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STATEMENT OF
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BEFORE THE
SENATE COMMITTEE ON GOVERNMENT OPERATIONS
ON S. 1707 "TO ESTABLISH A COMMISSION ON GOVERNMENT PROCUREMENT"

Mr. Chairman and Members of the Committee:

I appreciate your invitation to appear here today to discuss S. 1707. The bill would establish and empower a Commission on Government Procurement to conduct a broad study of the current procurement statutes, regulations, policies and procedures, and the problems arising thereunder.

In our report on S. 1707, we referred to the hearings on an identical bill, H.R. 474, before the Subcommittee on Military Operations, House Government Operations Committee, and listed the following reasons why we believe that an overall study as proposed by S. 1707 and H.R. 474 has merit:

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

--- 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."

While we do not have data for the entire fiscal year 1969, contracts awarded by the Department of Defense during the 9-months ended March 31, 1969, amounted to about $30.9 billion, an increase of about $1.1 billion over the 9-month period ended March 31, 1968. During the above periods about 11 percent of the dollar amount of awards were made on a formally advertised basis and about 89 percent on a negotiated basis. The latter amount includes about 29 percent where multiple proposals were solicited and about 60 percent where single sources were solicited.

Our work in the procurement area indicates there is room for improvement in Government procurement practices and procedures and confirms the need for a broad across-the-board investigation and study. Government procurement is so burdened with complex statutes and regulations and is so inter-related with other governmental, social and economic programs and policies that a Commission with a broad mandate for study could, no doubt, suggest substantial improvements in procurement procedures which would benefit both Government and business.

We endorse S. 1707 and recommend its favorable consideration. If a Commission of the type suggested is established it will receive our full cooperation and assistance.

An appendix to my statement is being submitted for the record. The appendix is in two major parts and sets forth (a) a report on the status of major activities of the GAO 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 S. 1707.

When similar legislation proposing to establish a Commission on Government procurement was under consideration last year in the House we outlined some of the problem areas in Government procurement which we recommended for consideration by the Commission. These were:

1. Government policies in regard to the use of formal advertising and negotiation procedures. Are these policies being uniformly and correctly applied by the procurement agencies and do they result in the procurement of supplies and services at the lowest reasonable cost to the Government?

2. Methods used by procurement agencies in formulating, reviewing and approving procurement regulations.

3. Government programs and policies in regard to (1) labor surplus area set asides, (2) small business set asides, (3) Buy American Act, (4) labor standards and minimum wage provisions, and (5) furnishing Government-owned facilities. What effect do these programs have upon the economy, efficiency and effectiveness of procurement?

4. Sources of supplies and services.

   A. Government policy concerning procurement of supplies and services (personal and non-personal) from Government as against private commercial sources.

B. Policy with respect to the use by Government contractors of Federal supply sources.

5. Consideration of ways and means of facilitating the procedures surrounding contract negotiation with a view towards making them less burdensome and more timely.

6. Consideration of ways by which paperwork associated with procurement could be reduced and simplified. In this connection a study could be undertaken to determine whether bid and offer solicitation documents could be simplified and more clearly drafted in order to give Government suppliers better notice of any unusual contract conditions and requirements.

7. Inquire into the need to define more fully (1) the extent to which contractors are permitted to use Government-owned tooling and equipment on commercial production, and (2) the basis for the establishment of equipment rental rates.

8. Should there be an overall Government policy as to the extent the Government should share in contractor's independent research and development costs?

9. Patents and proprietary data.

   A. What should be the respective rights of the Government and the contractor in items developed under Government contracts where a substantial portion of the developments costs have been borne either directly or indirectly by the Government?

   B. Should the Government's procurement of patented or proprietary components or items be made on a competitive basis or restricted to the firm to which the item is proprietary or which holds the patent?

   C. Inquire into the procedure under which the Government acquires rights to proprietary data and the use by the Government or contractor's proprietary data in procurements from other sources.

10. Access to records

A. Is the legal authority for access to contractor's records by Government representatives adequate to discharge the duties placed upon them by the Congress?

B. Are the laws relating to access to records sufficiently clear to insure recognition by all parties as to the types of records that may be examined?

11. Public Law 87-653 ("Truth in negotiations" statute)

A. Examine the experience under the act to determine whether such experience indicates a need to change the act or its implementing regulations.

