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Report to Congressional Committees

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METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

Contracting Practices Do Not Always Comply with Airport Lease Requirements

GAO

Accountability * Integrity * Reliability

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Abbreviations

ABA	American Bar Association
MWAA	Metropolitan Washington Airports Authority

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United States General Accounting Office
Washington, DC 20548

March 1, 2002

The Honorable Ernest F. Hollings
Chairman
The Honorable John McCain
Ranking Minority Member
Committee on Commerce, Science,
and Transportation
United States Senate

The Honorable Don Young
Chairman
The Honorable James L. Oberstar
Ranking Democratic Member
Committee on Transportation
and Infrastructure
House of Representatives

The Metropolitan Washington Airports Act of 1986 provided for the lease of Washington Dulles International Airport (Dulles) and Ronald Reagan Washington National Airport (Reagan National) and the transfer of operating responsibility from the federal government to the Metropolitan Washington Airports Authority. The Authority is an independent, nonfederal, public entity that has operated the government-owned airports since June 7, 1987, under a 50-year lease with the U.S. Department of Transportation.[1] The transfer of operating responsibility was intended to facilitate timely improvements at the airports to meet the growing demand for air transportation.

Under the statutory terms of its lease, the Authority must protect, promote, operate, and maintain Dulles and Reagan National airports in Virginia. To carry out this mandate, the Authority enters into a wide range of contractual relationships to acquire supplies and construction and other services. Acquisitions range from office supplies to heavy mobile equipment, from fuel oil and gasoline to replacement parts for air-conditioning systems, and from minor repairs to major construction. The Authority also contracts for a variety of revenue-generating concessions to

[1] The Authority was created by the Commonwealth of Virginia and the District of Columbia as a public authority to operate the airports.

provide, among other things, rental cars, food and beverages, customer service, parking, taxi services, advertising, and general aviation services needed by the airports' users.

The Authority's lease with the federal government was intended to protect the federal government's interest in the two airports. Thus, the 1986 act required that the Authority's lease with the federal government incorporate several terms. One such term involves contracting at the airports. Specifically, the Authority's lease with the federal government (the statutory lease provision) states the following:

> ". . . in acquiring by contract supplies or services for an amount estimated to be in excess of $200,000, or awarding concession contracts, the Authority shall obtain, to the maximum extent practicable, full and open competition through the use of published competitive procedures. By a vote of seven members [of its board of directors], the Authority may grant exceptions to the requirements of this paragraph."

In authorizing the airports' lease, Congress generally intended the airports to be operated as a business and in a manner similar to other airports. Congress provided the Authority with considerable discretion in structuring its procurement process. Although the Authority is not required to follow federal procurement statutes and regulations, Congress obligated the Authority to implement, through the use of published competitive procedures, procurement and concession franchising systems designed to achieve full and open competition. Furthermore, the congressional mandate required the Authority to conduct its procurements, to the maximum extent practicable, in a manner consistent with the well-established principles underlying full and open competition. These principles are intended to ensure that all firms that wish to furnish supplies or services have an equal opportunity to compete for the award. Appendix I provides additional information about the fundamental principles underlying full and open competition.

The 1986 act, as amended, requires us to periodically review the Authority's contracting practices. Our first review was conducted in 1992 and concluded that the Authority's contracting practices generally promoted a competitive environment. However, we identified some practices that, if not corrected, could adversely affect the Authority's

competitive process.[2] This report provides our current assessment of whether the Authority has satisfied its contracting obligations under the statutory lease provision. Specifically, this report addresses whether the Authority (1) has published the competitive procedures that it uses to award contracts and (2) for the contracts that we reviewed, has obtained, to the maximum extent practicable, full and open competition in contracting for goods and services whose estimated cost exceeded $200,000 or, if not, whether the Authority's board of directors approved the exceptions. This report also addresses the Authority's views about the meaning of full and open competition within the context of airport contracting. Finally, because the secretary of transportation represents the interests of the executive branch, this report addresses the Department of Transportation's role in ensuring that the Authority fulfills its obligations under the lease.

We focused primarily on two distinct groups of contracts that either exceeded $200,000 on the date of award or had exceeded $200,000 as of December 31, 1999. In total, 646 contracts met these criteria. The first group of contracts that we chose from this universe consisted of 13 contracts that, according to the Authority's contracting database, generally (1) were awarded between 1992 and 1999 using full and open competition and (2) exhibited the highest cost growth.[3] We selected these 13 contracts to represent a full range of the Authority's contracting activities, including the type and value of the Authority's contracts. We reviewed the initial contract awards and all 240 subsequent modifications to the 13 contracts. The modifications changed the terms of the original contracts by, among other things, adding work to the contracts. The second group of contracts consisted of all 22 contracts that, according to the Authority's database, were awarded without full and open competition in 1998 and 1999. In total,

[2] Identified practices included awarding contracts under procedures that were not publicly disclosed and extending one sole-source contract on several occasions without proper authorization. See *Contract Award Practices: Metropolitan Washington Airports Authority Generally Observes Competitive Principles* (GAO/RCED-93-63, Feb. 8, 1993). More recently, we provided information on the extent of contracting by the Authority. See *Metropolitan Washington Airports Authority: Information on Contracting at Washington Dulles International Airport and Ronald Reagan Washington National Airport between 1992 and 1999* (GAO-01-185R, Nov. 17, 2000).

[3] Two of the 13 contracts that we reviewed were awarded before 1992 but were still open as of December 31, 1999. These contracts exhibited the highest cost growth among all of the contracts that exceeded $1 million during the period. As discussed in further detail in appendix III, we focused on contracts with high cost escalation to determine whether the work associated with the cost increase had been subjected to full and open competition.

the 35 contracts that we examined were valued at about $408 million and accounted for 5 percent of the 646 contract awards and 19 percent of the value of the 646 contracts as of December 31, 1999. Because the Authority does not have a centralized database of its concession contracts or documented procedures for awarding these contracts, we did not review concession contracts. Instead, we focused our review on the Authority's contracts for supplies and services, including construction.

We used the Authority's written policies and procedures as well as the fundamental principles underlying full and open competition to evaluate the Authority's contracting actions. Because the Authority is not required to follow federal procurement statutes and regulations, as detailed in appendix I, we applied generally recognized principles underlying the concept of full and open competition. The results of our contract analyses are not projectable to the universe of the Authority's contracts for supplies and services.[4] Appendixes II and III provide additional information about our scope and methodology, including our methodology for selecting contracts.

We discussed our preliminary findings with officials from the Authority, and, by letters dated June 29, 2001, and July 9, 2001, the Authority provided additional information for us to consider in drafting our report. We incorporated this information as appropriate and, thereafter, provided a draft of this report for review and comment to the Authority and to the Department of Transportation. The parties' responses, including the Authority's letter dated January 4, 2002, are summarized in the following section and discussed in more detail at the end of this letter.

Results in Brief

Although the Authority issued guidance for awarding its contracts and concession franchises in 1993, the guidance does not adequately reflect competitive contracting principles and is out of date in numerous respects. Furthermore, the Authority does not use the 1993 guidance to award its contracts for non-concession-related goods and services. As a result, the Authority has not satisfied its obligation under the lease. In our view, the clear intent of the statutory lease provision is to ensure that the Authority develops, publishes, and follows an orderly set of contracting procedures for awarding its contracts and concession franchises. Such procedures are

[4] To project our results to the universe of the Authority's contracts, we would have had to randomly select a large number of contracts for detailed analysis. Time did not permit such an exhaustive review.

intended to enhance competition and, when published, provide the means for contractors to understand the Authority's contracting processes. Likewise, the requirement to publish the Authority's contracting procedures is intended to assure prospective contractors that the procedures will actually be followed. The Authority's 1993 guidance does not satisfy the intent of the statutory lease provision. For example, the contracting processes specified in the manual are written in such general terms that they provide little useful guidance to prospective contractors in understanding the Authority's contracting procedures. Moreover, the 1993 manual is outdated and is not written so as to be binding on the Authority's contracting activities. In fact, the 1993 manual is not the guidance actually used to award the Authority's contracts. Instead, for contracts involving non-concession-related goods and services, the Authority uses an internal manual it developed in 1998. The 1998 guidance is far more detailed, substantive, and prescriptive than the 1993 guidance but has not been published for use by prospective contractors.

The Authority also did not satisfy its obligation to obtain, to the maximum extent practicable, full and open competition for 15 of the 35 contracts that we reviewed, as follows:

- Twelve of the 13 contracts that the Authority identified as awarded using full and open competition and that generally had the highest cost growth did not comply with one or more of the fundamental principles underlying full and open competition. Four of the 13 contracts had problems pertaining to the Authority's evaluation of proposals, including errors in the Authority's scoring of contractor proposals, and 2 others involved the use of a potentially problematic evaluation methodology. Moreover, in 8 of the 13 contracts, the Authority did not solicit competition for all of its procurement needs, including $11.4 million in contract term extensions, which could have been subject to competition. Finally, the Authority modified 3 of the 13 contracts to obtain goods and services that were beyond the scope of work contained in the original solicitations. For example, the Authority modified 1 contract on at least 10 occasions to add about $2.1 million in work that it had originally planned to compete separately. According to the Authority, it changed its plan because of the contractor's success on another airport project and the Authority's desire to perform the work more quickly than could be accomplished otherwise. Since the Authority specifically excluded the additional work from the scope of the original contract, this work was not subject to competition. Thus, obtaining the work through contract modifications was tantamount to a series of sole-source procurements. The Authority disagrees that these and other actions represent sole-source procurements and, as a result, did

not prepare sole-source justifications—as required by its internal contracting procedures—or obtain exceptions to the use of full and open competition from its board of directors, as required by its lease with the federal government.

- The use of less than full and open competition for 19 of the remaining 22 additional contracts that we reviewed appeared acceptable given the contracts' circumstances. However, we believe that the Authority missed opportunities to fully compete 3 of the 22 contracts. The 3 contracts were awarded to United Airlines on a sole-source basis for the design and construction of office space for federal agencies that process international travelers, 12 passenger-screening checkpoints, and an outbound baggage-handling system. The improvements totaled about $10.6 million. The Authority did not prepare sole-source justifications or seek exceptions to the use of full and open competition from its board of directors because it concluded—erroneously, in our view—that the work was authorized under the parties' agreement for the airline's use and lease of airport facilities and therefore, in the Authority's view, was not subject to the requirement for full and open competition. In addition to the 3 airline sole-source awards, 2 of the 22 contracts that we reviewed were not approved by the Authority's board, as required for sole-source awards. The Authority agreed that the necessary board approvals were not obtained for these 2 procurements and indicated that the requirement had been overlooked.

