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UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, DC 20548

FOR RELEASE ON DELIVERY
EXPECTED AT 10 a.m.
TUESDAY, JUNE 7, 1983

STATEMENT OF

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NATIONAL SECURITY AND INTERNATIONAL AFFAIRS

DIVISION

before the

Senate Committee on Armed Services

on

GAO Views on S.338

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Mr. Chairman:

We are pleased to be here today to comment on S.338. We strongly support the bill and believe that it could, if properly implemented, be an effective framework for improving Federal procurement. There are, however, a few areas where we believe technical improvements are needed in the bill and we would be glad to work with the Committee on these matters.

MAGNITUDE OF THE PROBLEM

In fiscal year 1982, Federal Government contract awards totaled $159 billion, according to the Federal Procurement Data System, the official Federal procurement data base. Of this amount, 79 percent was awarded by the Department of Defense and 21 percent by Federal civil agencies. Federal contract awards exceeding $10,000 in value totaled $146.9 billion. Of this amount, about $54.5 billion (or 37 percent) was categorized as competitive. DOD's contract awards were 35 percent competitive.

Most of the dollars which Federal agencies obligated were for actions under existing contracts, such as modifications. Therefore, the initial or new contract decisions on which the subsequent actions are based are especially significant because they limit the Government to the use of the same contractor when contract modifications are necessary.

MANY UNWARRANTED SOLE-SOURCE DECISIONS

Our office has examined statistical samples of new, sole-source contracts above the small purchase threshold awarded by the Department of Defense and six major Federal agencies to assess the adequacy of their noncompetitive decisions. The civil

agencies were the National Aeronautics and Space Administration; the Veterans Administration; and the Departments of Energy, Interior, Transportation, and Health and Human Services.

The reviews showed that the Department of Defense and these major civil agencies frequently did not base their contract awards on competition to the maximum extent practical. A July 1981 report [1]/ showed that the Department of Defense should have competed 25 (or 23 percent) of the 109 new, sole-source contracts GAO reviewed. We estimated that DOD lost opportunities to obtain available competition on about $289 million in new fiscal year 1979 contract awards. In an April 1982 report [2]/ we estimated that for the six civil agencies reviewed competition was feasible on 32 percent of the new sole-source contracts in our universe. We also noted that an additional 8 percent could have been competitive with better agency planning or management. We estimated that six civil agencies lost opportunities to obtain available competition on $148.5 million or about 28 percent of the dollar value of our universe. The dollar amounts for both defense and civil agencies represent initial contract obligations, which in some cases may be substantially increased through later contract modifications.

The percentage of civil agency sole-source contract awards on which competition was found to be feasible varied from a low

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[1]/"DOD Loses Many Competitive Procurement Opportunities," dated July 29, 1981 (GAO/PLRD-81-45).

[2]/"Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting," dated April 7, 1982 (GAO/PLRD-82-40).

of 20 percent at HHS and 21 percent at NASA to a high of 73 percent at the Department of Energy and 49 percent at the Department of Transportation.

Basically both of these reviews showed that (1) many contracts were awarded sole-source unnecessarily, and (2) specific actions should have been taken to ensure that competition was obtained when available.

CAUSES OF MISSED OPPORTUNITIES TO OBTAIN COMPETITION

Why did agency officials fail to obtain competition on awards that could have been competitive? The major factors identified in both reports included:

--Ineffective procurement planning or the failure of contracting officers to perform market research adequate to ensure that sole-source procurement was appropriate.

--Inappropriate reliance of procurement officials on the unsupported statements of agency program, technical, or higher-level officials.

In addition, both reports show that a lack of commitment to competition on the part of key agency personnel was a major problem. Instances of overly restrictive specifications and failure to use available data packages to obtain competition were also found.

S.338

Senate Bill 338 proposes several important changes in the procurement statutes governing Federal agencies which address

these and other problems. First, the bill would remove the present strong statutory preference for sealed bidding and in its place substitute statutory provisions that (1) focus on competition, whether achieved through sealed bids or competitive proposals, and (2) seek to limit noncompetitive procurements. We agree that it is competition, not just competition through sealed bidding, that should be emphasized. We also agree that noncompetitive procurements should be limited to very special and well-defined circumstances and have specifically recommended this type of requirement in a recent report.

Second, the bill would strengthen procedures for publicizing prospective awards consistent with one of our recommendations that we consider especially important. The bill would require for most purchases of over $10,000 that notices be published in the Commerce Business Daily (at least 45 days before the deadline for submission of bids, proposals or quotations) and include a statement inviting bids, proposals or other responses.

In our previously mentioned report, we analyzed civil agency officials' use of the Commerce Business Daily on a statistical sample of noncompetitive contracts. We found that agency officials publicized a notice which invited competition on the prime contract on only 2 percent of the awards. On 39 percent of the awards, they publicized a preaward sole-source notice, which stated that the Government intended to negotiate with a particular contractor. These were in lieu of notices inviting competition. These sole-source notices are published for information purposes, such as alerting potential subcontractors to

subcontracting opportunities. Although this purpose is worthwhile, we believe such notices fail to encourage additional proposals on the prime contract. Even less satisfactorily, no preaward notices at all were publicized for the remaining 60 percent of the awards and usually there was no valid exception to the regulatory requirement to publicize such notices. We believe this is an area of serious abuse which results in potential competitors being effectively restricted from competing. Therefore, we strongly support this provision in the bill.

