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Administrative Law and Governmental Relations Subcommittee; by
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Act of 1977; H.R. 664 (95th Cong.); H.R. 3745 (95th Cong.);
H.R. 4713 (95th Cong.); H.R. 4793 (95th Cong.); H.R. 7212
(95th Cong.). 31 U.S.C. 724. 31 U.S.C. 952. 4 C.F.R. 101 et
seq.

Five bills, which if enacted would be cited as the "Contracts Disputes Act of 1977" or the "Contracts Disputes Reform Act of 1977," are intended to provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies and their instrumentalities. Each of the bills is an outgrowth of recommendations made by the Commission on Government Procurement. The recommendations of the Commission are a balanced approach to improving the Government's dispute-resolving process, and the bills are supported so far as they implement those recommendations. Each of the bills provides for the expansion of the disputes clause of Government contracts to authorize the executive agencies to settle, compromise, pay, or otherwise adjust all claims by or against the Government, including breach of contract claims. For each agency to have unlimited authority to compromise all claims without providing for the imposition of uniform standards is not desirable. Also, the settlement of claims for contract reformation and rescission should not be assigned to the agencies. It is recommended that the contractor be provided the right of direct access to the courts as an alternative to agency boards of contract appeals; only three of the bills at present make this provision. The courts should be allowed discretion to supplement agency board records with additional evidence and to finally resolve disputes as well as remand cases to agency boards of appeals, but they should not be permitted de nova review of board findings. (SC)

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Statement of
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Before the

Subcommittee on Administrative Law and Government Relations
Committee on the Judiciary
House of Representatives

Mr. Chairman and Members of the Subcommittee:

We appreciate your invitation to appear before your Subcommittee to discuss our views on H.R. 664, H.R. 3745, H.R. 4713, H.R. 4793 and H.R. 7212. The bills if enacted would be cited as the "Contracts Disputes Act of 1977" or the "Contracts Disputes Reform Act of 1977".

The bills are all intended to provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies and their instrumentalities. Each of these bills is an outgrowth of recommendations made by the Commission on Government Procurement (the Commission); H.R. 4793 and H.R. 7212 are identical.

The Commission made 12 recommendations concerning the resolution of disputes arising in connection with contract performance. They are:

1. Make clear to the contractor the identity and authority of the contracting officer, and other designated officials, to act in connection with each contract.
2. Provide for an informal conference to review contracting officer decisions adverse to the contractor.
3. Retain multiple agency boards; establish minimum standards for personnel and caseload; and grant the boards subpoena and discovery powers.
4. Establish a regional small claims boards system to resolve disputes involving \$25,000 or less.
5. Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into by the United States.
6. Allow contractors direct access to the Court of Claims and district courts.
7. Grant both the Government and contractors judicial review of adverse agency boards of contract appeals decisions.
8. Establish uniform and relatively short time periods within which parties may seek judicial review of adverse decisions of administrative forums.
9. Modify the present court remand practice to allow the reviewing court to take additional evidence and make a final disposition of the case.
10. Increase the monetary jurisdictional limit of the district courts to \$100,000.
11. Pay interest on claims awarded by administrative and judicial forums.
12. Pay all court judgments on contract claims from agency appropriations if feasible.

The Comptroller General, as a Commission member, supported these recommendations to improve the Government's dispute-resolving procedure. Our Office believes the recommendations of the Commission are a balanced approach to improving the Government's dispute-resolving process. The bills differ in various aspects from the Commission's recommendations. We support the bills so far as they implement the recommendations of the Commission.

We would like to highlight the principal provisions of the bills and comment on them as they relate to one another and to the Commission's recommendations.

Most Government contracts contain a "Disputes" clause. Under the clause factual disputes between the contracting officer and the contractor arising under the contract which cannot be resolved by mutual agreement are decided by the contracting officer. If the contractor disagrees, he may appeal to the agency head or his designated representative, usually a board of contract appeals. The board's decision with respect to an issue of fact is final and conclusive unless it is fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. These standards of finality are those permitted under the Wunderlich Act, 41 U.S.C. §§ 321-32, with respect to factual issues. No finality is permitted with respect to legal questions.