As previously noted, the results of our contract analyses are not projectable to the universe of the Authority's contracts for supplies and services. However, because the Authority permits several of the contracting practices that we questioned as a matter of policy or practice, we believe that similar problems are likely to exist in the Authority's other contracts.

While not conceding that the examples cited in this report represent a violation of "any law or its federal lease," the Authority acknowledged, in its June 29, 2001, letter to us, that it needed to better embrace and articulate "certain hallmarks of 'full and open' competition." The Authority stated, however, that our assessment of its contracting practices using recognized principles of full and open competition was inappropriate in part because, in its view, these principles do not adequately reflect the unique environment applicable to contracting at commercial airports. We disagree with the Authority's view. The Authority is not a private entity with authority to operate freely in the commercial world. Rather, the Authority is a public entity subject to contracting requirements that call

for the use of full and open competition, to the maximum extent practicable, that were set forth in its lease with the federal government.

As signatory to the lease, the secretary of transportation is the primary executive branch official responsible for representing the interests of the United States in its dealings with the Authority. The 1986 act that transferred responsibility for operating the airports, however, does not define the specific role of the Department of Transportation in overseeing the Authority's compliance with the contracting requirements imposed in its lease with the federal government.

The Authority's failure to obtain, to the maximum extent practicable, full and open competition for 15 of the 35 contracts that we reviewed, has numerous potential negative consequences. For example, it raises concern about whether the Authority obtained the best value available in the marketplace for the goods and services that the Authority acquired through contracts. Furthermore, it raises concern about whether the Authority has (1) deprived prospective contractors of the chance to compete for contracting opportunities and (2) fairly evaluated all contractors that have competed for its procurements. Finally, by not following recognized competitive principles, the Authority could convey an appearance of favoritism in its contracting decisions.

We provided a draft of this report for review and comment to the Department of Transportation and to the Authority. The department did not comment on the specific steps that it plans to take to address our recommendation that it follow up on the Authority's actions to address our findings and recommendations. However, the department indicated that it would take "appropriate actions" to fulfill its obligations under the lease. The department also provided technical and clarifying comments, which we incorporated as appropriate.

In a January 4, 2002, letter to us, the Authority disagreed with the report's major conclusions; raised concern about our scope and methodology, including the principles that we used to assess the Authority's contracting; and reiterated comments that it made to us in earlier letters. The Authority concurred with one of our recommendations, agreeing to publish an updated and more detailed version of its contracting manual for review and comment by the public and, thereafter, to make the procedures readily available. The Authority also said that it would "consider its approach" to pricing contract options when it revises its contracting procedures. However, the Authority did not comment on our other recommendations for correcting the problems that we identified. The

Authority's comments, as well as our evaluation of them, are discussed in detail at the end of this letter. The Authority's January 4, 2002, letter and our supplementary comments on it appear in appendix IV.

Given the Authority's silence on most of our recommendations and its fundamental disagreement with our view about the meaning and applicability of the requirement for full and open competition, it appears doubtful that the Authority will, on its own initiative, take all of the actions that we believe are needed to meet the statutory and lease requirement pertaining to the Authority's contracting practices. This is particularly troublesome given that the Authority recently embarked upon a multibillion-dollar construction program at Dulles. Furthermore, because the 1986 act does not specify the Department of Transportation's role in overseeing the Authority's contracting, it is unclear what the department will do to ensure that the Authority satisfies its obligations under the lease. Accordingly, we added a suggestion that Congress consider clarifying the 1986 act to specify that, as lessor, the department is responsible for ensuring that the Authority (1) fully complies with the contracting requirements imposed in the lease and (2) takes all steps needed to correct the problems that we identified.

Background

Before the airports' transfer to the Metropolitan Washington Airports Authority (MWAA), Dulles and Reagan National were operated by the Federal Aviation Administration and financed with federally appropriated funds. MWAA's funding now comes from operational revenues (rents, payments from concessionaires, landing fees, utility sales, and passenger fees). MWAA also receives federal grant funds from the Airport Improvement Program[5] as well as proceeds from bonds issued to finance its capital development program, which began in 1988.

MWAA is governed by a board of directors which, by law, consists of 13 members, including 5 members appointed by the governor of Virginia, 3 members appointed by the mayor of the District of Columbia, 2 members appointed by the governor of Maryland, and 3 members appointed by the president of the United States with the advice and consent of the Senate.[6] The board establishes policies pertaining to the airports' operation. The board and its five committees generally meet on a monthly basis. The

[5] The Airport Improvement Program provides federal grants for various airport development projects.

[6] As of January 31, 2002, there were two vacancies on the board of directors.

committees, comprising 4 to 5 board members, execute delegated responsibilities in areas such as business administration, finance, and planning. A chief executive officer appointed by the board performs day-to-day management.

Program offices, such as MWAA's Office of Engineering, identify procurement needs and forward them to MWAA's Procurement and Contracts Department (its contracting office) for action. Procurement requests contain an estimate of the cost of obtaining the required goods or services. Thereafter, the contracting office develops a solicitation to seek contractors' interest in supplying the goods and services and subsequently awards a contract to fill the procurement need. The contracting office is also responsible for making any changes to the contract after it is awarded.

According to its contracting database, MWAA awarded 2,843 contracts for supplies and services, including construction, at an initial award amount (in constant 1999 dollars) of about $1.43 billion from January 1, 1992, through December 31, 1999. On average, MWAA awarded about 355 contracts annually over the 8-year period. The average value of the contracts when awarded was approximately $504,000. Contract modifications increased the cost of MWAA's initial contract awards, however. Specifically, the amount authorized for the 2,843 contracts that MWAA awarded between 1992 and 1999 grew by about 38 percent—from about $1.43 billion at award to about $1.98 billion through December 31, 1999 (in constant 1999 dollars). This cost growth most likely resulted from MWAA's modification of contracts to extend the period of their performance and to purchase additional supplies and services.

MWAA Has Not Satisfied Its Obligation to Publish the Procedures It Uses to Award Contracts Competitively

MWAA's lease with the federal government requires it to award contracts for supplies and services exceeding $200,000 and all concession contracts "through the use of published competitive procedures." MWAA is aware of this obligation and, in 1993, issued a contracting manual that it believes satisfied the requirement.[7] While the 1993 guidance was announced publicly and is available to prospective contractors upon request, the guidance is inadequate in numerous respects. Thus, in our view, it does not satisfy MWAA's obligation to contract using published competitive procedures.

The clear intent of the statutory lease provision is to ensure that MWAA develops, publishes, and follows an orderly set of procedures for awarding contracts and concession franchises. Such procedures are meant to enhance competition and, when published, provide the means for contractors to understand MWAA's contracting processes. Likewise, the requirement to publish MWAA's contracting procedures is intended to provide assurance to prospective contractors that MWAA will actually follow its published procedures. Thus, in our opinion, to satisfy its obligation under the statutory lease provision, MWAA must ensure that its published procedures

- adequately explain its contracting practices to prospective contractors,
- are current, and
- are those that it actually uses to award contracts and concession franchises.

None of these requirements has been met. First, the manual that MWAA published in 1993 offers prospective contractors only limited information about its contracting processes. Instead of issuing a clear and well-defined set of procurement procedures governing its contracting processes, the 1993 guidance simply summarizes MWAA's contracting policies. The detail that one would expect in a manual intended to familiarize potential contractors with MWAA's contracting processes and to foster full and open competition is lacking. For example, the entire discussion of how MWAA solicits bids and proposals and makes awards—the heart of the contracting process insofar as prospective contractors are concerned—

[7] *Contracting Policies and Procedures Manual*, December 1, 1993.

consists of only a brief description of the various procurement methods that MWAA could elect to use.[8]

Moreover, the information supplied in the 1993 manual is inadequate for informing prospective firms about MWAA's contracting processes because the guidance provides MWAA with virtually unlimited latitude to decide—on a case-by-case basis—how to award its contracts and concession franchises. For example, regarding its negotiations with prospective contractors, the 1993 guidance merely indicates the following:

> "The Authority will select the proposal which offers the greatest overall benefit to the Authority in terms of the evaluation criteria listed in the Request for Proposals. <u>If the determination is made</u> to negotiate, negotiations generally will be open to all offerors [prospective contractors] with a realistic chance of being awarded the contract (those in the competitive range) as determined by preliminary technical and economic evaluation. Best and final offers <u>may be</u> solicited from one or more offerors <u>as appropriate</u>." [Underlining added.]

The 1993 guidance states that, in certain circumstances, contractors with competitive proposals will be included in negotiations. The guidance does not, however, explain when such circumstances will arise. Furthermore, the 1993 guidance does not specify who <u>will be</u> invited to submit best and final offers, only that offers <u>may be</u> solicited when MWAA deems such an action "appropriate."

Second, MWAA has not updated its 1993 guidance to ensure that it is current. For example, the guidance states that MWAA's board of review must review all contract awards. This board, however, was abolished in 1996. Moreover, MWAA has not updated the guidance to reflect, among other things, long-standing changes in (1) how its board of directors has delegated contracting authority, (2) the names and addresses of personnel currently responsible for MWAA's contracting activities, or (3) revisions to MWAA's ethics requirements.[9]

[8] According to MWAA, it frequently provides procurement-specific guidance in its solicitation documents. While it is appropriate to include unique, procurement-specific information in its solicitations, this does not satisfy MWAA's statutory obligation to obtain full and open competition through the use of published competitive procedures.

[9] MWAA revised its contracting delegations in 1995 and 1998 and, in 1999, moved its office to Reagan National. The ethics requirements were revised in 1998.

Finally, MWAA does not use the 1993 guidance to award contracts involving non-concession-related goods and services. Instead, MWAA uses an unpublished manual that it developed in September 1998.[10] The 1998 manual is far more detailed, substantive, and prescriptive than MWAA's 1993 manual. For example, in contrast to the guidance in the 1993 manual, MWAA's unpublished 1998 manual specifies that prospective contractors must be included in the competitive range for purposes of negotiations if their proposals have a reasonable chance of being selected for award. Furthermore, unlike the 1993 guidance, the unpublished 1998 manual provides specific rules governing MWAA's decision to dispense with negotiations. MWAA views the 1998 manual as internal guidance and, as a result, has not published it, posted it to its contracting Web site, or otherwise made it routinely available to prospective contractors.[11]

In January 2002, when we concluded our review, MWAA was in the process of updating its 1993 contracting guidance. When the update is approved, MWAA anticipates (1) posting the guidance on its contracting Web site and (2) placing a notice in *The Washington Post* to announce its availability. MWAA was also updating its detailed 1998 internal contracting guidance for awarding contracts for non-concession-related goods and services. According to MWAA, the revision will include information about its procedures for awarding concession franchises. Acknowledging that its detailed internal contracting procedures should be made widely available to interested parties, MWAA indicated that it would take steps to disseminate the updated guidance, including establishing a link to the guidance through its contracting Web site.

