Office of the Attorney General
Washington, D. C. 20530

June 20, 1991

Honorable J. Danforth Quayle
President of the Senate
United States Senate
Washington, D.C. 20510

Dear Mr. President:

Section 202(a) of Pub. L. No. 101-515, 104 Stat. 2101, 2116 (1990), by continuing the authorities contained in § 21 of Pub. L. No. 96-132, 93 Stat. 1040, 1049-50 (1979), requires the Attorney General to "transmit a report to each House of the Congress" in any case in which the Attorney General "determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional." This letter is submitted consistent with the notification requirement contained in Pub. L. No. 101-515.

Specifically, this letter concerns 31 U.S.C. § 3554(c), a provision of the Competition in Contracting Act of 1984 ("CICA" or "the Act"), which was enacted as part of the Deficit Reduction Act of 1984. See Pub. L. No. 98-369, tit. VII, § 2741(a), 98 Stat. 494, 1202 (1984). Subsection (1) of section 3554(c) authorizes the Comptroller General to declare that a successful bid protester is entitled to recover its bid protest costs (including attorneys' fees) as well as its bid and proposal preparation costs. Subsection (2) thereof requires the Federal agency concerned to pay such a monetary award promptly out of funds available to or for its use for procurement purposes. For the reasons set forth below, I have concluded that 31 U.S.C. § 3554(c) (the "costs and fees" provision) is unconstitutional.

The Department of Justice has repeatedly objected to CICA's "costs and fees" provision as a violation of the separation of powers required by the Constitution. When the provision was under legislative consideration, as part of H.R. 5184, the Department objected to it as "clearly unconstitutional." See Letter to Honorable Jack Brooks, Chairman, House Committee on Government Operations, from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (April 20, 1984). Notwithstanding the Department's constitutional objection to this proposed provision, Congress subsequently enacted it as part of the Deficit Reduction Act of

1984. In his signing statement, the President noted the constitutional objections that had been raised to both this provision and CICA's "stay" provision, and asked the Department of Justice to inform Executive Branch agencies how they might comply with the Act in a manner consistent with the Constitution. See 20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

Subsequently, the Office of Legal Counsel informed Attorney General William French Smith that both provisions were inconsistent with the constitutionally prescribed separation of powers and should not be executed. See Memorandum for the Attorney General, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, re: Implementation of the Bid Protest Provisions of the Competition in Contracting Act (October 17, 1984). Soon afterward, Attorney General Smith notified Congress that the Department of Justice would refrain from defending these provisions in any judicial or administrative proceeding. See Letter to Honorable George Bush, President of the Senate, from William French Smith, Attorney General (November 21, 1984); Letter to Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives, from William French Smith, Attorney General (November 21, 1984).

In his November 21, 1984 letter to Congress, Attorney General Smith began by reiterating the Department's position that the Comptroller General is an agent of the Legislative Branch. He stated that

> the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees.

Id. at 3. Attorney General Smith then explained that, in INS v. Chadha, 462 U.S. 919 (1983), "the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto." Id. at 4. Applying those principles to CICA's "costs and fees" provision, Attorney General Smith concluded that the provision was unconstitutional. His letter stated that

> [b]y purporting to vest in the Comptroller General the power to award damages against an Executive Branch agency, Congress has attempted to give its agent the authority to

> alter "the legal rights, duties and relations of persons . . . outside the legislative branch." [INS v. Chadha, 462 U.S. at 952], 103 S. Ct. at 2784. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise judicial authority than it may exercise executive authority. See INS v. Chadha, [462 U.S. at 959,] 103 S. Ct. at 2788 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, see Humphrey's Executor v. United States, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

Id. at 8.

