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COMPTROLLER GENERAL OF THE UNITED STATES
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September 26, 1979

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The Honorable Jamie L. Whitten
Chairman, Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

We refer to your letter dated August 1, 1979, concerning the legality of the Department of the Army's proposed test program for the selection of architect-engineering (A-E) firms for the design of military facilities to include the price to be paid as a selection factor. You request that we review the position of the Department of Defense (DOD) that such a program would not be permissible under existing legislation pertaining to military construction. You further request that we suggest any necessary changes or alternate approaches to accomplish the test.

The problem has arisen because of an apparent conflict between the language in section 604 of the Military Construction Authorization Act, 1979, Pub. L. No. 95-356, 92 Stat. 565, 582 (1978), and the Congressional conference committee report on the legislation that resulted in the Military Construction Appropriation Act, 1979, Pub. L. No. 95-374, 92 Stat. 707 (1978). The former provides:

> "* * * Further, such contracts (except architect and engineering contracts, which unless specifically authorized by the Congress shall continue to be awarded in accordance with presently established procedures, customs, and practices) shall be awarded, insofar as practicable, on a competitive basis to the lowest responsible bidder * * *."

"Presently established procedures, customs, and practices" for procuring A-E services are essentially those reflected in Section 18, Part 400 of the Defense Acquisition Regulation (1976 ed.), implementing the policy expressed in the Brooks Bill, 40 U.S.C. § 541 et seq. (1976), that fee shall not be considered in selecting A-E firms prior to negotiation with the most qualified firm.

However, the conference committee report considering the fiscal year 1979 appropriation bill stated:

> "Competition for A&E contracts: The conferees agree with the House that a pilot test program using price as a factor in selecting A&E firms to design military facilities should be conducted. * * * The conferees direct that the Army conduct this test and have set aside $5 million for this purpose in Army planning and design funds." H.R. REP. No. 1495, 95th Cong., 2d Sess. 3 (1978).

Nevertheless, there is no language in the fiscal year 1979 Military Construction Appropriation Act itself requiring or authorizing such a test.

DOD's position is based on the specific language in the fiscal year 1979 Authorization Act (which has appeared in every military construction authorization act since fiscal year 1971), requiring "presently established" procedures in the award of A-E contracts.

We have reviewed the subject legislation, the legislative histories, and DOD's position, and we agree with DOD that the direction of the conference committee cannot be legally implemented in the face of an express statutory limitation requiring the selection of A-E contractors by existing (Brooks Bill) procedures "unless specifically authorized by the Congress." We do not view statements in a conference committee report that are not carried forth in the legislation as such specific authorization

to deviate from an unambiguous legislative mandate.

For example, we have stated:

> "In construing appropriation acts, we have consistently applied * * * traditional statutory interpretation principles so as to give effect to the intent of Congress. In many cases, when the meaning of an appropriation act seemed clear, we resolved questions concerning the propriety of expenditures without resort to legislative history. * * * In other cases, we have referred to the legislative history of an appropriation act in order to properly interpret language in the act that purported to impose qualifications, requirements or restrictions. * * *
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> "* * * The objective of statutory construction, of course, whether applied to appropriation or other acts is to ascertain legislative intent with respect to the actual statutory language employed. This necessarily assumes that statements in committee reports and other sources of legislative history are meant to address, explain, and elaborate upon the words of the statute itself. * * * [W]e have also recognized that, with respect to appropriations, there is a clear distinction between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying * * * conditions in a non-statutory context.
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> "* * * [Thus] when Congress * * * intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language.

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> "* * * [A]s a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there." (Emphasis added.) LTV Aerospace Corporation, 55 Comp. Gen. 307, 317 (1975), 75-2 CPD 207.

We believe it necessarily follows that in order to authorize the use of $5 million of otherwise unrestricted Army planning and design appropriations for a pilot program in a manner directly in conflict with the specific restriction of the Authorization Act, the Congress must explicitly do so by "specifically" authorizing the test program by means of legislation.

For your information, we are enclosing a copy of our July 21, 1976, audit report "Greater Emphasis in Competition is Needed in Selecting Architects and Engineers for Federal Projects" (LCD-75-313), in which we discuss on pages 9 through 11 a number of ways to incorporate "competitive negotiation" into the procurement of A-E services.

We trust that the above is responsive to your request.

Sincerely yours,

Signed Elmer B. Staats

Comptroller General
of the United States

Enclosure

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Digest

Military Construction Authorization Act, 1979, expressly precluded consideration of price in selecting architect-engineering (A-E) firms prior to negotiation with most qualified firm "unless specifically authorized by the Congress." However, Congressional conference committee considering fiscal year 1979 military construction appropriation legislation directed that Army establish test program involving price-inclusive competition for A-E projects. Such test program would not be permissible since 1979 Appropriation Act does not authorize test, and conference committee report cannot be considered specific authorization contemplated by Authorization Act.