[10] *Contracting Procedures Manual*, September 1, 1998. The 1998 guidance is not applicable to the solicitation and award of MWAA's concession contracts. MWAA has not developed detailed procedures for awarding its concession franchises because, in its view, each concession has unique characteristics that necessitate using different procedures.

[11] According to MWAA officials, the 1998 guidance has been given to some prospective contractors upon request. However, the guidance has not been, among other things, advertised in trade publications; posted on MWAA's contracting Web site; or distributed to local libraries and, as a result, cannot be construed as satisfying the requirement for published competitive procedures.

MWAA Has Not Always Satisfied Its Obligation to Obtain, to the Maximum Extent Practicable, Full and Open Competition

Despite its obligation under the statutory lease provision, MWAA did not obtain, to the maximum extent practicable, full and open competition for 15 of the 35 contracts that we reviewed. MWAA's actions on 12 of the 13 contracts that MWAA identified as awarded using full and open competition did not comply with one or more of the recognized principles underlying full and open competition. Furthermore, while the use of less than full and open competition for 19 of the remaining 22 contracts appeared acceptable given the contracts' circumstances, we believe that MWAA missed opportunities to obtain, to the maximum extent practicable, full and open competition on 3 of the 22 contracts. The 3 awards as well as 2 others that we did not otherwise question were not approved by MWAA's board, as required for sole-source awards. We discussed these findings with officials from MWAA, and, by letters dated June 29, 2001, and July 9, 2001, MWAA disagreed with many of the problems that we identified. As a result, we incorporated additional information about MWAA's views and about our rationale for the concerns that we identified in our draft report. MWAA also disagreed with our analyses of its contracting actions in its January 4, 2002, comments on our draft report. (Our discussion of these comments appears at the end of this letter and in app. IV.)

The Benefits of Full and Open Competition Are Well Established

The use of full and open competition has long been recognized as promoting several important objectives. It saves money by obtaining lower prices and encouraging prospective contractors to focus on ways to provide more value to their customers. It also promotes fairness and equity through the use of open, impartial, and objective selection processes. Finally, full and open competition promotes innovative solutions and approaches and technical improvements by encouraging individual incentive. Such competition is achieved when all prospective contractors are provided an equal opportunity to compete successfully for a contract. MWAA's guidance recognizes the importance of full and open competition. Its 1993 contracting manual, for example, states that full and open competition is the "cornerstone" of MWAA's contracting process and indicates that it is to be used "whenever practicable." Similarly, MWAA's unpublished 1998 contracting guidance emphasizes the use of full and open competition "to the maximum extent practicable."

Twelve of the 13 Contracts Identified as Awarded Using Full and Open Competition Were Deficient in One or More Respects

As discussed in appendix I, the concept of full and open competition embodies a number of fundamental principles. To achieve full and open competition, a contracting organization must, among other things,

- adhere to the evaluation factors and processes that it specified in its contract solicitation,
- solicit competition for all of the needs that it could reasonably anticipate acquiring under the contract, and
- ensure that any modification to a contract is within the scope of work that it initially solicited.

As shown in table 1, 12 of the 13 contracts that MWAA identified as awarded using full and open competition were deficient in one or more of these areas.

Table 1: Contract Findings: Compliance with Selected Principles of Full and Open Competition

Contractor	Award date	Weaknesses found in MWAA's evaluation processes	Competition not solicited for all requirements	Added out-of-scope work	Value as of 12/31/99 (dollars rounded to the nearest thousand)
Dynamic Technology Systems, Inc.	12/97	X	X		$298
Motorola, Inc.	1/97	[a]	X		9,322
Sedgwick James of Virginia, Inc.	5/94	[a]	X		29,578
Skidmore, Owings & Merrill	7/89	X			41,537
CACI-IMS	5/93	X			11,379
Hensel Phelps Construction Co.	2/98	X		X	18,755
ATC/Vancom Management Services Limited Partnership	6/95		X	X	6,999
Quimex, Inc.	2/93		X		800
Merchant's Tire	12/93		X		434
Centennial One, Inc.	2/96		X		12,240
Motor Coach Industries, Inc.	6/97		X		3,122
Parsons Management Consultants	3/88			X	229,608
Burns and McDonnell[b]	8/93				4,017
Total		**4**[a]	**8**	**3**	**$368,089**

[a]MWAA's process for evaluating contractor proposals was potentially problematic for 2 of the 13 procurements involving Motorola, Inc., and Sedgwick James of Virginia, Inc.

[b]Contracting actions for 1 contract—Burns and McDonnell—complied with the selected principles of full and open competition.

Source: GAO analysis of MWAA's contracting data.

MWAA Did Not Adhere to the Evaluation Factors and Processes It Specified in 4 of 13 Contract Solicitations

Documentation pertaining to 4 of the 13 contracts that we reviewed revealed deficiencies in MWAA's evaluation of contractor proposals that limited the ability of prospective contractors to compete fully for MWAA's contracts. Like others with procurement needs, MWAA seeks proposals from contractors by distributing a solicitation that (1) describes the goods and services it needs; (2) identifies various factors—such as cost, technical excellence, management capability, and past performance—that will be used to evaluate the proposals; and (3) explains how the selection process will be conducted. To facilitate competition, solicitations must be clear and complete so that all interested firms have a common understanding of what is being sought and so that they can prepare proposals responsive to the organization's need. While a contracting

organization need not identify all the specific numeric values that it intends to apply to each evaluation factor, the concept of full and open competition necessitates that an organization's solicitations specify the relative importance of the evaluation factors that it will use in the selection process and, thereafter, that the organization follow the factors and processes that it specified. While MWAA's 1993 contracting guidance is silent on this matter, its unpublished 1998 contracting guidance requires MWAA to inform prospective contractors about the relative importance of its evaluation factors. The 1998 guidance, however, does not discuss the importance of adhering to the evaluation factors and processes that it specifies in its solicitations.

Two of the four contracts that we questioned were scored in a different manner from that specified in MWAA's solicitation. MWAA's November 1997 solicitation for design and construction services for a regional airline terminal at Dulles, for example, identified six evaluation factors, including "experience providing design/build services on projects of similar dollar value and complexity." Although this evaluation factor was listed fourth in relative importance, MWAA weighed it the same as the first-ranked factor and higher than two other criteria that MWAA's solicitation had indicated would be of greater importance in securing the award. A similar problem occurred in MWAA's evaluation of contractors' proposals for design work related to the expansion of the main terminal at Dulles. According to MWAA's contracting officials, the scoring irregularities on the first solicitation occurred because of time constraints that had precluded members of its technical review team from establishing specific scoring weights for the evaluation factors before issuing the solicitation. Regarding the other solicitation, MWAA contracting officials explained that for evaluation purposes, MWAA's technical review team changed the relative weight of the factors that had been specified in the solicitation to reflect the team's conflicting view about the relative importance of the evaluation factors that had been specified in the solicitation. In neither instance were prospective contractors notified of the change or afforded an opportunity to amend their proposals.

MWAA also did not follow the evaluation processes that it specified in two other solicitations. The solicitations described an evaluation process in which cost and technical factors would be evaluated concurrently in selecting a successful contractor. MWAA assessed the contractors' proposals against the technical factors identified in the solicitations. However, instead of considering all of the contractors' cost proposals, MWAA considered cost for only those firms that it deemed to be the "most technically qualified." As a result, MWAA prematurely eliminated 13 firms

without determining whether the contractors' proposed cost would have offset their lower technical scores.

Finally, while MWAA followed the process it specified in two other solicitations, the process used was, in our view, potentially problematic. The two solicitations informed prospective contractors that MWAA would identify the "most qualified" proposals and, from these, choose the proposal with the lowest cost for award. MWAA assigned predetermined numerical scores—an 80-percent "threshold" in one instance and an 85-percent "threshold" in the other—and used the scores to reject, on the basis of technical factors alone, all of the proposals that did not meet or exceed these scores. Although this process might not have disadvantaged contractors who competed for these procurements,[12] evaluating contractors against predetermined technical scores can nevertheless be problematic. Specifically, because technical merit and price are generally directly correlated,[13] establishing thresholds to evaluate proposals favors those firms that score just above the technical threshold, since their price should be lower, all other considerations being equal. Conversely, such a process could harm firms with technical scores just below the threshold since, technically, their proposals would have been roughly equivalent and might have been available at a lower cost.

In its June 29, 2001, letter to us, MWAA agreed that to have a level playing field for competition, it must (1) evaluate contract proposals in accordance with its solicitations and (2) notify all offerors of any changes it makes to its evaluation processes. According to MWAA, it follows these practices and the "isolated" examples we identified leaves the reader with the mistaken impression that these are not MWAA's accepted practices. Moreover, MWAA noted that "using a minimal technical acceptance basis for eliminating unqualified offerors is acceptable if adequately communicated in the solicitation [underlining added]." Likewise, MWAA

[12] In one of the two procurements, both of the competing contractors exceeded the technical threshold established by MWAA. As a result, because MWAA evaluated the two cost proposals, neither firm was harmed by MWAA's selection process. The impact on prospective contractors is more difficult to determine on the other procurement. Specifically, because only two of the four firms competing for the contract exceeded MWAA's technical threshold of 85 percent (both scored 86 percent), the cost proposals of the other two firms were not opened and evaluated. Thus, it is not possible to know what, if any, impact the firms' cost proposals could have had in the final selection process. These two firms scored 75 percent and 67 percent, respectively, on technical factors.

[13] The higher a proposal's technical merit, the more it is likely to cost.

said that its use of thresholds to evaluate contractor proposals is acceptable if appropriately documented. Thus, in MWAA's view, it can resolve our concerns by ensuring that its solicitations clearly specify the evaluation processes that it intends to use. In a subsequent letter to us MWAA further explained that "in the future we will ensure that when technical evaluation criteria alone are to be used to determine [the] competitive range [for a procurement], the solicitation will indicate that MWAA may make this determination based solely on technical criteria" [underlining added]. According to MWAA, "cost, of course, will be evaluated for those firms included in the competitive range" [underlining added]. Finally, MWAA's June 29, 2001, and July 9, 2001, letters to us indicated that we have not demonstrated any adverse impact on contractors who were involved in the procurements that we questioned.