B. Should the statute be made expressly applicable to civilian agencies?

C. Is there consistency in implementation of the act by procurement agencies?

12. Undertake a study of minimum wage requirements as they relate to Government contracting.

13. Undertake a study of Government debarment procedures, both under statutory and administrative authority, to determine whether these procedures are fair and afford adequate safeguards to contractors against unwarranted debarment.

14. Administrative settlement of claims under the standard Disputes clause.

A. Is there a need for greater uniformity in procedures and decisions of contract appeal boards?

1. If there is such a need, would the establishment of one or two Government-wide appeal boards satisfy such need?

B. Should a procedure be established under which the Government would have an adequate right of review of adverse decisions by contract appeal boards similar to that presently enjoyed by contractors?

C. Examine the need and feasibility of developing suitable contract clauses to provide an administrative remedy for all contract disputes and, thus, avoid fractionalization of remedies.

15. Subcontracts

A. Undertake a study to determine whether the no-privity rule should be relaxed in order to afford subcontractors direct access to the Government in the presentation of claims.

B. Undertake a study to determine whether it would be desirable or feasible for the Government to take an active role in assisting subcontractors and protecting them from possible abuses by prime-contractors.

This concludes my statement, Mr. Chairman, and I will be pleased to discuss any of these matters in further detail or answer any questions the Committee may have.

APPENDIX

CONTENTS

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 under a large number of contracts, costs actually incurred were substantially lower than the estimates upon which prices had been based. As a result, realized profits were higher than anticipated during price negotiations. In the late 1950's and early 1960's, we directed extensive effort to the review of cost estimates used in negotiating prices of 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 issued 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 audit 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.

While contract pricing continues as a major subject of interest in our audit efforts, the actions taken and the improvements made have placed us in a position to direct

more effort to other important procurement activities that appear to warrant attention.

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.

Our proposed budget for Fiscal Year 1970 provides for a total professional audit staff of 2,585. If approved by this Congress, approximately 425 staff members, or about one-third of our defense effort will be involved in defense procurement and contracting areas, the acquisition of major weapons systems, and the procurement aspect of research and development, and supply management.

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.

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 issued a report to the Congress in February 1969 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 have been developing a report to the Congress on our Government-wide review of contractors' independent research and development programs. The Government's participation in the costs of these programs exceeded

$600 million in 1966, and has been rising. The report will discuss differences in agencies' policies, the probable effects of proposed changes in policies, and the need for a Government-wide policy in this area.

We have deferred completion of our report pending receipt of additional information from the Chairman of the Armed Services Procurement Regulation Committee with respect to certain proposed revisions of the procurement policies covering IR&D and related matters.

We have requested this information inasmuch as our analyses to date indicates that the Government's share of IR&D costs will increase substantially if the proposed revisions are adopted. Further, the Government's control over the costs it will incur will be lessened, and the degree of assurance it now has that the IR&D efforts will be in areas in which the Government has an interest could be significantly diminished.

MAJOR WEAPONS

In our review of acquisition of weapons systems we intend to determine how the military services satisfy requirements for systems contracting under the broad criteria established by the Department of Defense. These criteria are intended to ensure that the system is necessary, reliable, cost effective and offering high probability of successful development and production.

We recently established a separate group in our Defense Division headed by a senior official of the Division in order to concentrate more emphasis on problems associated with the acquisition of major weapons. Initially this group will obtain current information pertaining to cost, schedule, and performance of these systems, making comparisons with initial estimates, and determining reasons for significant changes.

Our plans provide for a summary report to the Congress annually on the status of cost, schedule and performance of major weapon systems.

We also plan to perform in-depth reviews of major changes in specific weapon systems and report to the Congress on this work. A part of this work will address itself to the basic soundness of the practices followed by the Department of Defense in its weapon system acquisition processes.

Also, we recently completed an evaluation of two proposed methods for enhancing competition in weapons systems procurement. These methods were offered by witnesses testifying before the Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary in hearings concluded last fall.

The Chairman of the Subcommittee in a letter of October 10, 1968, asked us to make the evaluation of "Parallel Undocumented Development" and "Directed Technology Licensing". Our report, Evaluation of Two Proposed Methods for

Enhancing Competition in Weapons Systems Procurement (B-39995), and testimony were presented to the Subcommittee on July 14.

Parallel Undocumented Development was proposed as a method of acquiring new major weapons systems. It provides for competitive award and pricing of production on the basis of demonstrated prototypes, instead of relying heavily on paper studies, plans, and proposals. Competitive prototyping is not a new method, but has rarely been used in recent years.

Except for the data essential to the development process itself, other documentation ordinarily required by the Government for procurement, support, maintenance, etc., would be deferred until one of the production contractors is chosen.

