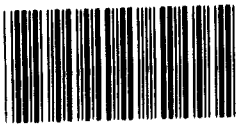
UNITED STATES GENERAL ACCOUNTING OFFICE



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STATEMENT OF

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COMPTROLLER GENERAL OF THE UNITED STATES

BEFORE THE

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Subcommittee:

We are pleased to appear here today to discuss the position of the President and the Department of Justice that two provisions of the Competition in Contracting Act, Pub. L. No. 98-369, are unconstitutional, and the action of the Executive Branch in not executing the two provisions.

The challenged provisions are included within the "procurement protest system" established by section 2741 of the Act. Both represent additions to the bid protest procedures formerly conducted by the General Accounting Office, and are designed to make bid protests a more effective mechanism for enhancing competition. The first requires agencies in many cases to suspend or "stay" a

protested procurement action until the Comptroller General issues a decision on the protest. The second authorizes us to award attorneys fees, as well as bid and proposal preparation costs.

We strongly disagree with the opinion of the Attorney General that these provisions of the Act are unconstitutional. The Attorney General's view is that the Act violates the separation of powers doctrine by authorizing the Comptroller General both to lift the suspension of procurement action by issuing a protest decision, and also to award costs. According to the Attorney General, the Comptroller General is solely an agent of the Congress and can, therefore, only perform those functions that the Congress may delegate to its committees. The Attorney General's opinion is premised upon an erroneous understanding of the nature of the Office of the Comptroller General and the authority which he may exercise. The Attorney General's opinion is also based upon a misunderstanding of the operation of the protest system established by the Act, and its effect upon Executive Branch operations.

We also believe that, in this case, it is the President who has violated the separation of powers doctrine by defying a duly passed Act of the Congress through the actions of the Attorney General and the Director of OMB.

I. Background

Before addressing the Attorney General's view in more detail, I think it would be useful to indicate briefly why the disputed provisions were passed. An interested party may protest a violation of a procurement statute or regulation to the Comptroller General. Section 2741 of the Competition in Contracting Act codifies and strengthens the bid protest system which has been operated by the General Accounting Office for over 60 years, ever since GAO was established.

In order to insure prompt resolution of protests, the Act provides deadlines designed to achieve a decision within 90 working days.

Also, the Act requires agencies to suspend protested procurement actions pending the Comptroller General's decision, except when an agency determines that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting.

Finally, in order to provide some meaningful relief to protesters in cases where remedial procurement action is not practical, GAO has awarded bid and proposal preparation costs in appropriate cases. The Act expands this relief by providing that the Comptroller General may award to successful protesters their costs of pursuing a protest as well as the traditionally-awarded bid and proposal costs.

The Act carefully balances competing public interests. Prospective contractors have an inexpensive and expeditious forum in which their claims of illegal exclusion from the government's business may be heard. The existence of a forum for such claims, made much more effective by the stay of contract performance in many cases, will, as the Congress intended, help insure that agencies comply with the mandate of full and open competition. At the same time, provision is made to eliminate interruptions in meeting the federal government's pressing needs for goods and services in appropriate cases.

II. Opinion of the Attorney General

Let me now turn to the objections of the Attorney General.

On November 21 the Attorney General informed the Congress of his decision that federal agencies should not execute two provisions of the new protest system. The Attorney General argues that the Comptroller General is solely an agent of the Congress, and, that as such, he may only perform the functions which the Congress may delegate to a committee. In support of his contention, the Attorney General points to two Reorganization Acts which describe the Comptroller General as being "a part of the legislative branch," and to the Accounting and Auditing Act of 1950 which describes the Comptroller General as "an agent of the Congress." The Attorney General also points to statutory limitations on the President's power to remove the Comptroller General as being significant.

In the Attorney General's view, the Comptroller General may not take any action which binds individuals and institutions outside of the Legislative Branch. To do so would be to perform an "executive" function. This includes the Comptroller General's statutory authority to lift the "stay" of procurement actions by issuing a protest decision, which the Attorney General characterizes as "the power to dictate when a procurement may proceed." It also includes the award of the costs of pursuing a protest and bid and proposal preparation costs.

III. Nature of the Office

I am firmly of the view that the Comptroller General of the United States is not solely an agent of the Congress, but rather serves as an officer of the United States. As such, the Comptroller General may exercise the authority given him under the Competition in Contracting Act wholly consistently with the Constitution.

Since creation of the Office of the Comptroller General in 1921, Comptrollers General have performed a variety of duties to serve the needs of the Congress. Such activities include our traditional audit reports, staff papers and studies, our responses to requests for views on proposed legislation, and legal opinions on matters which do not involve our account settlement responsibilities.

Other responsibilities affect directly the Executive Branch agencies and provide assurance that funds are fully and accurately accounted for and expended in a manner authorized by law. One example is the Comptroller General's responsibility to audit and settle accounts. Another is the settlement and adjustment of claims by and against the United States. And still another is promulgation of government-wide accounting and internal control standards.

However these various functions may be classified, one aspect of the Office of the Comptroller General is clear. The Comptroller General by statute is, in fact, appointed in the manner provided in the Constitution for appointment of "Officers of the United States." It is true that once appointed by the President after Senate confirmation he does not serve at the pleasure of the President but, rather, serves for a fixed term of 15 years.