Because the contracts we examined were not selected on the basis of a statistically valid sampling approach, we cannot determine the frequency of problems in MWAA's universe of contracts. However, MWAA's unpublished 1998 manual permits the use of thresholds for evaluating contractor proposals and considers it an acceptable contracting practice. We disagree that using a predetermined score, or threshold, to evaluate contractor proposals is a prudent or appropriate contracting practice. As recognized in MWAA's unpublished 1998 guidance, to promote full and open competition, agencies are expected to consider all proposals that have a reasonable chance of being selected for award. Such a process is intended to reflect all of the qualitative differences between the proposals and to identify a natural cutoff point between proposals that have a realistic chance of receiving the contract award and those that do not. As discussed, establishing a cutoff point, or threshold, before all of the benefits and disadvantages of the proposals have been fully considered could disadvantage firms that have scores just below the threshold score and might offer a roughly comparable technical proposal at a lower cost.

Furthermore, MWAA's practice of not considering cost for all contractors—when it has committed to do so—and its comments regarding this practice reflect a fundamental misunderstanding about the purpose and use of determinations pertaining to a proposal's "technical acceptability" and a proposal's subsequent inclusion in the "competitive range." A determination that a proposal cannot satisfy an organization's needs and is therefore not technically acceptable (i.e., a technical acceptability determination) differs markedly from a determination that the firm's proposal is outside of the competitive range (i.e., a determination that the proposal has no realistic chance of being selected for award). A determination about whether a contractor's proposal is

within the competitive range is based on the evaluation of all of the factors specified in the solicitation, not just the technical factors.

Moreover, we do not agree that MWAA can overcome our concerns solely through the use of clearer solicitation language. To the extent that MWAA expresses its intent to consider cost in awarding its contracts, as indicated in its policy,[14] MWAA must do so. On the other hand, if MWAA finds that it needs to evaluate proposals only for technical acceptability (i.e., to establish whether a proposal meets MWAA's minimum requirements), it can request technical proposals from firms and, on the basis of its evaluation of these proposals, seek cost proposals from only those firms that it finds acceptable. MWAA could also choose to award a contract based solely on technical considerations (i.e., select the most qualified firm). However, given the importance of cost in awarding contracts, public contracting entities generally would avoid such an approach.

Finally, concerning MWAA's view that we have not demonstrated any adverse impact on contractors involved in these procurements, we note that it is not always possible to quantify the extent to which offerors might have been harmed by MWAA's failure to follow its specified evaluation processes. For example, it is impossible to discern how contractors might have revised their proposals if they had been advised of changes in the relative importance of MWAA's evaluation factors. Likewise, because MWAA did not open all of the contractors' cost proposals, we do not know how individual procurements might have been affected had cost been considered in making the awards. Most important, in evaluating whether such practices are appropriate, it is not necessary to demonstrate that someone was injured by a noncompetitive practice.

MWAA Did Not Solicit Competition for All of Its Procurement Needs on 8 of the 13 Contracts Examined

To obtain full and open competition, an organization must solicit competition on all of the needs that it knows it will procure under the contract as well as those it can reasonably anticipate procuring under the contract. Potential needs are generally communicated to contractors in the form of "options," which, if exercised, allow the organization to order additional work by extending the duration of contracts or by purchasing additional goods and services. To meet the requirement for full and open competition, contract options must be priced and evaluated in making the initial or underlying contract award. If a contract was awarded on a fully

[14]According to MWAA's unpublished 1998 contracting guidance, cost should normally account for at least 40 percent of the total evaluation score for its procurements.

competitive basis, the acquisition of additional goods and services through the exercise of a previously priced and evaluated option would be a competitive acquisition. In contrast, exercising a contract option that was not priced and evaluated (an unpriced option) is tantamount to procuring the additional work on a sole-source basis because, even if the initial contract work was subject to competition, the additional work specified in the option was not. Neither MWAA's 1993 nor its unpublished 1998 contracting guidance specifically addresses options or the necessity of obtaining and evaluating prices for the entirety of its procurement need to avoid the subsequent acquisition of work on a sole-source basis.

MWAA did not seek competition for all the goods and services that it expected to acquire under 8 of the 13 contracts that we reviewed. Furthermore, while MWAA's modification of these contracts to acquire the additional goods and services should have been treated as sole-source procurements, MWAA did not prepare written justifications for any of the contract modifications—as required by its contracting procedures—or seek its board of directors' approval for exceptions to the use of full and open competition, as required by both its contracting procedures and its lease with the federal government.[15] The most common problem involved MWAA's practice of exercising unpriced options to extend the duration of its contracts. Specifically, while MWAA generally awarded 3-year contracts—contracts with a base year and 2 option years—it did not evaluate pricing for the expected duration of six of the eight contracts and, instead, considered the price for only the base period of the contract—typically the first year. After making the award, MWAA consistently exercised the unpriced options to extend the contracts' duration—typically in 1-year increments for a period of 2 years—and entered into sole-source negotiations to establish price. Work associated with the

[15] According to MWAA, its board of directors approved the options associated with two of the eight contracts. We disagree. The evidence cited by MWAA demonstrates that a standing committee of the board—not the full board—approved the two procurements prior to their initial award. No evidence was provided of the committee's approval of the sole-source follow-on contracts for the options. Furthermore, the committee has no authority to approve sole-source procurements. According to MWAA's delegations of contracting authority, sole-source awards can be approved only by the full board. Similarly, the statutory lease provision specifies that exceptions to the requirement for full and open competition must be approved by a vote of seven members of the board—not five members, which was the case for this standing committee. Finally, even if the committee had authority to approve sole-source awards, it was not authorized to approve contracts exceeding $3 million. The value of both contracts (base award and options) exceeded $3 million.

contract extensions was not subject to any price competition and was expected to cost MWAA at least $11.4 million.

For three contracts, MWAA did not solicit competition for its acquisition of additional goods and services that had not been priced and evaluated as part of MWAA's initial contract awards. For example, while MWAA's May 1997 solicitation for six buses included an option to purchase up to three more buses, MWAA did not evaluate the price for the additional buses in awarding the contract—even though it had requested pricing for all nine buses. Nevertheless, in August 1998, MWAA exercised the option to purchase three buses at a cost of about $1 million.[16]

In another example, although MWAA's solicitation for a mobile radio system included an option to purchase and install a supplemental communication system to eliminate "dead spots" in airport facilities, MWAA did not obtain competitive pricing for the option. According to MWAA's contracting officials, pricing was not obtained because construction had not progressed sufficiently to allow the system to be designed and installed in the airport facilities. MWAA subsequently stated that before the initial award it had not yet confirmed whether the new terminal arrangement at Reagan National would require supplemental communication coverage. Although this may have been the case for some of the facilities, at least two facilities—the Thomas Avenue tunnel and the existing terminal at Reagan National—were in existence years before MWAA finalized and issued the solicitation. Moreover, two other facilities—the boiler plant at Reagan National and the extensions to the main terminal at Dulles—were completed before MWAA awarded the contract in January 1997.[17] Although MWAA was aware of this, it did not amend the solicitation to obtain competitive pricing for the option or, alternatively, to conduct a separate competitive procurement for the additional work. Furthermore, MWAA never confirmed whether any of the airports' facilities would need supplemental communication coverage. Instead, in March 1997—only 2 months after awarding the contract—MWAA provided the successful contractor with a list of facilities to survey for dead spots and in May 1997 modified the contract to purchase the

[16] The price submitted for the three additional buses was about $16,500 more per bus than the contract price for the six buses acquired under the base contract. However, MWAA subsequently negotiated the same price for all nine buses.

[17] The renovation and expansion of the main terminal at Dulles, for example, was completed by early September 1996—about 4 months before the contract was awarded.

supplemental communication system for some of the airports' facilities. The additional work cost nearly $2.4 million and was not subject to any price competition.

Finally, even though MWAA anticipated adding about 257,000 square feet of space to a forthcoming contract for cleaning services related to the expansion of the main terminal at Dulles airport, MWAA's contract solicitation did not seek competitive prices for this eventuality. Instead, about 4 months after it awarded the initial contract, MWAA entered into negotiations—on a sole-source basis—with the successful contractor and modified the contract to satisfy its need for additional cleaning services. MWAA agreed to pay the contractor about $656,000 more annually for the additional work. This agreement represented an annual increase of almost 23 percent over the contract's initial award amount and was not subject to any price competition. According to MWAA's July 9, 2001, letter to us, MWAA did not request and evaluate pricing for cleaning the additional space as part of its initial award because its cleaning requirements "were different and changing." Specifically, MWAA noted that "there were new types of service related variables such as types of floors, surfaces, and passenger flow arrangements. In addition, construction carryover considerations affected the frequency of cleaning needs. Most importantly, a new ticket counter arrangement with the airlines was anticipated."

MWAA's failure to consider the entirety of its procurement need also resulted in another undesirable consequence. Because MWAA generally considered contract costs for only the first year of its contracts, MWAA treated three of the eight contracts as small purchases (contracts valued at $200,000 or less) and, thus, did not advertise them—as required by MWAA's contracting policy—to ensure that all interested contractors had an equal opportunity to compete for the awards.[18] The three contracts each exceeded $200,000 and had a total value of about $1.5 million. MWAA acknowledged that it did not advertise the three procurements. Nevertheless, it felt that each of the procurements had been subject to full and open competition. MWAA noted that a newspaper advertisement is

[18] According to the 1993 contracting guidance, MWAA's objective is to provide prospective contractors with well-publicized, advance notification of its solicitation requirements. The unpublished 1998 contracting guidance indicates that MWAA's policy is to achieve, to the maximum extent practicable, full and open competition. Toward that end, MWAA requires all procurements over $200,000 to be advertised. According to the 1998 guidance, maximum competition is achieved by, among other things, advertising in newspapers and trade publications, posting solicitations to MWAA's contracting Web site, and other outreach efforts.

not the only way to achieve full and open competition and indicated that it takes other steps to advertise its contracting opportunities. Such steps include posting contracting opportunities to MWAA's contracting Web site, which is publicly accessible, and to its bulletin board of solicitations in its office at Reagan National. While the competition on one of the three procurements did not fully satisfy MWAA's requirement for advertising, we agree that it appears to have been adequate.[19] However, MWAA limited competition on the other two procurements to a group of "known suppliers." Limiting competition to only those suppliers that are known to MWAA does not constitute full and open competition, since other firms may also be interested in and capable of accomplishing the work.

