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

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July 14, 1981

The Honorable Jack Brooks
Chairman, Committee on
Government Operations
House of Representatives

Dear Mr. Chairman:

By letter dated March 27, 1981, you requested our views on H.R. 2580, 97th Congress, to reform contracting procedures and contract supervision practices of the Federal Government. This bill is directly related to H.R. 5381 introduced during the 96th Congress. H.R. 5381 was the subject of hearings held on October 15, 1979, before the Government Activities and Transportation Subcommittee. H.R. 2580 in part reflects suggestions made in testimony given on H.R. 5381 by the General Services Administration (GSA) and the Department of Justice, as well as this Office.

The proposed legislation would amend Titles II and III of the Federal Property and Administrative Services Act of 1949 (FPASA). The purpose of the bill is to provide administrative remedies and reforms for abuse and waste in Federal procurement. We strongly endorse the bill's objective. However, we believe that the scope and applicability of many of the bill's provisions are unclear or unwarranted, and we have commented on those sections individually. Moreover, as a general matter, we note that the Committee report on H.R. 5381 (H.R. Rep. No. 1198, 96th Cong., 2d Sess. (1980)) indicates that the bill was primarily intended to correct GSA contracting practices in view of the scandals that occurred there in 1978 and 1979, which were primarily associated with GSA's Federal Supply Service. H.R. 2580, however, applies variously to contracts under FPASA and to agencies to which GSA has delegated contracting authority. Thus, it would apply to many civilian agency contracts in addition to those entered into by GSA, and is not confined to agency purchases under the Federal Supply Service program. It is unclear whether this is consistent with the Committee's intent.

Our specific comments on various sections of the bill follow.

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Section 1 - Remedies for Contractor Abuse

Section 1 adds a new section 306 to Title III of FPASA. New section 306 would apply to contracts entered into "pursuant to this Act [FPASA]." Title III applies to purchases and contracts for property and services made by executive agencies exclusive of the Department of Defense (DOD), the Coast Guard and the National Aeronautics and Space Administration (NASA). (Those agencies are subject to the provisions of the Armed Services Procurement Act instead.) See 41 U.S.C. § 252(a) (1976). It should be noted, however, that contracts entered into pursuant to FPASA are not limited to those covered by Title III.

For example, the Brooks Act, 40 U.S.C. § 759, contained in Title I of FPASA, governs the purchase, lease and maintenance of automatic data processing equipment (ADPE) by Federal agencies, which as defined by section 3(b) of FPASA (40 U.S.C. § 472(b)), include any establishment in the legislative or judicial branch, exclusive of the Congress and the Architect of the Capitol, as well as executive agencies. Further, the Brooks Act applies to ADPE procurements by DOD, the Coast Guard and NASA. 40 U.S.C. § 759(e). Thus, we believe that placing the new provision in Title III creates confusion as to its scope.

New Section 306(a)

For clarity we suggest that the words "material information" be inserted after "will not furnish false or misleading" and before "nor fail to furnish material information * * *" in lines 15 and 16, page 2 of the bill.

In addition, new section 306(a) appears to set out civil penalties for unintentional or nonnegligent violations of the certification requirement as well as for intentional or negligent ones. The usefulness of penalties for unintentional or nonnegligent violations is not apparent.

New section 306(a)(2)(F) would provide, as one possible remedy for a false certification or certification violation, for the restoration to the United States of any money or property obtained by the contractor under the contract as well as the retention by the United States of any money or

property given as consideration for such contract. Since a contractor might give services rather than or in addition to money or property as consideration, we believe that this subsection should be amended so that the last two lines (lines 23 and 24 of page 3 of the bill) read as follows: "shall retain any money or property, or the value of any services, given by the contractor as consideration for such contract." The addition of the words "by the contractor" is recommended for clarity.

New Section 306(b)(3)

Section 306(b)(3) would provide that "notwithstanding any other provision of law" the GSA Administrator may compromise, modify or remit any assessment imposed for a false certification or certification violation. We note here that the provision would affect certain functions of our Office since the Committee report on H.R. 5381, in commenting on language identical to that quoted above, stated that the purpose of this provision was to resolve any potential conflict with the provisions of 31 U.S.C. § 952, which grants the Attorney General and the General Accounting Office (GAO) certain power over claim settlements in excess of $20,000. H.R. Rep. No. 1198, supra at 13.