The Attorney General argues that the security of the Comptroller General from removal by the President necessarily renders him a part of the legislature. Yet there are other officers of the United States for whom Presidential removal is significantly circumscribed without affecting their status. And the fact is that the Comptroller General cannot be removed at the whim of the Congress either. The Congress can remove the Comptroller General by joint resolution (which requires a majority vote of both chambers and the signature of the President), but

only after notice and hearing, and only for one or more of five specified reasons: permanent disability, inefficiency, neglect of duty, malfeasance, or conduct which is felonious or involves moral turpitude. Congress can also remove the Comptroller General by impeachment, as it can remove any officer, but again only through lengthy procedures designed to ensure due process and fairness and only for certain limited reasons: treason, bribery or "High Crimes and Misdemeanors."

In short, the provisions governing removal of the Comptroller General support, rather than contradict, his status as an officer of the United States. This status of the Comptroller General is in no way affected by references in the 1945 and 1949 Reorganization Acts to the General Accounting Office as "a part of the legislative branch of the Government." By characterizing the Comptroller General, the head of the GAO, as part of the Legislative Branch, the Congress did nothing more than restrict the ability of the President to place him in a subservient status through the device of a reorganization plan. In 1932, President Hoover had proposed a transfer of GAO to the Bureau of the Budget. Thereafter, GAO was excluded from Presidential reorganization authority, including the 1945 and 1949 Reorganization Acts. The Attorney General errs in attributing constitutional significance to statutory classifications of the Comptroller General.

IV. The Comptroller General and the Separation of Powers

The Comptroller General's entire duty under the Competition in Contracting Act is limited to three basic actions: the promulgation of procedural rules, the issuance of recommendations pursuant to specific findings, and the award of costs based upon specified legal determinations. There is no doubt that these are precisely the type of duties that the Comptroller General has exercised since 1921. Under the Act, the Comptroller General is required to give advisory opinions regarding the legality of procurement actions, which will presumably bind him in the audit and settlement of accounts, just as he has always done under his account settlement authority. He is empowered to award bid and proposal preparation costs and the costs of pursuing protests, just as he traditionally granted bid and proposal costs under his claims settlement authority.

The Attorney General argues that the authority to award costs and the "stay" provisions of the Act involve the exercise of executive powers which can only be exercised by an officer under direct control of the President. Certainly, there are officials whose purely executive jobs are so related to the President's constitutional duties that operation of our form of government requires the official to be directly responsible to the President. However, the award of costs to protesters

cannot reasonably be viewed as requiring the President to have direct control over the official who performs the function. The authority to award costs based upon a determination that a procurement action violated a statute is not assigned by the Constitution to the President, and exercise of that authority by an officer of the United States cannot reasonably be said to interfere with the President's performance of his constitutional duties.

Similarly, the "stay" provisions do not place purely executive powers in the hands of the Comptroller General. The Act merely requires the procuring agency, if it can do so consistently with the national interest, to "wait and see" what the Comptroller General recommends before proceeding. The agency is not required to wait at all if it determines that performance would be in the best interest of the United States or that delay would "significantly affect interests of the United States." The "stay" provisions can hardly be said to involve one branch assuming the power to control another branch. Moreover, the "stay" provision cannot "disrupt the proper balance between coordinate branches" or "coerce" the constitutional office of the President by delaying previously authorized executive action, since the "stay" is only implemented if the Executive Branch itself finds delay consistent with the interests of the United States.

V. Constitutionality of Executive Branch Actions

Finally, we believe that the President, not the Congress, has violated the separation of powers doctrine. Upon signing the Act, the President stated that he was instructing the Attorney General to inform executive agencies how to comply with the Act consistently with the Constitution. As I have discussed, pursuant to this instruction the Attorney General directed agencies not to comply with two provisions of the Act. The Director of OMB, in turn, issued a bulletin specifically providing the same direction to all executive agencies.

Disobediance of a law is itself a matter of serious constitutional significance. The President's constitutional duty is to "take care that the laws be faithfully executed." We cannot find any justification for the action taken to deliberately avoid the law in this case.

The Competition in Contracting Act imposes few limitations upon executive action in a field long-recognized to be a proper concern of the Congress, contracting by the federal government. The disputed "stay" provision can be avoided by executive agencies when required by the pressing needs of the United States, and the payment of compensation or damages to private claimants cannot reasonably be claimed to have major constitutional significance.

The Comptroller General has exercised statutory duties similar to those provided in the Act since 1921, and the Attorney General cannot point to one judicial decision holding that those duties violate the separation of powers doctrine. In fact, the absence of decided case law supporting the Attorney General's constitutional opinion is a strong argument that, in this case, the Constitution requires the President to uphold the law.

It is significant that the actions of the Attorney General and the Director of OMB, which constitute lawmaking by the Executive Branch, were unwarranted based upon the Attorney General's legal opinion. The Attorney General recognized in his opinion the power of the Congress to enact a law providing for suspension of a procurement for 90 days following a protest. He was only concerned about the Comptroller General's authority to release a suspended procurement by issuing a decision, and the authority to delay a procurement for more than 90 days following a protest. In order for agencies to comply with the law in a manner consistent with the Attorney's General's opinion, they need only have been directed not to proceed with a protested procurement action for 90 days even if the Comptroller General issues an earlier decision,and to end a stay after 90 days if a decision or satisfactory justification for delay has not been issued by the

Comptroller General. Instead, OMB eliminated a provision of the Competition in Contracting Act that is central to enhancing the ability of the bid protest system to increase full and open competition for contracts. We do not believe that the Constitution empowers the President and his subordinate officers to undertake this revision of the Competition in Contracting Act.