Finally, we found little documentation of MWAA's efforts to determine that the prices for additional goods and services resulting from changes in the scope and terms of MWAA's contracts were fair and reasonable. As MWAA's 1998 contracting procedures recognize, sound contracting principles necessitate that an organization award contracts for goods and services at fair and reasonable prices. Such prices are expected to result from full and open competition. Thus, when contract changes are involved, an organization must use other methods to assure itself that the cost of the changes is fair and reasonable. Except for the construction-related contracts that we examined, we found little evidence of MWAA's efforts to do so. The contract files, for example, rarely demonstrated that MWAA (1) prepared an independent cost estimate for the proposed contract changes, (2) obtained market prices from the contractor's competitors, or (3) considered prices previously paid for similar goods and services before entering into sole-source negotiations with a contractor for additional goods and services. Moreover, the contract files rarely documented the result of MWAA's contract negotiations.[20] Without documentation to the contrary, these findings raise questions about

[19] Fifty-three firms received MWAA's solicitation for this procurement. Twenty-eight of the 53 firms were initially sent the solicitation by MWAA. The remaining 25 firms received the solicitation after learning of it through other sources. According to MWAA, one source might have been its "Opportunity Alert" announcement that it sent to 275 firms.

[20] MWAA's 1993 contracting guidance is silent about the necessity of determining whether a price is fair and reasonable in situations in which there is no competition. In contrast, MWAA's unpublished 1998 guidance requires its contracting officers to prepare a memorandum of negotiations that describes, among other things, (1) MWAA's objectives for each negotiation, (2) the outcome of the negotiations, and (3) the reasons why MWAA considers the negotiated price to be fair and reasonable.

whether MWAA obtained fair and reasonable prices for its contract modifications.

MWAA contracting officials agreed that, in many instances, they should have done a better job of documenting their efforts to ascertain whether prices were fair and reasonable. Nevertheless, in their view, the negotiated prices were fair and reasonable. MWAA disagreed with the remainder of our findings in this area. For example, MWAA disagreed that it should have obtained and evaluated pricing on its contracts for a supplemental communication system and airport cleaning services because, in MWAA's view, there were too many unknown variables involved in the procurements. According to MWAA's July 9, 2001, letter to us,

> ". . . if there is risk of a change in the requirements or conditions for performance…adherence to fundamental principles of evaluating proponents would dictate that due to technological risk and changing circumstances the options [should] not be evaluated[;] otherwise the award is likely to be premised on performance that is not in accordance with what will be the actual requirements."

Thus, as a matter of policy, MWAA does not currently require contractors to price additional option years contemplated in its solicitations. Instead, according to MWAA officials, MWAA prefers to negotiate the price for additional work when it exercises the option. According to the contracting officials, MWAA's approach is more cost-effective because it avoids being locked into prices that may be influenced by unstable market conditions, inflation, or other factors. Finally, while not providing any information supporting its view, MWAA's June 29, 2001, letter to us indicated that MWAA believes that the "commercial world" and other airports commonly use unpriced options. Thus, MWAA indicated that it plans to revise its procedures in an "attempt to provide a foundation for [the] use of this commercial mechanism." [21]

We continue to believe that MWAA, using its best judgment, could have (1) made a relatively accurate assessment of its future requirements under the communications and cleaning contracts, (2) sought pricing on the basis of its assessments, and (3) evaluated the contractors' prices in making its initial contract awards. For example, using the terminal's detailed

[21] According to MWAA's June 29, 2001, letter to us, "the use of established business relationships, the need to make strategic decisions that affect the operational needs at the airports and customer service, and the benefits of known and dependable revenue streams argues for authorization to use unpriced options under certain circumstances."

construction plans and specifications, MWAA could have estimated the amount of carpeted area in the terminal and the number of times per week that it would need to be vacuumed as well as the amount and frequency of tile or other flooring to be mopped and, thereafter, requested contractors to provide unit pricing for each of these tasks. After award, if changes in the amount or frequency of the cleaning occurred, MWAA could have used the contractor's unit pricing to adjust pricing under the contract. According to the deputy commissioner of the Public Buildings Service of the U.S. General Services Administration, the General Services Administration—the landlord for the federal government—typically uses this approach to award cleaning contracts for buildings under construction. Furthermore, MWAA could have used appropriate contract language to protect itself from uncertainties that might have resulted in changes to MWAA's original assessment of its needs. Alternatively, if MWAA considered the two procurements too uncertain to estimate its future needs, MWAA could have conducted new procurements. For example, for the period in which MWAA was defining its future cleaning needs at Dulles, MWAA could have awarded a short-term contract for the existing facilities and, thereafter, conducted a new procurement for cleaning the entire airport.

We also disagree with MWAA's other views regarding the appropriateness of using unpriced options. From the broadest perspective, MWAA's use of unpriced options represents an "option" in name only. Specifically, for the contracts we discussed, because MWAA generally did not ask the contractors to provide pricing for its anticipated options, MWAA did not establish a unilateral, contractual right to require the contractors to perform the future work at an agreed-upon price.[22] Thus, when MWAA subsequently elected to obtain the additional goods and services, it had to enter into price negotiations. Such a contracting approach results in the award of preplanned, noncompetitive (sole-source), follow-on contracts. If these sole-source awards had been adequately justified, MWAA's board of directors could have approved them. However, MWAA did not treat the procurements as sole-source awards and did not seek the board's approval.

[22] It follows from the fundamental principles of full and open competition that absent pricing, a valid, exercisable contract option does not exist. Furthermore, unless pricing is evaluated in making the contract award, a priced option cannot be said to have been competed. Appendix I provides additional information on this topic.

Additionally, MWAA's view that its use of unpriced options is more cost-effective than a full and open competitive approach conflicts with both the guidance in MWAA's unpublished 1998 contracting manual and the experience of other public entities, including the federal government. MWAA's contracting guidance recognizes, for example, that "negotiation(s) without the element of competition [i.e., a sole-source procurement] is difficult" in arriving at a fair and reasonable contract price.[23] Furthermore, because MWAA is not obligated to exercise a priced option if its interests are not well served in doing so, MWAA cannot be locked into paying unfavorable prices. Instead, MWAA can always choose to resolicit its requirement.[24]

Finally, in our view, the question of whether the use of unpriced options is common in the commercial world is not relevant to MWAA's position. MWAA is not a private entity with authority to operate freely in the commercial world. Rather, MWAA is a public entity subject to contracting requirements, including the use of full and open competition, that were set forth in its lease with the federal government. As a result, we do not agree that MWAA's plan to revise its contracting procedures to "attempt to provide a foundation" for using unpriced and unevaluated options will resolve our concerns.

MWAA Added Out-of-Scope Work to 3 of the 13 Contracts

When an organization needs to acquire goods and services, it can either conduct a separate procurement or use an existing contract. However, using an existing contract is appropriate only if the acquisition is within the scope of the original contract. Modifying a contract to obtain goods and services that are outside the general scope of the contract (i.e., out-of-scope work) is tantamount to awarding the work on a sole-source basis

[23] For example, recognizing the difficulties inherent in sole-source negotiations, the federal government generally requires certified cost and pricing data whenever pricing is not competitively determined to provide a verifiable basis for its price negotiations.

[24] The federal government, for example, requires its contracting officers to determine that exercising an option is the most advantageous method of fulfilling the government's needs. If exercising an option is not deemed to be in the government's best interest, competition for the procurement is expected to be reopened. MWAA's procedures do not specify a similar requirement.

because the additional work was not subject to competition.[25] MWAA's 1993 contracting guidance does not address this matter. However, its unpublished 1998 internal guidance specifically precludes contracting officers from adding new work to an existing contract when the work is beyond the general scope of the contract. Instead the work is to be treated as a new procurement. According to the 1998 guidance, "although it may be administratively easier to add new work to an existing contract, this is a sole-source, noncompetitive approach which may not be as cost effective as treating the work as a new competitive procurement."

Although initially subject to full and open competition, 3 of the 13 contracts that we reviewed were subsequently modified to obtain goods and services that were beyond the contracts' original scope of work. In each case, the value of the goods and services included in the modification exceeded $200,000 and the modification was subject to the statutory lease requirement for full and open competition. The first out-of-scope modification occurred on MWAA's 1995 contract for bus services. The solicitation and subsequent contract required the contractor to provide drivers and administrative support for the daily operation of a bus system between the airports and other area locations. The buses were to be supplied by MWAA. In April 1996, MWAA modified the contract to lease four used buses for a period of up to 3 years with an option to purchase the buses. The lease and purchase of the buses were not subject to competition as part of the contract solicitation and clearly constituted an out-of-scope contract modification, since neither the lease nor purchase of the buses had anything to do with obtaining drivers and administrative support for the bus service. According to contracting officials, the contract modification was needed to meet operational needs until MWAA could acquire new buses. Even though MWAA did not prepare a sole-source justification for the modification or seek the board's approval for an exception to the use of full and open competition, MWAA's July 9, 2001, letter to us agreed that the contract modification was outside the scope of the contract. The out-of-scope modification totaled about $360,000.

[25] As discussed in appendix I, the fundamental principles of full and open competition require that all work performed under every contract be competed. This means that work that may be ordered under a contract is limited to work that reasonably falls within the contract's terms, including any changes clause that the contract may have. As a result, goods and services that differ materially from those that might reasonably have been provided under a contract are considered outside the scope of the contract. Amending a contract to purchase out-of-scope goods or services is a noncompetitive acquisition.

Another example of contract modifications for out-of-scope work stemmed from MWAA's February 1998 contract for a portion of the design and construction of a regional airline terminal at Dulles. The contract was awarded for $9.7 million using full and open competition and was part of a much larger construction effort that included, among other things, the acquisition of terminal furnishings, such as communications and flight information display systems, interior furnishings, and public telephone systems. According to MWAA, it specifically excluded the terminal furnishings from the contract's solicitation because it intended to obtain the furnishings under separate, competitive procurements. MWAA did not follow through with this plan and, despite guidance in its unpublished 1998 manual, modified the contract on at least 10 occasions in 1998 and 1999 to acquire the out-of-scope furnishings. According to MWAA personnel, MWAA modified the contract instead of soliciting competition for the furnishings because of its successful experience with the contractor on another airport project. Also, MWAA officials stated that prudent management dictated that MWAA trade the benefits of obtaining full and open competition with the necessity of accomplishing the work quickly to satisfy its operational needs for the new terminal. MWAA did not justify the modifications as sole-source procurements or seek exceptions to the use of full and open competition from its board of directors. Contract modifications for the out-of-scope work totaled about $2.1 million.