This procurement method, in our opinion, has merit as an acquisition strategy for advanced weapons systems, subsystems, and other military hard goods which have probable technological or strategic uncertainties or which intend to penetrate state-of-the-art frontiers. These weapons systems embody new or significantly modified subsystems, unusual interfacings, new and untried configurations, or uncertain performance characteristics.

Additionally, these weapons systems would have good prospects for volume production and a low to moderate ratio of development cost to total cost.

We favor Parallel Undocumented Development because, among other things, rival performance of physical hardware can be tested and compared before a production go-ahead decision is made; and the competition would be more analogous to the commercial market place.

Directed Technology Licensing was proposed as a re-order or re-procurement method. It provides for a clause to be inserted in the early development contract allowing the Government to reopen competition for subsequent or follow-on production, select the winner, and appoint him as licensee. It is aimed at obtaining competition in the reprocurement of technological hardware, which is ordinarily very difficult to achieve.

In return for royalty and technical assistance fees, the licensor would then provide the winner with manufacturing data and technical assistance to help the licensee produce successfully.

While we would not rule out any method that would tend to introduce more competition in Defense Procurement it appears to us that Directed Technology Licensing involves some very serious problems which are difficult to overcome. Motivating

the contractors to cooperate and protecting trade secrets, for example, would be difficult to accomplish. We suggested to the Subcommittee that Leader Company Procurement and Second Sourcing are probably better routes to competition at reprocurement time.

Apart from these programs, we are currently involved in assisting congressional committees and members in some twenty-five (25) individual requests relating to defense procurement matters. For example, we are providing information and assistance to the Chairman, Senate Armed Services Committee, on the Committee's investigation into three major weapon systems -- the Army Cheyenne Helicopter, the Air Force SRAM air-to-ground missile and the Navy CONDOR air-to-ground missile. We also recently completed an examination into the cost overruns and total cost for the C5A program.

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 reasonablenss 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.

In the area of negotiated procurements we plan to examine into the classification of procurements as emergency and into 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 other problem areas that appear to require our further attention.

We are giving increased attention to contract pricing work at agency procurement offices and contractor plants and, by the end of this year, we expect to significantly increase our efforts in this area.

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 ASPR is to use performance incentives to motivate contractors to exceed stated performance targets.

-- 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 current reviews of construction contracting include an examination into the award and administration of formally advertised contracts for various type of buildings and other facilities, a review of the pricing of change orders to construction contracts, and a survey of contracting procedures for architect-engineer services.

Also, we are reviewing the award and administration of contracts totaling about $250 million for the construction of military communications networks in Thailand and Vietnam. We expect to undertake shortly an examination of contracts for facilities operation and maintenance in Thailand and a survey of recent military construction in Korea.

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.

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 in the Spring of 1968 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 in the 1968 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 GAO has been notified of the intention to make the award and the reasons therefor.

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.

We have recommended to the Armed Services Procurement Regulation Committee that this procedure be required by appropriate amendment to the regulations. In any event the whole problem area of bid-protest procedures is one which would be deserving of thorough study and consideration by the proposed Commission.

FORMAL ADVERTISING VERSUS NEGOTIATION

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, under circumstances appropriate for its use, 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 the dollar amount of defense and space procurement and in certain other types of procurement. On the other hand, 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 full negotiations. 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.

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.

On January 14, 1969, the Attorney General rendered an opinion in a case generally known as the Southside Plumbing case and in which he considered our authority in this area. In our letter of February 7, 1969,

to the Attorney General with reference to that opinion we stated that we do not agree with that portion of the opinion which states that we have no authority to allow a claim which has been denied by an Appeals Board but that we do agree completely, however, with his 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 stated further that 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. In this connection, we are submitting for the record a copy of our decision in the Southside Plumbing case, B-156192, December 8, 1966; a brief dated December 11, 1967, which we sent to the Attorney General in the Southside Plumbing case; a copy of our decision of December 5, 1966 (46 Comp. Gen. 441) in the

so-called "S & E" case which contains an exhaustive analysis of our position in connection with this matter, including excerpts from the legislative history of the Wunderlich Act; a copy of the Attorney General's opinion of January 16, 1969; a copy of our letter of February 7, 1969, to the Attorney General; and a copy of his reply of March 10, 1969.

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.

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 which have been issued concerning affirmative actions which have the objective of ensuring that administratively determined goals of members of minority groups are actually employed at all levels throughout 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 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.