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Statement of

Elmer B. Staats

Comptroller General of the United States

before the

Subcommittee on Government Activities

Committee on Government Operations

House of Representatives

on

H.R. 16443

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to appear before your subcommittee in connection with H.R. 16443. This bill deals with the Government's procurement of architect-engineer services, which has been of interest for some time to the General Accounting Office. We would like to briefly provide this committee with the background of our involvement in this subject.

On June 16, 1965, we issued a report to the Congress entitled "Noncompliance with Statutory Limitation on Amount Allowable for Architectural-Engineering Services for the Design of a Facility at the Nuclear Rocket Development Station, Nevada," wherein we reported that the fee payable under a particular architect-engineer contract awarded by the National Aeronautics and Space Administration exceeded the applicable statutory 6-percent limitation.

Thereafter, NASA, in its fiscal year 1967 authorization request, proposed that it be given authority to enter into A-E contracts for highly complex research and development facilities without regard to the statutory limitation. Instead of granting NASA's request, the conference report on the authorization bill directed that our Office undertake on a Government-wide basis a comprehensive analysis of the interpretations and applications of the statutory fee limitation and that GAO submit to the Congress a report with conclusions and recommendations for legislative action. In this regard, the report states:

> "The House receded from its proposal to include a new Section 5 which would permit NASA to waive the provisions of 10 U.S.C. 2306(d) regarding limitations on architect-engineer fees.
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> "The Conferees noted that the Comptroller General had on April 20, 1966, at the request of the Committee on Science and Astronautics of the House, initiated a government-wide study of the interpretations and applications of the six percent limitation imposed by various statutes on architect-engineer contracts. The Conferees agreed that the study, as proposed by the House, should be continued to completion by the GAO in lieu of a separate study by the Bureau of the Budget as proposed by the Senate.
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> "In view of this, the Conferees agreed that any legislative action deemed necessary for NASA in this regard should await the results of this study scheduled for completion by January 1, 1967, and until such date with respect to this limitation, the Comptroller General should not take exception to or disallow as unlawful, costs incurred by NASA for research, development or engineering activities required for the establishment of design criteria or development of design concepts involving the use of nuclear energy or other advanced and unusual technology provided that in contracting for such activities NASA is consistent with practices and procedures established by the Department of Defense for similar work."

Prior to this directive, we had initiated in early 1965 a survey of the policies and procedures followed by the major construction agencies in their selection of A-E's and in their negotiation of fees. Since the two reviews were so closely related, we included the results of both in a report to Congress dated April 20, 1967, entitled "Government-Wide Review of the Administration of Certain Statutory and Regulatory Requirements Relating to Architect-Engineer Fees."

Concerning the 6-percent fee limitation, we interpreted the limitations contained in 10 U.S.C. 4540, 7212, and 9540 to relate only to the production and delivery of designs, plans, drawings, and specifications. However, in 1947 the Congress enacted the Armed Services Procurement Act of 1947, now codified in title 10, which provided in section 4(b) "that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project." The same language was enacted in the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254(b)). Consequently, we interpret this language to apply to all A-E services. We found many instances where Government construction agencies contracted for A-E services at amounts in excess of the 6-percent ceilings.

legislative history of Public Law 87-653 indicated that the competitive negotiation requirements of that act were not intended to apply to A-E services. In addition, it was stated that even if A-E's were subject to such requirements, existing agency procedures were fully consistent with the spirit and purpose of the requirement that proposals be solicited from the maximum number of sources consistent with the nature and requirements of the services to be procured; in their opinion, it would be incompatible with the expert and individualized character of A-E services to apply the procedures prescribed by Public Law 87-653. Certain other policy considerations were advanced by the professional societies as militating against the view of the matter taken by our Office. Taken together, the A-E's emphasized that, because of the unique relationship between A-E and client and because of the nature of the services to be rendered, an undue concern for price could only lead to a reduction in the quality of performance, to the serious detriment of the Government.

In our report we stated:

> "We believe that the nature and requirements of the A-E services to be procured will determine in large measure the number of proposals solicited for a particular procurement. The maximum number of sources solicited may be properly influenced by both the scope and complexity of the contemplated services and the contracting agency's judgment as to the firms qualified to perform these services. Once this determination has been made, proposals can be solicited from all qualified sources.
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> "We find no present statutory basis, however, which would exempt A-E contracts from compliance with the requirements of Public Law 87-653 to solicit proposals from the

respect to the question of the quality of A-E services which the Government procures, we stated as follows:

> "We recognize the need for the Federal Government to assure itself that the architect-engineer services for which it contracts will be of a high quality. However, we do not believe that legislation of the kind exemplified by these bills is required in order to secure the necessary caliber of service. We are of the opinion that the well-recognized concept of competitive negotiation can be successfully applied to the procurement of architect-engineer services without adversely affecting the quality of the service to be furnished.
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> "It is necessary in the context of the procurement of architect-engineer services to distinguish very clearly competitive bidding from competitive negotiation. While the rigid rules applicable to formally advertised procurement generally require award to the lowest (price) responsive, responsible bidder, the flexibility inherent in the concept of negotiation permits an award to be made to the best advantage of the Government, 'price and other factors considered.' Negotiation permits, and indeed requires, the contracting officials of the Government to consider these 'other factors' of the procurement which, in a proper case, may result in an award to one offeror as opposed to another less qualified offeror submitting a lower price. The award of an architect-engineer contract may and properly should be made to the offeror whose proposal promises the greatest value to the Government in terms of performance and cost, rather than to an offeror who merely proposes to perform the services at the lowest price. In brief, we believe that within the framework of competitive negotiation as it is presently being administered the Government would be afforded reasonable assurance that it would receive the best possible professional services, from both a design and a price standpoint. Competitive negotiation, properly conducted, will not compromise the quality of the services to be rendered for a price savings."

I should like to emphasize that the decisions by our Office clearly support the principle that when the Government selects a contractor under negotiation procedures, award may properly be made on the basis of factors other than price. Furthermore, we would point out that other

professionally oriented procurements involving a significant degree of expert talent and ingenuity, such as for management consultant services, for research and development, and for sophisticated and technically advanced weapons or aerospace systems, are accomplished successfully by means of competitive negotiation. The concern expressed that price would become the primary factor in contractor selection is not borne out by this experience. Consequently, we find it difficult to see why A-E services cannot be obtained by the same method.

We believe that the problem of the proper emphasis to be placed on the price component of the negotiation process is the prime reason for the use of the present A-E selection procedure. It is our firm opinion that the Government should receive the benefit of the competitive negotiation procedures prescribed by Public Law 87-653 in the procurement of A-E services. We know of no valid reason why it would not be appropriate to negotiate contracts for these services on a basis where professional competency and other related factors, including price, are given consideration.

In our report of May 15, 1970, on the bill under consideration, we suggested alternative language which would:

--repeal the arbitrary and unrealistic 6-percent fee limitation.

--prescribe a method of negotiation that would insure the selection of an offeror found to be technically qualified, thus precluding the possibility that quality will be sacrificed to secure a lower price, and

--provide a degree of price competition that gives reasonable assurance of fair pricing for services rendered by requiring price proposals from at least two offerors found to be technically qualified.

As stated in our report, we believe the approach we have suggested represents a fair resolution of the many and sometimes conflicting views expressed by various parties and will result in award of negotiated contracts to A-E firms offering the Government the best value in terms of performance and price.

That concludes my statement, Mr. Chairman. We will be glad to answer any questions you may have.