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Statement of

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before the

Special Subcommittee on the M-16 Rifle Program  
Committee on Armed Services  
House of Representatives

on the

[ Legality of Contracts Awarded to  
Two Additional Sources for the  
Production of the M-16 Rifle ]

Mr. Chairman and Members of the Subcommittee:

In accordance with the request made in letter from the Chairman dated June 13, 1968, we are appearing before you today to give you our opinion on the legality of contracts awarded to General Motors and Harrington & Richardson by the United States Army Weapons Command for the production of M-16 rifles.

A report dated June 11, 1968, on this procurement signed by Robert A. Brooks, Assistant Secretary of the Army, was received by us on June 12. A request for proposals was issued on October 3, 1967, for the stated purpose of establishing a "strong, responsible, second source for the M-16 Weapons System Family and thus broaden the production base." The procurement was initiated as a two step negotiated procurement pursuant to the

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authority of section 2304(a)(16) of title 10 of the United States Code, which provides that where formal advertising is not feasible and practicable, the head of an agency may negotiate a purchase when:

"(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved."

The material furnished by the Department of the Army includes a copy of a Determination and Findings dated September 27, 1967, signed by Assistant Secretary of the Army Robert A. Brooks, to justify use of the authority to negotiate as required by 10 U.S.C. 2310(a).

In response to the request for proposals technical proposals were submitted by General Motors, Harrington & Richardson, Maremont Corporation, and Cadillac Gage Company, and all four firms submitted acceptable technical proposals under the procurement contemplated at that time; that is, for the number of rifles and the delivery dates called for in the October 1967 request for proposals. However, before the price proposals required under the second step of the procurement were due to be submitted, a new Determination and Findings was issued on March 28, 1968. This new Determination and Findings was issued as the result of a review of the M-16 requirements in January and February 1968, which concluded that both the immediate and long range requirements for the weapons were substantially in excess of previously programmed requirements. The D & F of March 28, 1968, provided that:

*Source  
Substantive  
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"The purpose of this procurement is to establish two additional producers who will supply a quality product in an economical manner and act as additional mobilization producers. This will necessitate preaward discussion and negotiations to ensure selection of the best overall prospective contractors."

As a result of the new D & F, Amendment No. 10 to the RFP was issued on March 29, cancelling the second step of the original procurement action and advising that:

*Telegram  
3/29/51  
D.F.*

"As a result of increased urgency to supply the maximum number of rifles at the earliest possible date with minimum risks of production interruption, the object of this procurement is changed to select those two sources which will afford to the Government the highest degree of confidence in their ability in meeting or exceeding the accelerated schedule set forth below while maintaining good quality and provide the Government the strongest mobilization base."

The amendment included the new delivery schedule and the increased quantities of rifles required. The amendment stated that the Army proposed to enter into letter contracts based on reasonable ceiling prices with the two selected sources. The amendment also advised the offerors that final discussions on the technical aspects of their proposals would be held on April 4 and 5.

In another telegram of March 29 the four offerors were informed of the exact time discussions would be held with them. This telegram included instructions to prepare budgetary estimates of their ceiling prices and to have such estimates available on April 13. The telegram also included a warning that the budgetary estimates were not to be provided until specifically requested.

We understand that discussions with the four offerors were held on April 4 and 5. The technical proposals which had previously been evaluated

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were reevaluated on the basis of modifications made during the discussions and in light of the changes in the RFP. The Army reports that on April 15 the Source Selection Authority, the Commanding General of the Army Materiel Command, selected General Motors and Harrington & Richardson for award because it was believed that the two companies afforded to the Government a higher degree of confidence in their ability to meet the accelerated schedule while providing the strongest mobilization base. Thereafter, the two successful offerors were requested to submit their ceiling prices to be incorporated in letter contracts with the understanding that negotiations would continue to establish a definitive contract price. It is reported that the ceiling prices for General Motors and Harrington & Richardson are approximately \$56.2 million and \$41.6 million, respectively. Price proposals were not requested from the two unsuccessful offerors. We understand from earlier hearings held by your Subcommittee that Maremont had established a ceiling price of approximately \$36.5 million and that Cadillac Gage had established a ceiling price of approximately \$36.8 million. Letter contracts with General Motors and Harrington & Richardson were executed on April 19, 1968.

On the question of the legality of the contracts awarded to General Motors and Harrington & Richardson we think the basic question is whether the Army was required to obtain price proposals from Maremont and Cadillac Gage before deciding to make awards to General Motors and Harrington & Richardson.

10 U.S.C. 2304(g) provides, in pertinent part, as follows:

"(g) In all negotiated procurements in excess of \$2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered \* \* \*."

In the usual case the contracting agency has both price and other factors, such as technical know-how, delivery capability, and the like, before it when it determines which proposals are within a competitive range. And, there are situations in which factors other than price are determinative in deciding whether a particular proposal is within a competitive range. For example, if the product or delivery offered falls short of the needs of the Government and it seems improbable that the proposal can be satisfactorily upgraded, the price offered by that particular bidder becomes immaterial.

Ordinarily, of course, price should be considered. We understand the Army position as agreeing with this. In the Army's report of June 11, 1968, it is stated that the Army did not disregard price; that it had, prior to the final selection, made its own estimate of the probable prices of all four proposers. On this point, we do not believe Congress in enacting 10 U.S.C. 2304(g) contemplated the substitution of Government estimates for prices from competing bidders in determining those within a competitive range.

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We are informed that there was a substantial difference in the Army cost estimates as between General Motors and Maremont. In other words, the

Army's decision to select General Motors as a contractor was made with knowledge that the course of action followed would probably be more costly to the Government. While we believe there would have been a sounder basis for the exercise of judgment if prices had been obtained from both companies, we think there is some support for the Army's position that cost to the Government was not ignored in the selection process.

*Army Report  
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Secretary Brooks' report to us states the Army is convinced that prices were solicited from the maximum number of qualified sources consistent with requirements of the Government. We interpret this statement to mean that the Army had determined, prior to requesting ceiling prices from General Motors and Harrington & Richardson, that Maremont and Cadillac Gage were not considered within a competitive range after evaluation of the four technical proposals in the light of the revised requirements in that General Motors and Harrington & Richardson afforded to the Government a higher degree of confidence in their ability to meet the revised requirements.

We are not in a position to substitute our judgment for that of the Army in evaluating the technical ability and qualifications of the four companies who made technical proposals. However, Amendment No. 10 to the solicitation made it quite clear that selection would be made on the basis of sources which would afford to the Government the highest degree of confidence in their ability in meeting or exceeding the accelerated schedule while maintaining good quality and providing the strongest mobilization base, and we think that bidders were on notice throughout the procurement process that awards would not be made primarily on the basis of price.

*See pg. 11  
of Army  
Report.*

As stated the Army determined, after technical evaluations of all four proposals, that General Motors and Harrington & Richardson were the most qualified. Since award was to be made to only two sources, Maremont and Cadillac Gage, having been rated lower technically, were, in effect, determined as not within a competitive range at that point in time. Consequently, the failure of the Army to obtain prices from them did not contravene 10 U.S.C. 2304(g).

Under the circumstances, we do not believe the contracts awarded to General Motors and Harrington & Richardson can be questioned from a legal standpoint.