Section 306(b)(3) also provides that the amount of any assessment may be deducted from any sums owed by the United States to the person charged. We believe that this provision should be clarified to indicate whether such deductions may be made only from sums due on Government contracts or whether they also may be made from other sums owed by the United States, such as tax refunds.

New Section 306(j)

New Section 306(j)(1) defines the term "material information," to which the certification requirements of section 306(a) are applicable. This definition includes information relating to price.

As indicated in our testimony on H.R. 5381, insofar as advertised procurements are concerned, the requirement for certification of pricing information would represent a significant change in procurement philosophy by the Government. It has long been believed that the competitive forces of the marketplace obviate the need for the type of procurement controls, such as certification of cost and pricing data, required for negotiated contracts.

In addition, we believe there is a need to clarify the intended relationship between this requirement and the existing provisions of the Federal Procurement Regulations which, with certain exceptions, require contractors to certify cost and pricing data furnished in connection with negotiated contracts expected to exceed $100,000 and contract changes or modifications expected to exceed $100,000. 41 C.F.R. § 1-3.807-3 to 6 (1980). It is unclear whether the new requirement is intended to replace the existing one or merely to supplement it.

Section 306(j)(2) defines the phrase "to the prejudice of the Government's interest," a finding of which is a prerequisite to an assessment for a false certification or a certification violation under section 306(a)(2). Under the definition, such prejudice occurs when there is "any actual or potential reduction of any contractual benefit * * *." We believe that the potential reduction of a contractual benefit provides a speculative standard of prejudice which may be unenforceable. We therefore suggest that it be deleted.

We also note that the definition of prejudice would include "any reasonably forseeable consequential or collateral diminution * * * of the Government's property or powers or their beneficial use." This provision needs clarification. For example, it is unclear what a collateral diminution of the Government's powers would encompass.

Section 2 - Improved Procurement Practices

Section 2 amends section 307 of FPASA (41 U.S.C. § 257) by adding a new subsection (e). At the outset, we note that the scope and applicability of this provision are unclear. For example, new section 307(e)(2) would provide in part as follows:

> "The Administrator shall * * * establish and maintain a single and exclusive system for control and coordination of all contracts and agreements for procurement of property or services under this Act. Such system shall provide that the Administrator (with respect to the General Services Administration) and any agency head to whom the Administrator has delegated contracting authority (with respect to that agency) will * * * [accomplish certain stated objectives]." (Emphasis added.)

The section of FPASA being amended, section 307, is part of Title III of that act. However, the system for control and coordination of contracts which the Administrator must establish is made applicable to all contracts under FPASA. Since contracts under FPASA include but are not necessarily limited to those covered by Title III, this section needs clarification. (See our comments on new section 306, supra at 2.) In contrast, section 307(e)(6) would apply specifically to purchases under "this title" [Title III].

Also, the procurement control system is to include specified requirements applicable to "any agency head to whom the Administrator has delegated contracting authority." (Similar language is contained in subsection (e)(4), as well as in subsections (f)(1) and (f)(4), added by section 3 of the bill.) As GSA pointed out in its testimony on H.R. 5381, the Administrator only delegates contracting authority in limited areas such as ADPE procurements. See 40 U.S.C. § 759(b). While section 205(d) of FPASA (40 U.S.C. § 486(d)) permits the delegation "of any authority transferred to or vested in [the Administrator] by this Act" to any other Federal agency, the actual delegations made under this provision are apparently limited in number.

In that regard it should be noted that there presently is no general requirement that agencies entering into procurements first obtain a delegation of procurement authority from GSA. If the Committee's intent in establishing an "exclusive system for control and coordination of all contracts" is to institute such a requirement, this should be clarified. However, any such change would greatly extend GSA's authority over the procurement actions of civilian agencies and we question both the wisdom and necessity of such a change.

New Section 307(e)(2)

New section 307(e)(2) requires the GSA Administrator to establish and maintain a system for control and coordination of all contracts and agreements under the Act. One such requirement, contained in subsection (C)(ii), is the imposition of a system of accounting and internal controls sufficient to "permit preparation of financial statements in conformity with generally accepted accounting principles." However, Government agencies do not presently prepare financial statements, and the accounting principles generally accepted by private accounting firms have been considered unsuitable for use by Government agencies, since Government audits are primarily directed at economy and efficiency. If the intent is that agencies begin preparing financial statements and that audits henceforth be conducted in accordance with generally accepted accounting principles, we question both the practicability and necessity of instituting such requirements.