MWAA does not agree that its acquisition of terminal furnishings involved a series of sole-source procurements. According to MWAA, its decision to obtain the additional work under the existing contract rather than to procure the work through a series of procurements, as had been originally planned, was justified by the urgency of the project. According to MWAA's July 9, 2001, letter to us, "the only deficiency with this procurement action may be a lack of adequate documentation of the urgency." MWAA further stated that there "was no perceived detrimental effect" but considerable efficiency in using one contractor to handle the various procurements. We disagree with MWAA's assessment that the contract modifications did not constitute sole-source procurements. Moreover, MWAA's subsequent finding of "urgency" is not supported by documentation in the contract file. Instead, MWAA consciously excluded the work for the terminal's furnishing from the contract's solicitation because, at that time, it intended to award the work under separate, competitive procurements. Work specifically excluded from a solicitation cannot, after the contract's award, be viewed as being within the contract's scope. Furthermore, even if there were efficiencies associated with using one contractor to handle the procurement, we do not agree that there was no detrimental effect to

other contractors who, if afforded the opportunity, might have been interested in competing for this work.

The final example of modifications to obtain out-of-scope work involved MWAA's contract for architecture and engineering support services for MWAA's capital development program at Reagan National and Dulles. According to the solicitation, the program was expected to take 5 years and cost from $700 million to $1 billion. MWAA awarded a 3-year contract in 1988 and extended it for another 3 years in 1991. While this 6-year period roughly approximates the scope of work specified in MWAA's solicitation, MWAA extended the contract in 3-year increments in 1994, 1997, and 2000—for a total of 9 additional years. According to an internal memorandum discussing MWAA's rationale for the most recent contract extension in December 2000, the extension was needed so that the contractor could, among other things, assist in overseeing (1) the completion of work related to the airports' original development plan and (2) a new 6-year, $3.4 billion development plan that MWAA initiated at Dulles in August 2000.

MWAA does not agree that the latter three contract extensions should have been treated as sole-source procurements and did not prepare sole-source justifications for the extensions or obtain exceptions to the use of full and open competition from MWAA's board of directors. According to MWAA officials, while the initial 5-year estimate was overly optimistic, MWAA envisioned that the contract would span the entirety of its original development program.[26] In support of this view, the officials noted that the contract does not specify a maximum time frame for completing the contract. Thus, according to MWAA, it can legitimately extend the contract until at least 2008 when the last of the projects identified in the airports' original development plan are scheduled for completion. We disagree. In our view, all of the contract extensions beyond 1994—the contract's 6th year—represent work beyond the scope of what MWAA offered for competition in 1988. The solicitation clearly anticipated a contract for professional services for a period approximating 5 years. Finally, although the contractor was asked to prepare MWAA's original capital development

[26] As part of the solicitation, MWAA provided contractors with a report prepared by the Department of Transportation that described the nature and magnitude of the improvements needed. The report identified a 5-year capital development program for Reagan National and Dulles totaling $280 million and $420 million, respectively. Through December 31, 2000, over $2.4 billion had been expended on MWAA's capital development program at the airports. The development program is expected to continue for many years.

plan, the solicitation did not (1) specify that the contractor was to oversee the plan's implementation until completion or (2) anticipate the contractor's involvement in the new development plan that MWAA initiated in August 2000. The contract, which is currently scheduled to expire in December 2003, is now in its 13th year and had cost about $230 million through December 31, 2000.

MWAA noted that although its board of directors was aware and supportive of the contract extensions, it now regrets not having sought the board's approvals. According to MWAA, the approvals would have eliminated even the shadow of a doubt about the propriety of MWAA's contract extensions. MWAA explained that it would have been detrimental to initiate a change in its program management services during the high growth and highly dynamic period between 1995 and 2000 because of the need to address, among other things, protracted and ongoing issues involving an unfinished project in MWAA's original capital development project. Thus, in MWAA's view, we did not adequately consider the importance of maintaining continuity in its program support during this period. We disagree. Under the terms of MWAA's lease with the federal government, it is the responsibility of MWAA's board of directors to decide whether MWAA's desire for continuity necessitated a series of sole-source contract extensions. The extensions in question were not competed, and MWAA staff did not present the sole-source contract extensions, along with a justification supporting each extension, to the board. Accordingly, the board did not approve them.

Finally, for the three procurements involving out-of-scope work, we found little evidence of MWAA's efforts to establish that the negotiated prices for contract changes were fair and reasonable. MWAA acknowledged that the three contract files do not adequately document actions taken by its contracting officers to determine that pricing was fair and reasonable. Nevertheless, MWAA indicated that the prices were fair and reasonable.

MWAA Missed Opportunities to Compete 3 Contracts It Awarded Using Less Than Full and Open Competition in 1998 and 1999

While the use of less than full and open competition for 19 of the 22 contracts in the second group of contracts that we reviewed appeared acceptable given the circumstances,[27] we believe that MWAA missed opportunities to obtain competition for 3 of the 22 contracts. The contracts were awarded to United Airlines for $10.6 million for improvements at Dulles and included the design and construction of (1) office space for federal agencies that process international travelers, (2) 12 passenger-screening checkpoints, and (3) an outbound baggage-handling system. While each of the contracts exceeded $200,000, MWAA did not consider the statutory requirement for full and open competition applicable to the awards because, according to MWAA, the work was accomplished under amendments to its sublease with United and involved improvements to United's facilities or areas directly associated with the airline's facilities.[28]

MWAA's lease with the federal government allows MWAA to enter into subleases with airlines for the use of the airports.[29] Also, MWAA can allow airlines and other tenants to make improvements in areas that they sublease from MWAA.[30] Improvements that are made by and for the exclusive benefit of an airline in space that it sublets from MWAA are not subject to the requirement for full and open competition. However, as specified in MWAA's lease with the federal government, airline subleases cannot be used to avoid any of MWAA's obligations under the lease.[31]

In our view, each of the three projects undertaken by United Airlines was MWAA's—not the airline's—acquisition and, therefore, subject to the

[27] According to MWAA's database, the 22 contracts were all awarded for more than $200,000 in 1998 and 1999 using less than full and open competition.

[28] MWAA further indicated that it had assigned contract numbers to the projects simply as an administrative convenience to reimburse United for the improvements.

[29] The agreements are called *Use and Lease Agreements*.

[30] According to MWAA, it sometimes amends its sublease agreements to allow an airline to contract for improvements when the work to be performed is (1) within the airline's premises or immediately adjacent to its premises and (2) when it is more efficient and expedient to have an airline control the construction. In such cases, MWAA reimburses the airline for the cost of the construction, usually up to a defined dollar threshold, and recovers the cost over time through rent on airline premises and other charges.

[31] MWAA's lease with the federal government allows MWAA to "sublease portions of the Leased Premises for use by subtenants, for purposes consistent with, and subject to the provisions of, this lease." However, as specified in the lease, "no such sublease shall relieve the Authority from any of its obligations pursuant to this lease."

requirement for full and open competition. We reached this conclusion because

- the work included in each of the projects was an integral part of MWAA's capital development program at Dulles and was performed on MWAA's behalf,
- the work was performed on MWAA's premises—not in areas subleased by United,
- MWAA—not United—received immediate title to all of the improvements, and
- each of the projects served interests beyond those of United.

In the first case, MWAA and United agreed that United would, among other things, construct new offices and other facilities for federal agency staff who process travelers in the international arrivals building and upgrade the fire alarm and telecommunications systems in the affected space. According to MWAA, United arranged to perform the work because it, as the largest international carrier at Dulles, was the primary beneficiary of the federal processing services. Representatives of MWAA told us that United sometimes uses the international arrivals building for international flights that terminate at Dulles. However, according to the officials, flights connecting to other United locations generally use a separate United facility located in the midfield of the airport—an area well away from the international arrivals building. Thus, although the international arrivals building is shared by all airlines, it is used predominately by airlines other than United. Moreover, the international arrivals building is not subleased by United. Instead, the building is controlled by MWAA and the federal agencies (the Immigration and Naturalization Service, the Customs Service, and the Department of Agriculture) that occupy the building.

MWAA and United also agreed that United would (1) acquire, among other things, 12 passenger-screening checkpoints at Dulles and offices, storage, and other rooms used by security personnel that operate the checkpoints and (2) relocate flight information monitors, pay lockers, and several advertisement displays in the vicinity of the new screening checkpoints. The checkpoints are located throughout the main terminal at Dulles and are used to screen all enplaning passengers, regardless of the airline they are using. During a tour of the airport, representatives of MWAA indicated that it was more convenient to allow United to contract for the work because the airline—as the principal party on the airlines' security committee—was more familiar with what needed to be done.

Finally, MWAA and United agreed that United would acquire an outbound baggage system for the east side of Dulles's main terminal. The baggage-handling system routes bags through the airport for passengers embarking from the east side of Dulles's main terminal. United and its affiliated airlines are located in this area and, as a result, primarily benefit from the improvement. However, like the other projects, the baggage-handling system is a fixed improvement that is located within space controlled by MWAA and, should there be any change in airline tenants, the new tenants would benefit from the improvement. During a tour of the airport, MWAA representatives indicated that MWAA had intended to install the baggage-handling system. However, United wanted a higher-capacity system than MWAA had planned to install so, according to the officials, it was more convenient to allow United to contract for the work. In addition to convenience, the amendment to the airline's use and lease agreement indicated that using United to perform the work would allow the expansion of the east side of the main terminal to "be completed earlier than it otherwise would be."

According to MWAA's June 29, 2001, letter to us, using airlines to make airport improvements is a common practice among airport operators. MWAA explained that the practice derives from the highly competitive environment of the aviation industry that necessitates that airport operators be responsive to, among other things, the needs of their tenant airlines. Thus, according to MWAA, airport operators need flexibility to be able to authorize their tenant airlines to make airport improvements that affect the airlines' operational needs. MWAA noted that it often considers it expeditious and prudent to allow airlines to make such improvements. Moreover, according to MWAA, this flexibility better ensures timeliness, compatibility, and cost-effective decision-making. Finally, MWAA indicated that Congress intended MWAA to have flexibility in developing the airports when it authorized the airports' lease to an independent entity. As discussed in the next section of this report, we largely disagree with MWAA's view.

In addition to the 3 airline sole-source awards, 2 of the 22 contracts that we reviewed were not approved by MWAA's board of directors as required under the statutory lease provision and MWAA's internal procedures. The sole-source awards were for telephone services and parking system upgrades that appeared appropriate under the contracts' circumstances. MWAA agreed that the necessary board approvals were not obtained and indicated that the requirement had been overlooked.

