

088763

11790

352
694 70545



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

IN REPLY
REFER TO: B-156489

October 19, 1979

The Honorable Dan Daniel, Chairman
Special Subcommittee on NATO Standardization, *HE500509*
Interoperability and Readiness
Committee on Armed Services
House of Representatives

Do not make available to public reading

Dear Mr. Chairman: *[Comments on]*

In connection with our continuing assistance to the Special Subcommittee, we have examined H.R. 5580, (~~96th Cong., 1st Sess.~~), the "NATO Mutual Support Act of 1979" and wish to offer our comments on the bill. We understand that H.R. 5580 has been introduced as a possible substitute for H.R. 4623, about which we provided you with detailed comments on October 11, 1979 (B-156489).⁷

In general, we consider H.R. 5580 to be a marked improvement over H.R. 4623 because its scope is much narrower, the authority to be conferred upon the Department of Defense (DOD) is more closely tailored to what it has claimed it needs, and the bill contains improved controls over the value of the transactions that can occur. Nevertheless, some of our concerns expressed previously in connection with H.R. 4623 (and H.R. 11607, 95th Cong., 2nd Sess.) remain, and we therefore recommend that the issues we raised earlier be explored thoroughly with DOD representatives. In addition, since the authority to be granted by the bill may significantly affect NATO readiness, Congress might want to review how the law has been implemented after some reasonable period. Therefore, the Subcommittee may wish to limit the duration of the bill to 3 to 5 years, so that a careful assessment of its use could be made before it is extended.

Section 2 of the bill would exempt acquisitions under the bill from various provisions of law. We generally have no objection to such exemptions. However, as we have previously noted, DOD already has authority to waive the provisions of the Truth in Negotiation Act, 10 U.S.C. 2306(f) and the requirement for Examination of Records by the Comptroller General, 10 U.S.C. 2313; the Cost Accounting Standards Board has ruled that contracts with foreign governments are

CNG
01756

AGC 00005

507570

not subject to the Board's rules and regulations (See 4 C.F.R. 331.30(b)(5)). Particularly with respect to 10 U.S.C. 2313, we question the need for an exemption. As the law now stands, DOD has to make an affirmative determination that the waiver would be in the public interest and we see no compelling need to remove such a requirement.

With respect to the matter of audit rights when the contract is with a foreign government, we have experienced some difficulties in the past in obtaining audit access to any and all DOD records relating to such contracts. Accordingly, we would find it helpful if the Subcommittee made it perfectly clear to DOD that the bill is not to be construed as in any way impinging upon our audit authority under the Budget and Accounting Act, 1921, and other law, and the concomitant right of access to DOD records.

As written, no U.S. authority will be able to audit contracts with NATO members, even where those parties in turn issue contracts to private suppliers. Consequently, there is no direct mechanism for assuring that the prices paid are fair and reasonable. It may be prudent, therefore, to require that in connection with such acquisitions the supplying country certify that the prices being paid by the U.S. are as favorable as those paid by the supplying country for identical items or services, recognizing that there may be price differentials due to differing specifications, delivery schedules, points of delivery and the like. In the case of such differentials, the U.S. should be entitled to have a reasonable accounting for and explanation of such differentials. In addition, where the supplying country is in turn contracting with a private concern, the U.S. should be able to call upon the supplying country for audits of such contracts, wherever appropriate. An audit arrangement such as is in effect for the F-16 program would be satisfactory in our view.

In section 3(a), the authority is limited to forces "deployed in Europe and adjacent waters." Because of the possibility of NATO activities outside of this strict geographical area, the Subcommittee may wish to add the phrase, "* * * or deployed in any actions taken in accordance with the North Atlantic Treaty."

Section 3(b) provides for a limited extension of the authority of the bill to transactions in or involving Canada. We believe the Subcommittee should inquire of DOD why this is necessary. Does Canada have agreements with other NATO countries which may participate in activities in Canada? If the Subcommittee concludes that the provision is warranted, should it not be extended to embrace also naval vessels?

Section 4 sets forth the methods of payment for the transactions under the bill. Again, we refer the Subcommittee to our prior comments regarding issues of valuation and cost recovery. This section does not provide for full cost recovery in that it is silent with regard to administrative services, asset use charges, and other unfunded costs. The Arms Export Control Act (22 U.S.C. 2761(e)) provides that prices charged foreign governments include appropriate charges to cover these costs. GAO has consistently maintained that there should be full cost recovery for equipment and services under Foreign Military Sales (FMS) transactions and believes that similar charges are applicable to transfers contemplated under this bill. The Arms Export Control Act provides that asset use charges and nonrecurring costs of research, development, and production may be reduced or waived for particular sales that would significantly advance United States interests in NATO Standardization or foreign government procurement in the United States under coproduction arrangements. The Subcommittee may wish to clarify whether the transfers contemplated by the bill under consideration would qualify for such a cost waiver. Also, in view of the more limited nature of the transactions contemplated by the bill, the Subcommittee may wish to consider providing for reciprocal waiver of such charges, and of contract administration charges.

Subsection 4(1)(A)(ii), in conforming to provisions of the Arms Export Control Act, provides that replacement prices may be reduced by any depreciation in the value of supplies sold. Considering the nature of the transfers contemplated by the bill, CAO anticipates that such depreciation would be rarely, if ever applicable. If it were, however, how would it be determined?

Section 6 provides that DOD appropriations can be replenished by receipts for transactions under the bill. As discussed in our October 11, 1979, letter DOD would need

to modify its existing accounting system or develop a new system to assure proper crediting of receipts, especially since payments through offsetting balances are contemplated. We believe that modification of existing accounting systems may be the best alternative. In any case, DOD must assure that adequate accounting systems are in place before implementing provisions of the bill and should seek GAO approval of the system.

Again, too, we question what element within DOD will be responsible for implementing the bill and for monitoring the transactions?

Section 7 sets annual ceiling amounts for transactions under the bill. We believe this is a salutary provision. We read this is to mean that total sales may not be offset against total acquisitions in order to stay within the ceilings. If this is correct, report language to that effect might be advisable.

Section 9 requires the Secretary of Defense to prescribe regulations for implementation of the bill. We believe it would be appropriate for these regulations to detail the internal control procedures to be employed.

Section 11 contains definitions. We consider the definition of "logistical support, supplies, and services" to be a substantial improvement over H.R. 4623. We suggest, however, that the term "ammunition" be changed to "conventional ammunition," so as to take advantage of the definition of that term set forth in DOD Directive 5160.65, November 26, 1975.

Lastly, the Subcommittee may wish to consider the interrelationship between H.R. 5590 and Section 11 of H.R. 3173, the International Security Assistance Act of 1979, which is intended to facilitate cooperative cross-servicing arrangements among NATO members.

We trust the foregoing is of assistance to the Special Subcommittee.

Sincerely yours,



Acting Comptroller General
of the United States