New Section 307(e)(4)

New section 307(e)(4) would require the Administrator to periodically and regularly review GSA's own contracting activities as well as those of any other agency to the head of which the Administrator has "delegated contracting authority." We believe that this requirement could create a significant burden on GSA resources. Therefore, the Committee may wish to consider modifying this provision to allow for more flexible review requirements. Such flexibility could in part be accomplished by providing a mechanism for coordinating the various roles of the Administrator, Inspectors General and the Comptroller General in assuring that agencies comply with existing laws and regulations. A need for some form of coordination is indeed suggested by the fact that all of these officials has a legitimate role in the oversight of procurement practices. Without coordination between these various activities, an unnecessary duplication of efforts is likely to result.

New Section 307(e)(5)

New section 307(e)(5)(A) would require that the Administrator prescribe regulations requiring each agency head to establish a system for reporting quarterly to the Administrator

purchases made from any GSA buying program or from other designated sources. While we agree that GSA needs information concerning the nature and source of agency purchases, we are concerned that this provision creates a severe administrative burden, and will generate a significant amount of additional paperwork.

We believe that there are less burdensome ways to gather the needed data. For example, we understand that GSA currently receives monthly reports from contractors on sales under the multiple award program. While they presently do not provide sufficient information for management purposes, they could be made more meaningful if information on sales by item and model number were also requested. The reports could be requested quarterly rather than monthly.

New section 307(e)(5)(C) would require the Administrator to establish regulations requiring the invalidation of any late bid not received by registered mail containing verification of its timely transmission. Existing Federal procurement regulations, contained at 41 C.F.R. § 1-2.303, permit the acceptance of late bids sent by certified or registered mail not later than the 5th calendar day prior to the date specified for the receipt of bids, as determined by the U.S. Postal Service postmark on the envelope or wrapper, or on the original Post Office receipt. Acceptance of late bids sent by mail or by telegram is also permitted where delay is due to Government mishandling. The certified mail and Government mishandling exceptions would be eliminated by the new provision. Also, the Office of Federal Procurement Policy, at the suggestion of this Office, has proposed that Express Mail be included in the late bid clause. New section 307(e)(5)(C) would preclude or eliminate such a change.

We understand that the Department of Justice has identified abuses in the use of certified mail and that this provision responds, at least in part, to that concern. It should be noted, however, that a change in the existing regulations would create an inconsistency between the FPR and the Defense Acquisition Regulation. Further, there would appear to be no reason to eliminate the Government mishandling exception.

In addition, we note that the new provision would apply to late bids but not late proposals, which are also currently subject to certified mail and Government mishandling exceptions.

New Section 307(e)(6)

New section 307(e)(6) provides that purchases made under Title III "are not authorized unless made from sources within a buying program established by the Administrator or from other sources as provided * * * by regulation." We believe that this provision needs clarification.

As presently written, this provision could be interpreted to prohibit any executive agency purchases not made from a list of approved sources. We do not believe the Committee intends to place any such restriction on the procurement process nor do we believe such a sweeping requirement would be either workable or desirable.

The various agencies have diverse needs many of which, we believe, cannot practically be supplied through a list of approved sources. While such an approach may indeed be efficient for filling certain agency needs, we believe that in many instances it would be impractical and inconsistent with obtaining full and free competition. In this regard, see our report entitled "Ineffective Management of GSA's Multiple Award Schedule Program -- A Costly Serious And Longstanding Problem" (PSAD 79-71), May 2, 1979.

If the Committee actually intends, as we suspect, that this provision require agencies to make purchases from the existing Federal Supply Schedule whenever a needed item is available therefrom, we suggest that the provision be amended to simply require purchase from the Federal Supply Schedule where the type or class of item needed is available from that program. It would also be advisable to provide for limited exceptions to that requirement, such as allowing procurement outside the Schedule where a genuine specialized need can be shown. Such exceptions could be made subject to prior approval by the Administrator.

Further, we suggest that some indication of the consequences of making "an unauthorized purchase" be given. Such clarification is necessary if this provision is to operate effectively.

New Section 307(e)(7)

New section 307(e)(7) would provide for the review of contracts and agreements to determine whether

> "by aggregation or otherwise, such contracts and agreements (except [those] the negotiation of which is authorized by statute) can be more

economically and efficiently secured by advertised bids or otherwise." (Emphasis added.)

We believe that the underscored language requires clarification.