MWAA Believes That the Principles of Full and Open Competition Need to Be Defined within the Context of Airport Contracting

While not conceding that the examples cited in this report represent a violation of "any law or its federal lease," MWAA indicated in its June 29, 2001, letter to us, that it needed to better embrace and articulate "certain hallmarks of 'full and open' competition." MWAA stated, however, that our assessment of its contracting practices using recognized principles of full and open competition was inappropriate because, in its view, these principles do not adequately reflect the unique environment applicable to contracting at commercial airports. MWAA noted that its charter, as reflected in statutes of the District of Columbia and the Commonwealth of Virginia, recognized the need for flexibility in MWAA's contracting and, consequently, granted it expanded commercial discretion in making and entering into contracts.[32] In MWAA's view, it has the power to use contracting practices and procedures that are based upon business needs and "not inherently linked to federal concepts" for maximizing competition. MWAA's June 29, 2001, letter further explained that, as a self-supporting enterprise, MWAA is obligated to ensure its financial continuity rather than simply looking at "short[-]term least cost alternatives." MWAA stressed that it would be wrong and inconsistent with Congress's intent in transferring the operation of the airports to eliminate the flexible framework for contracting at the airports. According to MWAA, the revised contracting procedures that it intends to publish will eliminate the concerns we identified in this report. Finally, MWAA indicated that its revised policies and procedures should put an end to any lingering misconception about what "full and open competition" is in an airport setting.

We understand that Congress, in transferring control of the airports, intended that the airports be operated in a more businesslike manner than had been possible when the federal government operated the airports.[33] We also understand that MWAA's charter provided MWAA with flexibility and discretion to make and enter into contracts. Nevertheless, such flexibility and discretion are subordinate to the obligations MWAA assumed under the statutory lease provision. MWAA accepted the conditions imposed on its contracting when it signed its lease with the

[32] MWAA's charter authorizes it to make and enter into contracts that are "exclusive or limited when it is necessary to further the public safety, improve the quality of service, avoid duplication of services, or conserve airport property and the airport environment."

[33] By empowering MWAA to fund projects through the issuance of bonds, for example, Congress enabled MWAA to proceed with beneficial and long overdue renovations at the airports.

federal government. As a result, MWAA—unlike other airport operators—is subject to the statutory lease provision for full and open competition, to the maximum extent practicable. While Congress provided MWAA with the flexibility to permit exceptions to the use of full and open competition when authorized by a vote of seven members of MWAA's board of directors, the board did not approve exceptions for any of the contracting actions that we questioned.

We also do not agree with other views expressed in MWAA's June 29, 2001, letter to us. Regarding the meaning of full and open competition as used in the statutory lease provision, we note that the imposition of the requirement for MWAA to use full and open competition followed a long history of development of the fundamental principles applicable to competitive contracting for public entities in this country. Many of the authorities on which we relied on to identify the principles applicable to MWAA predate current federal procurement statutes and regulations. Thus, as discussed in appendix I, we applied those generally recognized principles that underlie any requirement for full and open competition by public entities such as MWAA.[34]

Finally, we do not agree that the fundamental principles are inapplicable to contracting in an airport environment. Federal, state, and local governments as well as other public entities conduct thousands of competitive procurements annually, expending billions of dollars. Collectively, these procurements have been used to build and maintain the public infrastructure in this country. On the basis of our knowledge of Reagan National and Dulles airports, MWAA's procurements appear to be no more complex or challenging than many of these procurements. As a result, MWAA's intention to reflect its view of the meaning of full and open competition in an airport setting through a revision of its contracting policies and procedures will not resolve the contracting concerns that we identified.

[34] As discussed in its charter, MWAA is a public entity with public responsibilities. MWAA was formed for one specific purpose—that is, to operate two government-owned airports.

The Department of Transportation Represents the Interests of the United States in Its Dealings with MWAA

The secretary of transportation's responsibilities with respect to the lease are to (1) ensure that the airports are used for their intended purposes, (2) periodically renegotiate the amount of MWAA's annual payments to the federal government that is attributable to inflation, and (3) negotiate any extensions beyond the 50-year period specified in the lease. The 1986 act that transferred operating responsibility to MWAA does not define the specific role of the department with respect to overseeing MWAA's compliance with the contracting requirements in its lease with the federal government. Nevertheless, as signatory to MWAA's lease with the federal government, department officials agreed that the secretary of transportation is the primary executive branch official responsible for representing the interests of the United States in its dealings with its tenant, MWAA. Accordingly, we discussed our findings with Department of Transportation officials. The officials suggested that MWAA publish a draft of its revised contracting procedures for the review and comment of all interested parties and indicated that, on the basis of the information in our draft report, corrective actions by MWAA are likely to be needed. According to the officials, the department will take "appropriate actions," as necessary, to fulfill its obligations under the lease. However, noting that the 1986 act does not define the specific role of the department with respect to overseeing MWAA's contracting, the officials did not identify the actions that the department would take to ensure that MWAA complies with its contracting obligations under the lease.

Conclusions

In a number of important respects, MWAA's procurement practices are not in compliance with its obligations under its lease with the federal government. As a result, for many of the contracts that we reviewed, MWAA may not have realized the important benefits that full and open competition is intended to achieve. Moreover, because MWAA permits several of the contracting practices that we questioned as a matter of policy or practice, we believe that similar problems are likely to exist in MWAA's other contracts.

MWAA's failure to publish the competitive procedures it actually uses to award its contracts and concession franchises is inconsistent with the objective of fostering, to the maximum extent practicable, full and open competition. Moreover, its continued reliance on incomplete and outdated guidance to satisfy its requirement for "published procedures" disregards the requirements imposed in MWAA's lease with the federal government. Weaknesses in MWAA's evaluations of contractor proposals also raise concern about whether contractors have been treated fairly in competing for MWAA's contract awards. Likewise, MWAA's (1) practice of

improperly exercising contract options that MWAA did not compete as part of its initial solicitation, (2) use of existing contracts to obtain goods and services that are beyond the scope of work contained in its contract solicitations, and (3) improper use of sole-source awards fail to ensure that MWAA obtains the best value available in the marketplace for the goods and services it purchases and could result in MWAA's paying higher prices than necessary. MWAA's contracting practices also deprive prospective contractors of the opportunity to compete fully and openly for all available contracting opportunities and, related to this, could create the perception of favoritism in MWAA's contracting process. Finally, although the lease provides MWAA's board of directors with the flexibility to authorize exceptions to the use of less than full and open competition, MWAA often did not seek the board's approval for the contracting actions that we questioned.

Given MWAA's silence on most of our recommendations and its fundamental disagreement with our view about the meaning and applicability of the requirement for full and open competition, it appears doubtful that MWAA will, on its own initiative, take all of the actions that we believe are needed to meet the statutory and lease requirement pertaining to MWAA's contracting practices. This is particularly troublesome given that MWAA recently embarked upon a multibillion-dollar construction program at Dulles. Furthermore, because the 1986 act does not specify the Department of Transportation's role in overseeing MWAA's contracting, it is unclear what the department will do to ensure that MWAA satisfies its obligations under the lease. Accordingly, we added a suggestion that Congress consider clarifying the 1986 act to specify that, as lessor, the department is responsible for ensuring that MWAA (1) fully complies with the contracting requirements imposed in the lease and (2) takes all steps needed to correct the problems that we identified.

Recommendations for Executive Action

To help ensure that MWAA's future contracting activities comply with the requirements imposed in MWAA's lease with the federal government, we recommend that the board of directors take steps to ensure that

1. MWAA publishes, for review and comment by the public, procedures for competitively awarding contracts in excess of $200,000 and all of its contracts for concession franchises and thereafter that MWAA publishes—and makes readily available to the public—a complete, adequate, and current set of its contracting procedures;

2. MWAA's published procedures provide for, among other things,

- evaluating all future contractor proposals in accordance with the factors and processes specified in its solicitations;
- obtaining and evaluating prices for the entirety of its known or anticipated need for each procurement before selecting a successful contractor;
- ensuring that contract modifications for additional goods and services are within the scope of work that MWAA solicited and competed;
- ensuring that all work (i.e., work where the total contract value is estimated to exceed $200,000) is subject to full and open competition, to the maximum extent practicable, including all work ordered through the exercise of options or through other contract modifications;
- ensuring that any work (i.e., work whose total contract value is estimated to exceed $200,000) that is awarded using less than full and open competition is adequately justified and approved by MWAA's board of directors, as appropriate; and

3. MWAA updates its published contracting procedures regularly and that MWAA consistently follows the published procedures.

In addition, we recommend that the board reevaluate MWAA's use of preestablished thresholds to exclude contractor proposals from award consideration. Finally, to help ensure that the board is well-informed, we recommend that the board require periodic reports on (1) MWAA's actions to address our audit findings and (2) the extent of MWAA's use of less than full and open competition.

As signatory to MWAA's lease with the federal government, we recommend that the secretary of transportation take appropriate actions to follow up on MWAA's actions to address our findings and recommendations.

Matter for Congressional Consideration

To help ensure that MWAA satisfies its obligations under the lease, we suggest that Congress consider clarifying the 1986 act to specify that, as lessor, the Department of Transportation is responsible for ensuring that MWAA (1) fully complies with the contracting requirements imposed in the lease and (2) takes all steps needed to correct the problems that we identified.

Authority Comments and Our Evaluation

We discussed our preliminary findings with MWAA officials, including the vice president and general counsel and the vice president for business administration on June 22, 2001. By letters dated June 29, 2001, and July 9, 2001, these officials provided additional information for us to consider in drafting our report. After a thorough analysis of the letters and extensive follow-up, we incorporated MWAA's comments as appropriate. On October 9, 2001, we provided a draft of this report for review and comment to the Department of Transportation and MWAA. The department did not comment on the specific steps that it plans to take to address our recommendation that it follow up on MWAA's actions to address our findings and recommendations. However, the department indicated that it would take "appropriate actions" to fulfill its obligations under the lease. The department also provided technical and clarifying comments, which we incorporated as appropriate.

In their January 4, 2002, letter to us, MWAA's board of directors disagreed with the report's major conclusions, raised concerns about our scope and methodology, and reiterated comments made in MWAA's previous letters. Furthermore, MWAA commented on some, but not all, of our recommendations. MWAA's comments on our conclusions, scope and methodology, and recommendations and our evaluation of these comments are discussed below. MWAA's January 4, 2002, letter and our supplementary comments on it appear in appendix IV.