The Disputes clause relates only to questions which arise under a provision of the contract. Therefore, breach of contract disputes currently are not resolved through this process. Section 4 of each bill would expand the application of the Disputes clause by including a provision authorizing the executive agencies to settle, compromise, pay or otherwise adjust all claims, including breach of contract claims. This is intended to eliminate the present distinction between disputes arising "under" a contract, which are decided by agency boards of contract appeals, and disputes arising out of an alleged breach of contract, which the boards generally are without jurisdiction to decide. We favor this aspect of Section 4.

Each bill's Section 4 is based on the Commission's recommendation that agencies be empowered to "settle and pay, and administrative forums to decide, all claims or disputes" in connection with contracts entered into by the United States. However, it goes further than contemplated by the recommendation. The Commission report indicates an intent to use an "all disputes" clause which would permit the resolution of breach of contract claims under the contracts disputes procedure. The bills, however, would also authorize agencies to compromise claims by or against the Government.

The authority of agencies to compromise claims currently is limited, for the most part, to compromising claims of the United States in amounts not exceeding \$20,000, under 31 U.S.C. § 952, and such claims can be compromised only in accordance with the standards developed jointly by the Department of Justice and the General Accounting Office. See 4 C.F.R. 101 et seq. In other situations, referral to the Department of Justice is necessary before compromise can be effected. Since most compromised claims are processed by the Department of Justice or are handled in accordance with the standards of 4 C.F.R. 101 et seq., consistency in the Government's approach is generally assured. The bills would eliminate this assurance by giving each agency unlimited authority to compromise all claims relating to Government contracts without providing for the imposition of uniform standards. We do not believe this authority is desirable or is in any way related to the Commission's recommendation.

In addition, Section 4 of the bills would authorize the settlement of claims for contract reformation and rescission. These are legal remedies for mistakes-in-bids. As such, we believe this authority too goes beyond what the Commission envisioned in making its recommendation.

To provide an improved means for review and settlement of contract disputes short of litigation, Section 6 of H.R. 644, 3745 and 4793 provides that a contractor may request an informal conference to be held following an adverse

decision of the contracting officer. In the case of H.R. 3745, the conference may be held before or after the contracting officer's decision. The conference is intended to promote settlements by having both sides of the dispute presented to a Government official at a higher level than the contracting officer. We agree with the purpose of the procedure--promoting settlement before litigation and increasing the confidence in the procurement process. However, we believe the purpose may be equally well realized through conferences held before or after the issuance of the contracting officer's decision. H.R. 3745 does not require that the Government conferees be above the contracting officer level. H.R. 4713 does not provide for an informal administrative conference. The standard Disputes clause, which requires a contractor to appeal a final decision of the contracting officer within 30 days, may have to be modified to allow for the post-decision conference procedure.

Section 7 of H.R. 4713, Section 8 of H.R. 3745 and 4793 and Section 9 of H.R. 644 allow the retention of agency boards of contract appeals where the caseload justified a "full-time" board. There are 11 agency-affiliated boards of contract appeals in the executive branch, as well as boards maintained by the House Office Building Commission, the Postal Service, and the

Government of the District of Columbia. The Commission believed that the agency boards of contract appeals generally have developed into satisfactory forums for the resolution of contract disputes, and, with only relatively minor changes, can be strengthened to continue in this role even more effectively. To this end, the establishment or maintenance of an agency board of contract appeals would be prohibited unless the agency can justify the maintenance of a full-time board with no other duties but to hear and decide contract appeals. All members of the board would be selected in a manner that minimizes their ties to the agency head.

The bills, with the exception of H.R. 3745, allow appeals of board decisions by both parties. The agency boards of contract appeals as they exist today, and as they would be strengthened by other provisions in the bills, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding making findings of fact and interpreting the law. Their decisions contribute heavily to the legal precedents in Government contract law, and often involve substantial sums of money. In performing this function, a board does not act as a representative of the agency, since the agency is contesting the contractor's entitlement to relief. For this reason, the Commission concluded that the Government, as well as contractors, should have a right to judicial review of adverse decisions. We agree with the Commission.