H.R. Rep. No. 1198, supra at 18, indicated that the purpose of the identical provision in H.R. 5381 was to convert more procurements to formal advertising. In this regard, FPASA already establishes a preference for formal advertising, and before a contract for property or services legally can be negotiated, it must be found to come within the scope of one of certain enumerated statutory exceptions. 41 U.S.C. § 252(c). A similar requirement, applicable to civilian agencies which are not covered by 41 U.S.C. § 252(c), is contained at 41 U.S.C. § 5. Thus, any legally negotiated contract for property or services entered into by a civilian agency is one which is "authorized by statute" and one which would fall within the exception to section 306(e)(7). We do note that H.R. Rep. No. 1198 at p. 18, states that this exception does not apply to contracts negotiated under section 203 of the Act, 40 U.S.C. § 484, which covers surplus property disposal.

Section 3 - Required Audit Procedures

This section would require GSA to establish a uniform and regular system of contract audits. It further amends section 307 of FPASA (41 U.S.C. § 257) by adding new subsections (f), (g), and (h).

New Section 307(f)

Initially, we point out that the applicability of this section is somewhat unclear. For example, subsection (f)(1) states that the required audits will be conducted by GSA or by any agency to which "the Administrator has delegated contracting authority or which is otherwise purchasing pursuant to a contract secured by the Administration." As we noted earlier, GSA only delegates contracting authority in certain limited instances. Further, the meaning of "otherwise purchasing pursuant to a contract secured by the Administration" should be clarified.

Section 307(f)(2)(B) in part requires the establishment of audit criteria "necessary to ensure a significant probability that any * * * advertised contract that is the subject of either three or fewer bids or other indication of a lack of full competition * * * will be audited * * * ." (Emphasis added.) This section thus assumes that whenever three or fewer bids are received, there is a lack of full competition. We believe, however, that there are legitimate reasons why three or fewer bids might be received, such as the number of potential suppliers available and the nature of the supplies or services being solicited. Therefore, we recommend against establishing a presumption that there is a lack of full competition where three or fewer bids are received. We would prefer to see this audit requirement made applicable to sole-source contracts or situations where only one bid is received.

New Section 307(h)

New section 307(h) would provide that to the fullest extent consistent with the purposes of subsections (e) and (f), such subsections shall be subject to the Accounting and Auditing Act of 1950 and the Inspector General Act of 1978. We suggest that this provision be amended to more fully delineate the relationship to be established between the amendment being made to FPASA and the existing provisions of the Accounting and Auditing Act of 1950 and the Inspector General Act.

Section 4 - Alteration of Leased Facilities

This section would amend section 210 of FPASA (40 U.S.C. § 490) by adding a new subsection (l) prohibiting any expenditure or obligation under section 490(a)(8) (pertaining to the alteration, repair or improvement of rented premises) unless (a) GSA submits in advance, to the oversight committees of both Houses, an explanatory statement describing the overall work; (b) the work does not directly affect more than 5,000 net square feet of space, or (c) such alterations were authorized in advance by "the Congress or a committee or committees of the Congress pursuant to procedure established by statute." We believe that the quoted portion of the provision should be clarified to indicate which committee or committees are to grant this approval, and pursuant to what statute such approval will be given.

GAO has in the past expressed concern that closer scrutiny of alterations to leased space is needed. Therefore, we support in purpose the passage of this provision with the above noted clarification.

We would also like to suggest that the 25 percent Economy Act limitation on alterations to leased buildings be repealed. GAO audits have shown that it is not an effective mechanism for limiting and controlling expeditures for leased building alterations. 40 U.S.C. § 490(a)(8) currently authorizes the Administrator to repair, alter, or improve rented premises without regard to the 25 percent Economy Act limitation, upon a determination that such work is advantageous to the Government in terms of economy, efficiency, or national security. This authority is made subject to a proviso that the total cost to the Government for the expected life of the lease be less than the cost of alternative space needing no such repairs, alterations, or improvements. This proviso would be deleted by section 4 and the limitations of new subsection (l), described above, substituted for it.

Rather than continuing to provide for waiver of the 25 percent Economy Act limitation, we suggest that it be repealed outright. 40 U.S.C. § 490(a)(8) as amended then would permit the repair, alteration, or improvement of rented premises where the Administrator determines that such work is advantageous to the Government in terms of economy, efficiency, or national security, subject to the limitations imposed by new subsection (l).

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States