Third, the bill requires agencies to use advance procurement planning and market research to obtain competition. As previously discussed, our recent reviews of defense and civil agencies' sole-source contracts identified ineffective procurement planning and inadequate market research as major deficiencies needing correction.

Fourth, the bill provides a Government-wide ceiling of $25,000 for small purchases. The Congress, in December 1981, raised the small purchase ceiling for the Department of Defense to $25,000. This bill would also raise it for civil agencies, which are currently held to the $10,000 ceiling which the Congress established in 1974. We support raising the ceiling to $25,000 Government-wide as long as reasonable competition is achieved. We believe the additional purchases to be made under simplified procedures will save administrative costs and reduce the paperwork burden on both the Government and small business.

As noted earlier, although we endorse S.338, we believe there are several areas in which the bill could be improved. For

example, although we would oppose any effort to add a specific exception to competitive procedures for unsolicited proposals, we suggest that the bill be revised to exempt agencies from conducting market research and publicizing a preaward notice in the Commerce Business Daily when these procedures cannot be performed without disclosing the unsolicited proposer's original thoughts, innovative approach, solution, or other proprietary information. This should properly restrict the Government's market search for competitive sources to those situations in which it is appropriate. However, based on our reviews of contracts resulting from unsolicited proposals, we believe that agencies can with relatively few exceptions undertake such a market search for competitive sources to meet the Government's minimum requirements without disclosing such data.

In addition, we suggest that the bill or the Senate Committee on Armed Services' report on S.338 clearly provide that the use of noncompetitive procedures is appropriate in awarding follow-on contracts that must be directed to a specified source because competition is not feasible. In such a case, agency officials should be required to demonstrate that a noncompetitive award is necessary to avoid (1) unacceptable delays in accomplishing the agency's mission objectives or (2) duplication of costs to the Government for the property or service being procured (that is, a substantial investment of some kind would have to be duplicated at Government expense by another source entering the field and because of the magnitude of these costs, recovering

them through competition, would be highly unlikely). However, the fact that the Government would incur some cost and/or delay by changing contractors is not, in and of itself, a sufficient reason for noncompetitive procurement.

Otherwise, we do not know of any situations for which noncompetitive procedures are appropriate, aside from those that would be covered by S.338's six exceptions to the requirement to use competitive procedures, as set forth in the bill and further explained in the Senate Committee on Governmental Affairs' report accompanying S.338. However, we recognize there is always the possibility that in a few cases unforeseen circumstances may make noncompetitive procurement appropriate, even though this is not authorized under the six exception categories of S.338. To provide for such unforeseen circumstances, some have advocated adding an exception which would permit noncompetitive procedures to be used when the agency head determines that competition is impracticable. We are concerned that such an exception would be too easily misused if the agency head's authority could be delegated widely. Therefore, we would support such an exception only if

--a clear expectation is stated that such an exception would be used very infrequently,

--the specific reasons for any use of this exception must be disclosed and justified, and

--the authority to use this exception could not be delegated to any official more than one level below the agency head. That is, only officials at or above the level of

assistant secretary of any department or a comparable level in an independent agency should be able to authorize noncompetitive procurement on a basis other than that provided by S.338's more specific exceptions.

We also suggest that the bill or its legislative history clearly reflect congressional intent that:

1. The use of noncompetitive procedures is permissible under the first exception (title I, section 303 (e) (1) and title II, section 2304 (e) (1)) when data, such as drawings or other specifications, needed for competition is not available and there are no alternative ways of obtaining competition, such as redescribing the requirement in terms of function or performance required. However, the agency is responsible for (a) avoiding such noncompetitive situations by making sure that adequate data is available for competition, or (b) demonstrating that obtaining such data is not in the Government's best interests.

2. Implementing regulations should require requesting officials to notify procurement officials as soon as requirements become known in order to avoid delays in the procurement process and allow reasonable time to obtain competition. Our work has shown that requesting officials do not always notify procurement officials in a timely manner when requirements are identified. This sometimes results in problems, such as the failure to publicize notices in the Commerce Business Daily due to

the "lack of time." This suggestion has become more important because S.338 would lengthen the time period to 45 days between publication of the notice and the deadline for the submission of bids, proposals or quotations.

3. An award should not be considered "competitive" unless an agency enters into the contract after receiving in response to its solicitation sealed bids or competitive proposals from two or more independent sources that are capable of satisfying the agency's needs. Without such a minimum standard for competition we believe it is likely that agencies will classify many awards as competitive merely because they solicited competitive bids or proposals from more than one source, even though the benefits of competition, such as lower prices and better quality products and services, have not been achieved. This could have a dramatic but deceptive effect on Government procurement data and trends relating to competition.

This concludes my prepared statement. I will be happy to address any questions you may have.