Section 10 of H.R. 664, 3745 and 4793 allows the contractor the right of direct access to the courts as an alternative to agency boards. Because of judicial interpretation of the Wunderlich Act, discussed earlier, agency boards, in effect, have become the final arbiters of fact. The Commission concluded that most disputes would be best resolved in an administrative proceeding. However, it also concluded that the contractor should not be denied a full judicial hearing on a dispute that the contractor deems important enough to warrant the maximum due process available under our system. This point is important when considered in light of the Commission's recommendation that the jurisdiction of the agency boards of contract appeals be broadened to encompass all disputes between the Government and the contractor, including claims that the Government had breached the contract. Support for broadening the boards' jurisdiction probably would diminish if contractors did not retain the present right of direct access to the courts in breach of contract cases.

Section 10 of these bills also implements the Commission's conclusion that the system would further economy and fair treatment if the courts were allowed discretion to supplement the board record with additional evidence and finally to resolve the dispute as well as remand the case to an agency board of contract appeals. In addition, however, this section, in H.R. 644 and H.R. 4793, would modify the Wunderlich Act by eliminating the

finality that attaches to board findings of fact.

As a result, the findings of fact may be overcome by evidence introduced in a de novo judicial proceeding.

These modifications clearly exceed what the Commission had in mind. The Commission was concerned with enabling the courts to take evidence to fill in any gap that might be present in board records. It did not envision de novo review of board findings. These portions when read together with the provisions that would permit contractors to bring suit directly in court, would create a more complex, unwieldy system for resolving disputes, since it would allow a contractor to select the board and then to take an appeal to the court if it disagrees with the decision of the board. This is particularly significant under Section 6 of the bills which would give the contractor, through an informal conference with agency officials, an opportunity to overcome (in effect appeal from) an adverse contracting officer decision even before lodging a formal appeal with the board. We agree that the contractor should be permitted to select either an administrative or judicial forum. However, once having selected the board approach, we do not think it would be proper to permit him to change his mind and select the other alternative after he has lost under his first choice. It would seem more appropriate to allow either direct

contractor access to the courts or a more detailed judicial review of board findings than is now permitted under the Wunderlich Act. To allow both appears to make the system more time consuming.

On the other hand, H.R. 4713 does not allow contractors direct access to the courts. It does however, in Section 9, permit the board to certify an appeal to the Court of Claims where to do so would be expeditious. In this case, the Court of Claims would decide the matter as if it had been originally filed therein. Section 9 also provides that if an appeal is before the Court of Claims upon judicial review of a board decision and additional evidence is required (unless the question involves the amount of recovery only), the court must remand the matter to the board for additional proceedings. In both respects, Section 9 of H.R. 4713 is inconsistent with the Commission's recommendations.

All of the bills grant discovery and subpoena powers to the board of contract appeals. We agree that the boards should have this authority. This will ensure that the tools to make complete and accurate findings are available, and would minimize the need for a court to supplement the board on review. Similarly, the bills provide for the payment of interest on contractor claims. This has already been implemented through changes in the procurement regulations.

Finally, where final judgment is made by a court, the contractor is presently paid out of the permanent indefinite appropriation established under 31 U.S.C. § 724(a) for the payment of judgments, rather than from agency appropriations. H.R. 3745 provides that awards made by a board or court are to be paid out of that fund, but that the fund shall be reimbursed by the agencies out of available funds or by obtaining additional appropriations. This may decrease an existing incentive for agencies to avoid settlements and to litigate in order to have the final judgment made by a court. Perhaps more importantly it will provide visibility to the Congress as to the true economic cost of the procurement programs.

In summary, we believe that the Commission's recommendations for an improved disputes-resolving system should be implemented. As we have stated, the importance of the remedies system to good procurement requires the enactment of a sound statutory foundation in order to establish basic policy for resolving disputes under Government contracts. Enactment of any of the bills, revised to conform with the Commission's recommendations, would provide such a foundation.

This concludes my prepared statement. I will be pleased to reply to your questions.