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Statement of

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before the

SUBCOMMITTEE ON MILITARY OPERATIONS
COMMITTEE ON GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

B-152015.10

on

GAO's Position on Review of
Contract Appeals Board Decisions

I appreciate this opportunity to present the views of the General Accounting Office on the opinion of the Attorney General dated January 16, 1969, in the Southside Plumbing case concerning the authority of the General Accounting Office to review decisions by contract appeal boards.

In February of 1965 Progressive Construction Company (formerly the Southside Plumbing Company) requested the Comptroller General to review a decision by the Armed Services Board of Contract Appeals. This decision (ASBCA No. 8120, December 20, 1963, and July 14, 1964) denied an appeal by Southside Plumbing under a contract calling for the rehabilitation and improvements to 500 family housing units at Hunter Air Force Base, Georgia.

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In a decision of December 8, 1966, the Comptroller General reviewed the ASBCA's decision and held that Southside Plumbing was entitled to an equitable adjustment for insulating certain ductwork in the hallway section of the housing units. We agreed with the other portions of the Board's decision which denied the contractor's claims for insulating ductwork in the kitchen and mechanical room sections of the housing units. Because, under the terms of the contract, the amount of the equitable adjustment to which we considered the contractor to be entitled was to be settled between the contractor and the contracting officer, we requested the Secretary of the Air Force to have the amount determined administratively under the disputes clause procedures. The Air Force declined to honor the Comptroller General's request and, instead, submitted the matter to the Attorney General for an opinion. In this connection, we were advised by the Air Force General Counsel that under the circumstances the Department of the Air Force believed the Board's decision should be accorded finality until reversed by a court of competent jurisdiction.

In his opinion of January 16, 1969, the Attorney General advised the Air Force that the GAO had no authority, statutory or otherwise, to direct or compel remand of a claim to an executive agency for further proceedings and he further concluded that GAO's request for such remand should not be honored as a matter of comity. In this latter respect the Attorney General was of the opinion that the effect of a compliance with the Comptroller General's request would be to surrender the Government's rights without an opportunity to defend in the Court of Claims a case that the Government had successfully presented to the Board.

It should be noted that the Attorney General did not squarely hold that the GAO had no authority to review decisions favorable to the Government although his opinion certainly implies that such is the case. The only explicit conclusion stated in the opinion is that the Air Force was not required to honor the GAO's request to determine the amount due nor should it do so as a matter of comity.

On the other hand, the opinion concedes that GAO has authority, under its audit powers, to review and disallow payment on claims decided against the Government. Significant, also, is the fact that the Attorney General recognized a need for close scrutiny by the contracting agencies themselves of contract appeal board decisions that are adverse to the Government with a view toward obtaining a court review of those decisions deemed to be of questionable validity under the Wunderlich-Act standards. We in GAO have long recognized this need and have advocated that executive branch procedures be established for this purpose. We have endorsed that portion of the Attorney General's opinion dealing with this problem and his suggestion that contracting agencies consider the desirability of adopting affirmative procedures to facilitate the screening of board decisions. We emphatically disagree, however, with that part of the opinion which implies that the GAO has no authority to review and reverse board decisions favorable to the Government.

The Budget and Accounting Act, 1921 (31 U.S.C. 71), is quite clear in providing that all claims and demands whatever by or against the United States, and all accounts whatever in which the United States is concerned, either as debtor or creditor, shall be settled and adjusted

in the General Accounting Office. Pursuant to this statutory mandate, and in conjunction with its audit authority, the GAO has long exercised the authority to review board decisions whether they were adverse or in favor of the Government. This authority was exercised prior to the enactment of the Wunderlich Act and it has been exercised subsequent thereto.

The General Accounting Office was instrumental in persuading the Congress of the need for the Wunderlich legislation after the Supreme Court had decided United States v. Moorman, 338 U.S. 457 (1950) and United States v. Wunderlich, 342 U.S. 98 (1951). These decisions, in effect, eliminated the review authority of the GAO and the courts except in cases of fraud. The major purpose of the Wunderlich Act was to restore the standards of review previously exercised by the GAO and the courts and we have acted on the basis that it, in fact, did so.

An analysis of the legislative history of the Wunderlich Act has previously been furnished this Committee and it would be too time consuming to go into it here except to state that we are convinced that this history fully supports GAO's position in this controversy. We have yet to see or hear a detailed and responsive rebuttal of our position based upon that history as set forth in our S&E decision (46 Comp. Gen. 441) and in the memorandum brief submitted to the Attorney General in connection with the Southside Plumbing case. We have heard nonlegal general policy arguments made as to why the GAO should not have this review authority but it is well to note that it is not the function of executive branch agencies to declare the policy as to how GAO should exercise

its authority. The Congress declared the applicable policy when it passed the Budget and Accounting Act and the Wunderlich Act and it is the Congress alone that can, or should, alter it. An Attorney General's opinion cannot repeal the provisions of 31 U.S.C. 71.

