parties. FPR 1-3.805-1(b) and ASPR 3-805.1(b).

While we have not questioned the prohibition against the use of "auction techniques" as such, we have some doubt whether they should be completely precluded. If our understanding is correct that price leaks do occur, are often suspected, and cannot be protected against in many cases, perhaps it would be fairer to all offerors concerned and, of course, more advantageous to the Government, for the contracting officials to make public pricing information.

For the reasons indicated, we believe that the obvious problems which result from the authorization to accept the lowest proposals without negotiations or discussions and from the complete prohibition against the use of "auction techniques" deserve thorough study and consideration with the view to determining satisfactory solutions to these problems.

BUY AMERICA PROVISIONS

ASPR 6-104.4 provides for application of a 50 percent differential to bids offering foreign end products, while FPR 1-6.104-4 provides for only a 6 percent (or 12 percent in the case of a small business or surplus labor area concern) differential on procurements by the civilian agencies. Since we perceive no reason for a distinction between defense and civil agency procurements so far as the gold-flow problem is concerned, and since the present regulations result in application to civilian agencies of only the FPR differentials, even with respect to items purchased by GSA which are primarily for use by defense agencies (see B-165321, December 12, 1968), we believe consideration should be given to providing for uniform treatment in the civil and defense regulations. In connection with this problem, attention is invited to the

April 1968 report of the Subcommittee on Economy in Government of the Joint Economic Committee wherein the recommendation is made that "The Bureau of the Budget should issue a uniform policy for the guidance of Federal agencies and contractors regarding the use of price differentials under the Buy American Act." However, we understand that no such uniform policy has been issued to date and is not expected to be issued any time within the near future.

Another aspect of the gold-flow problem which deserves serious consideration is the fact that many millions of dollars may be spent abroad without any Buy-American or gold-flow differential being applied to bidders furnishing so-called "domestic" end products although such products may include substantial foreign components. This is made possible because the applicable Buy American regulations permit end products including up to 49 percent foreign components to be considered domestic end products. If a 50 percent gold-flow differential were applied to the cost of all significant foreign components, it could then result that award could be made to a bidder offering all United States made components, rather than to the bidder offering a so-called domestic end product but nevertheless a product which includes substantial foreign components. Our report to Congress, B-152980, January 6, 1966, entitled "Review of Policies and Procedures Applied in Evaluating Foreign Source Components and Barter Bids for an Undersea Cable Communications System" involved a striking example of this problem.

CONTRACT APPEAL BOARD DECISIONS

As you know, GAO has always considered that it has the right to review Contract Appeal Board decisions either for or against the Government.

By letter dated January 31, 1969, our General Counsel submitted to your staff, in accordance with their request, a brief dated December 11, 1967, which we sent to the Attorney General in the Southside Plumbing case. He also enclosed with his letter of January 31 our decision of December 5, 1966 (46 Comp. Gen. 441), in the so-called "S & E" case which contains an exhaustive analysis of the basis for our position in connection with this matter, including pertinent excerpts from the legislative history of the Wunderlich Act. We understand that you also have a copy of the Attorney General's opinion of January 16, 1969, in which he considered our authority in this area and a copy of our letter of February 7, 1969, from the Comptroller General to the Attorney General with reference to the Southside case and the Attorney General's opinion in the case.

As we stated in our February 7 letter we do not agree with that part of the Attorney General's opinion which says that we have no authority to allow a claim which has been denied by an Appeals Board. We do agree completely, however, with the statement that the legislative history of the Wunderlich Act, taken as a whole, makes it clear that the Congress intended Board decisions to be no more conclusive against the Government than against the contractor. We agree also with the Attorney General's position that the Executive agencies have the basic responsibility for reviewing Board decisions against the Government which may be questionable and, in fact, should establish affirmative procedures for such internal review. This is a very important problem area which deserves further study and possibly clarification through legislation.

CONTRACTING FOR ARCHITECTURAL ENGINEERING SERVICES

Another contract problem stems from our report to Congress in April 1967 entitled "Government-Wide Review of the Administration of Certain Statutory and Regulatory Requirements Relating to Architect-Engineer Fees." In our report we made findings and recommendations as follows:

1. We found that the 6 percent fee limitations on A-E contracts were being violated, and recommended that Congress repeal the several statutes since, in our opinion, they are unrealistic.
2. We found that the construction agencies were not complying with the competitive negotiation requirement of 10 U.S.C. 2304(g) which requires that in all negotiated procurements in excess of $2,500 proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the services and supplies to be furnished, and recommended that Congress clarify its intent as to whether the competitive negotiation requirements of the law are to apply to the procurement of A-E services.

We feel quite strongly that these are valid recommendations.

EQUAL EMPLOYMENT OPPORTUNITY PROVISIONS

By Executive Order No. 11246 dated September 24, 1965, the President's Committee on Equal Employment Opportunity was abolished and the functions of that Committee, including the promulgation of appropriate rules and

regulations, were delegated to the Secretary of Labor. Implementing regulations by the Secretary of Labor, appearing in Title 41, Chapter 60, of the Code of Federal Regulations, were issued for the promotion and insuring of equal opportunity for all qualified persons, without regard to race, color, creed or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts, and their subcontractors.

Unless otherwise exempted, the Order and the above regulations require each contracting agency to include in Federal and federally assisted contracts an equal opportunity clause whereby the contractor agrees that he will not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and that he will take "affirmative action" to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color or national origin. The contractor is also required to include such provisions in his subcontracts and purchase orders within specified limitations.

While the head of each agency is charged with primary responsibility for obtaining compliance with the equal opportunity clause and Department of Labor regulations pertinent thereto, neither the Order, the clause, nor such regulations define the term "affirmative action" or specifies the details of the affirmative action programs which must be undertaken by the contractors and subcontractors, and a variety of implementing regulations have been issued in such connection by the various agencies.

Certain procedures by which the Department of Labor and other agencies have imposed, or attempted to impose, affirmative action programs on prospective contractors have been held by our Office to be inconsistent with the basic fundamentals of the competitive bidding process required generally by statutes and regulations in Federal and federally assisted contracts. See 47 Comp. Gen. 666 and B-163026, November 18, 1968, 48 Comp. Gen. ____. We are currently considering additional administrative procedures concerning affirmative actions which have the objective of ensuring that administratively determined quotas of members of minority groups are actually employed at all levels through out industry.

Since the requirements for affirmative actions by contractors on Federal and federally assisted projects are not based on specific provisions of the Civil Rights Act of 1964 or other statutory authority, and are creating increasing difficulties and burdens to the efficient awarding of contracts pursuant to the competitive bidding process, we suggest that this may be an area for study in the event a Procurement Commission is established.

In conclusion, Mr. Chairman, you may be assured that we will give our full cooperation and assistance should a Commission of the type suggested be enacted into law.

I will be pleased to discuss any of these matters in further detail or answer any questions the Subcommittee may have on our statement.