In opposition, those who asserted that the "costs and fees" provision was constitutional argued that the Comptroller General was not a purely legislative official. Relying upon United States v. Stewart, 234 F. Supp. 94, 99 (D.D.C.), aff'd, 339 F.2d 753 (D.C. Cir. 1964), the provision's defenders contended that the Comptroller General is, at least in part, a member of the Executive Branch and, as such, is entitled to execute the laws. Accordingly, they found the Department's reliance on Chadha to be misplaced. See Memorandum to Senate Committee on Governmental Affairs, from Morgan F. Frankel, Assistant Counsel, Office of Senate Legal Counsel (August 1, 1984); Memorandum to the Subcommittee on Oversight and Management, Senate Committee on Governmental Affairs, from the American Law Division, Library of Congress (August 8, 1984).

In 1986, the Supreme Court in Bowsher v. Synar, 478 U.S. 714 (1986), resolved this dispute over the Comptroller General's status, agreeing with the Department's position as set forth by Attorney General Smith in his letter of November 21, 1984. Declaring that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment," the Court stated that "we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers." Id. at 726, 732.

The Court in Bowsher then concluded that, under the statute in question, the Comptroller General's role "plainly entail[ed] execution of the law in constitutional terms," id. at 732-33, because the statute required the President to implement spending

reductions that the Comptroller General believed were necessary under the statute. Since "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law," id. at 733, the Court held that the role assigned to the Comptroller General by the statute was unconstitutional. As the Court explained,

> once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly -- by passing new legislation. Chadha, 462 U.S., at 958. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

Id. at 733-34. In sum, the Court in Bowsher held that the Comptroller General may not execute the laws and that the statute in question violated this principle by requiring the President to implement spending reductions specified by the Comptroller General.

In light of these holdings, the conclusion is inescapable that CICA's "costs and fees" provision is unconstitutional. Under this provision, when "the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation," he may declare that the bid protester is entitled to recover from the Executive Branch procuring agency the costs of its bid protest (including attorneys' fees) and of its bid and proposal preparation. 31 U.S.C. § 3554(c). Thus, the "costs and fees" provision entrusts the Comptroller General with "[i]nterpreting a law enacted by Congress to implement the legislative mandate," Bowsher, 478 U.S. at 733, with "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," Chadha, 462 U.S. at 952. In so doing, the provision violates the constitutional principle of separation of powers.

The courts have not yet had an occasion to address the constitutionality of CICA's "costs and fees" provision. Soon after Attorney General Smith notified Congress that the Department considered CICA's "costs and fees" and "stay" provisions to be unconstitutional, litigation arose concerning the constitutionality of the Act's "stay" provision. See Ameron, Inc. v. U.S. Army Corps of Eng'rs, 607 F. Supp. 962 (D. N.J. 1985), aff'd as modified, 787 F.2d 875 (3d Cir. 1986), aff'd, 809

F.2d 979 (3d Cir. 1986), cert. granted, 108 S. Ct. 1218 (1988), cert. dismissed, 109 S. Ct. 297 (1988). Subsequent to the district court's decision in Ameron, which held that the "stay" provision was constitutional, the Executive Branch decided to comply with CICA, including its "costs and fees" provision, on a temporary basis pending the outcome of the Ameron litigation. See 50 Fed. Reg. 25680 (June 20, 1985). Before the Supreme Court could issue a decision in the Ameron case, however, Congress amended the Act's "stay" provision, see Pub. L. No. 100-463, tit. VIII, § 8139, 102 Stat. 2270-47 (1988), and the Court withdrew its grant of certiorari at the parties' request. Although Congress also considered amending the "costs and fees" provision to authorize the Comptroller General merely to recommend that procuring agencies reimburse bid protesters' costs and attorneys' fees, see Amendment No. 2848, 134 Cong. Rec. S11542 (daily ed. August 11, 1988), Congress did not enact this proposal, and the "costs and fees" provision remains as originally enacted in 1984.

For the reasons set forth in Attorney General Smith's letter of November 21, 1984, and in accordance with the Supreme Court's subsequent decision in Bowsher, the Department of Justice continues to believe that CICA's "costs and fees" provision is unconstitutional. Accordingly, we intend to seek a prompt judicial resolution of this longstanding dispute.

Sincerely,

Dick Thornburgh
Attorney General