In his letter to us which declined to honor our request for referral of the claim to the ASBCA, the General Counsel of the Air Force noted that the ASBCA had been designated the agent of the Secretary of the Air Force to hear appeals; that the Board rendered its decision in the case after a full hearing; and that under the circumstances the Air Force believed the decision should be accorded finality until reversed by a court of competent jurisdiction. We would respond to this assertion by pointing out that the ASBCA, like all contract appeal boards, was created solely by administrative action. The board is neither a creature of statute nor does it possess statutory powers. It can exercise only such authority as is delegated to it by the department head. In the end, its power can be no greater than that of its creator and its determinations can have no greater effect than would the determinations of the department head.

The mere clothing of the department head's designee with the trappings of formal hearing procedures does not confer greater authority on the designee than that possessed by the department head. We are aware of no law, statutory or otherwise, empowering the agency head to make final determinations in contract disputes cases. The Wunderlich Act was passed for the very purpose of overcoming the finality previously enjoyed by the departments under the Moorman and Wunderlich decisions.

The Act confers only limited finality on findings of fact and prohibits any finality from attaching to determinations on questions of law.

Our decision in the Southside Plumbing case dealt solely with a question of law. As the Attorney General's opinion notes, we accepted the board's decision on all questions of fact. However, we disagree with the legal conclusion drawn by the Board from the admitted facts. Under these circumstances, how any finality could properly be accorded to a board decision dealing with a question of law has not been explained to this day. Moreover, to assert that the Board's decision in this case must be accorded finality when opposed by a decision from an agency clothed with full statutory authority to settle and adjust all claims is to elevate nonexistent and, thus, nondelegable administrative power, over statutory authority.

To summarize, we believe that in phrasing the question here in terms of jurisdiction to review, the Air Force has attempted to make a distinction, which does not in fact exist, between the authority to consider the effect of an administrative decision under a contractual disputes clause and the authority to settle and adjust a claim against the United States. When the GAO was requested by the contractor to review the ASBCA decision, the legal effect of the request was to invoke our statutory authority to settle and adjust claims. If the claim had not been cognizable under the disputes clause, settlement by our Office would have been made on the basis of the established facts appearing in the administrative record. In such cases, if the facts are in dispute the claim is disallowed and the contractor is left to pursue his remedy

in court. However, those classes of claims cognizable under the disputes clause, must be, and are, considered by the GAO in accordance with the requirements of the Wunderlich Act as construed by the Supreme Court in United States v. Carlo Bianchi and Company, Inc. 373 U.S. 709 (1963). That is, aside from questions of fraud, the review of a departmental decision on a question of fact arising under a disputes clause must, under the Wunderlich Act, be confined to consideration of the record made before the department.

It must be emphasized that in either case, whether the claim is cognizable, or not cognizable, under the disputes clause, our authority to consider and settle the claim is based on the provisions of 31 U.S.C. 71. The only difference between the two types of claims is that a claim subject to the disputes clause must be considered in the light of the Wunderluch Act and the Bianchi decision. To cast the controversy here in terms of authority to review Board decisions only serves to confuse the issue. The real question is--does GAO have authority to consider and settle the claim. We think we do. This authority was conferred by the Congress and is not dependent upon contractual consent and delegation of power. The statute (31 U.S.C. 71) is clear and if upon consideration of the record, including the decision of the Board and the evidence presented to the Board, we conclude that the facts found by the Board do not in law justify the denial of the claim, we are duty-bound to allow it.

We are not impressed with the Attorney General's argument that compliance with our decision in Southside Plumbing would have the effect of

surrendering the Government's rights without the opportunity to defend before the Court of Claims. The question may well be asked--what rights? The ASBCA's decision is not final. Southside Plumbing had the right to invoke GAO's settlement authority without incurring the substantial expense of prosecuting its claim in the courts. Or is it the right to defend before the Court of Claims? The Government, including the Air Force, surrenders this "right" literally hundreds of times a year when it pays contract claims found to be meritorious by contract appeal boards or, for that matter, when the Attorney General compromises a claim without litigation. We believe it to be quite probable that some of these Board cases could not survive court review if challenged by the Government. Yet under present administrative procedures very few are challenged and we have seen no stampede by contracting agencies to implement the Attorney General's recommendation that affirmative procedures be implemented to facilitate the screening of board decisions.

We believe it is safe to say that the GAO has not been noted for authorizing payment of claims which are doubtful. In such cases we have consistently refused payment leaving the claimant to his judicial remedies. In those cases where we are firmly convinced that the claimant has a clear legal right to payment we feel duty-bound to authorize payment. This not only affords simple justice to the claimant, but saves the Government the time and expense of defending the claim in the courts. These are the considerations which guided us in authorizing payment to Southside Plumbing.

This concludes our statement, Mr. Chairman. We will be glad to answer any questions you might have.

WUNDERLICH ACT

Public Law 356 CHAPTER 199

AN ACT

To permit review of decisions of the heads of departments, or their representatives or boards, involving questions arising under Government contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fradulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

Approved May 11, 1954.