First, referring to its 1993 contracting manual, MWAA disagreed with our conclusion that it is not in compliance with its obligation to publish competitive procurement procedures. MWAA noted that the manual was adopted and published and that the 1993 manual is available to the public. MWAA also noted that all of its solicitation documents contain procurement-specific procedures. Thus, according to MWAA, the manual—considered either individually or in conjunction with the procedures it specifies in its solicitations—satisfies its obligation under the lease. We disagree with MWAA's view. The requirement to publish "procedures" specifically conveys Congress's intent that MWAA develop, publish, and follow routinized, orderly, and established processes for conducting all of its procurements. MWAA's 1993 contracting manual (1) does not adequately explain MWAA's contracting practices, (2) is outdated, and (3) is not actually used to award MWAA's contracts and concession franchises. Thus, in our opinion, the manual cannot be construed as meeting the intent of the statutory lease provision. Likewise, we do not believe that the procedures MWAA specifies in its solicitations can be viewed in conjunction with MWAA's manual as satisfying MWAA's obligation under the lease because the procedures are applicable only to

individual procurements. Furthermore, on the basis of our findings on the contracts that we examined, MWAA's procurement-specific procedures appear to promote ad hoc and arbitrary contracting actions.[35] Notwithstanding our differences in views, MWAA agreed with our recommendation to publish its contracting procedures for review and comment by the public and, thereafter, to make the procedures readily available. According to MWAA, it is currently revising the 1993 contracting manual to, among other things, incorporate the more detailed, internal guidance it developed in 1998. MWAA further indicated that, after consideration of any comments received, it would make the revised manual available on request and through its Web site.

Second, MWAA disagreed with our conclusion that it did not always satisfy its obligation to obtain, to the maximum extent practicable, full and open competition, on 15 of the 35 contracts that we reviewed. MWAA further disagreed with our belief that a similar conclusion could probably be reached about MWAA's other contracts for goods and services. MWAA commented that it "is committed to maximizing competition in its procurement process consistent with reasonable business practices" applicable to airports and, related to this, that its data on contracting demonstrate that MWAA obtains full and open competition "where required." We disagree with MWAA's views. MWAA's data on contracting for supplies and services, including construction, are derived from a database maintained by MWAA's Procurement and Contracts Department. This database cannot be used to quantify the extent of MWAA's use of full and open competition on its contracts between 1992 and 1999—the time frame that we reviewed. In part, this is because MWAA did not begin identifying the form of award—full and open competition, limited competition, or sole-source award—on its contracts for supplies and services until mid-1997. Furthermore, our limited tests to evaluate the integrity and reliability of the database disclosed numerous errors.[36] Most important, to the extent that the database is accurate about the form of award for MWAA's initial awards for these types of contracts, MWAA does

[35] For example, we identified significant differences in MWAA's evaluation of proposals that were received in response to two solicitations. The differences occurred even though the solicitations contained nearly identical language describing the process MWAA intended to use to evaluate contractor proposals. In our view, such differences are at least in part attributable to MWAA's failure to develop, publish, and follow an adequate set of established procedures.

[36] Our November 17, 2000, report provides additional information about limitations in MWAA's contracting database. See GAO-01-185R.

not update the database to reflect any modifications it makes or options it exercises on a sole-source basis to its initial awards. Finally, as discussed elsewhere, the database does not include information about MWAA's concession contracts.

Furthermore, regarding our conclusion that MWAA did not always obtain, to the maximum extent practicable, full and open competition, MWAA commented that, in its view, we employed a faulty methodology for selecting contracts for review. Specifically, MWAA indicated that we did not employ a statistically valid sampling approach, failed to consider the full range of MWAA's contracts, "preselected" only the most complex of its procurements, and "purposefully skewed" our contract selections "to include only those contracts with [the] highest growth." As a result, MWAA indicated that our methodological approach did not comply with generally accepted government auditing standards. We disagree. As the office responsible for developing these standards, we make every effort to ensure that each of our reviews is, among other things, designed, implemented, and reported in conformance with applicable standards. Consistent with these standards, we also routinely disclose any limitations applicable to our findings. Thus, because we did not conduct a statistical sample of MWAA's contracts, this report clearly indicates that our results cannot be projected to the universe of MWAA's contracts. Nevertheless, because MWAA permits—as a matter of policy—several of the contracting practices that we found objectionable, we continue to believe that similar problems are likely among MWAA's other contracts.

We also disagree that our methodology for selecting contracts was deficient. Contrary to MWAA's assertion, generally accepted government auditing standards do not require the use of any particular methodological approach, including random sampling. A fundamental consideration in designing any audit is to ensure that the time and resources needed to carry out the review are commensurate with achieving the assignment's specific objectives. Thus, while we considered a random sample of all of MWAA's contracts, we did not adopt that approach for two reasons. First, only contracts exceeding $200,000 are subject to MWAA's requirement for full and open competition. Second, randomly sampling the 646 contracts that exceeded $200,000 would have taken substantially more time and resources than we had available to accomplish the detailed contract reviews that we intended to perform. Instead, as discussed in appendix III, we designed a systematic and replicable method for selecting contracts. MWAA's inference that this approach resulted in the arbitrary selection of its most complex and problematic contracts, including contracts with multiyear options and modifications, is not true. First, as

discussed in appendix III and elsewhere, we examined the entire universe of contracts identified in MWAA's database as awarded in 1998 and 1999 using less than full and open competition. Thus, 22 of the 35 contracts that we reviewed were in no way "preselected." Furthermore, far from being arbitrary, our approach for selecting the 13 remaining contracts that we reviewed was specifically designed to be free from any selection bias and, thus, our approach is completely replicable by any outside auditor. Our approach for selecting the 13 contracts also resulted in a good cross-section of both the value (above and below $1 million) and type of contracts (construction-related contracts, non-construction-related services contracts, and contracts for supplies) that MWAA identified as initially awarded using full and open competition. Moreover, even though most of the 13 contracts that we selected involved multiyear option periods and all of the contracts were modified, the 13 contracts were no more complex than others in MWAA's contracting database. In this regard, for example, it should be noted that about 79 percent of the 646 contracts exceeding $200,000 between 1992 and 1999 were modified at least once.

Likewise, MWAA's suggestion that we purposely "skewed" our 13 contract selections toward those with high cost growth because we suspected that they would be particularly problematic is also incorrect. As discussed in this report, we focused our contract selections on contracts with a high percentage of cost growth solely to determine if the work associated with the contracts' cost growth had also been subject to full and open competition. Moreover, in contrast to MWAA's view, given the average amount of the contracts' cost growth—about 617 percent—one could easily argue that the contracts should have been subject to continuous management scrutiny and, thus, expect that the contracts would be relatively free of problems. Finally, we discussed all aspects of our planned methodology with MWAA officials, including the manager of MWAA's Procurement and Contracts Department, before selecting contracts for review. At that time, MWAA officials did not voice any concerns about our planned approach and, in fact, considered it more complex than necessary because, according to the manager, each of MWAA's contracts would likely be found beyond reproach.

Third, MWAA reiterated its view that our assessment of its contracting practices using recognized principles of full and open competition was inappropriate because it is not a federal agency and, consequently, is not obligated to follow federal procurement statutes and regulations. MWAA also reiterated that the criteria we applied do not adequately reflect the "unique environment" applicable to contracting at commercial airports.

Related to this, MWAA commented that the requirement to obtain, to the maximum extent practicable, full and open competition is broadly stated by design and that Congress intended to provide MWAA with flexibility to operate the airports in a manner consistent with the operation of other commercial airports. We disagree with MWAA's view. Our report clearly notes that MWAA is not obligated to follow federal procurement statutes and regulations. Thus, while the precepts of "full and open competition" owe much to the federal government's experience, we did not use federal procurement statutes or requirements to assess MWAA's compliance with the statutory lease provision. Instead, as detailed in appendix I, we applied generally recognized principles underlying the concept of full and open competition. In addition, we clearly acknowledge that Congress, in transferring control of the airports, intended the airports to be run in a more businesslike manner than was possible when the federal government operated the airports. Congress also intended to leverage the ability of an independent, nonfederal, public entity to obtain funding in private money markets for use in financing the airports' renovation and operation. The fact that Congress sought such a benefit, however, does not provide MWAA with a basis for not adhering to the conditions imposed upon MWAA's contracting. Finally, although the board of directors' letter to us emphasized the need for "flexibility" in MWAA's contracting, the letter did not discuss the specific mechanism that Congress provided for achieving flexibility in MWAA's contracting. As explicitly discussed in this report, the statutory lease provision permits exceptions to the use of full and open competition when approved by a vote of seven members of MWAA's board of directors. None of the contracting actions that we found objectionable were approved by MWAA's board.

Finally, implying that our 1993 report endorsed its contracting procedures and practices, MWAA questioned what it described as "the foundation for such a fundamental change" in our views. According to MWAA, our 1993 report "concluded that the Authority's approach and understandings [regarding the meaning and applicability of the requirement for full and open competition] were acceptable to develop policies, implement recommendations and execute a successful procurement system." Thus, absent additional audits, guidance, or monitoring in the interim, MWAA indicated that it had relied on our earlier report to conduct its procurements. We disagree with MWAA's characterization of the conclusions in our earlier report and, related to this, note that MWAA has

misrepresented our 1993 report in various court proceedings.[37] Our 1993 report concluded that, even though MWAA had not yet published detailed procedures for awarding its contracts and concession franchises, the contracting practices that we reviewed in the early years of MWAA's contracting program—1989 to 1991—generally promoted a competitive environment. However, we also concluded that, if not corrected, certain practices we identified could adversely affect MWAA's competitive process in the future. The problems that we identified in our 1993 report are similar to those identified in this report and included awarding contracts under procedures that were not publicly disclosed and extending one sole-source contract on several occasions without proper authorization. Thus, in contrast to MWAA's view, these and other problems appear to have been simply exacerbated in the years between our audits.

Furthermore, regarding MWAA's claim that it had no previous knowledge of the problems that we identified, we must note that, in 1998, MWAA's Office of Audit identified problems similar to the ones that we found. The audit focused on 34 professional services contracts and found that MWAA's use of options and other contract modifications deprived contractors of opportunities that could otherwise have been competed. The audit also identified, as we have reported, the use of modifications to add out-of-scope work to contracts. Furthermore, the audit found that required board approvals had not always been obtained. The office recommended that MWAA increase its oversight of its contracts to, among other things, identify work that should be offered as separate procurements.

We also disagree that we changed the rules applicable to MWAA's contracting for the purpose of this audit. Both our 1993 report and this report clearly state that MWAA is not obligated to follow federal procurement statutes and regulations related to full and open competition. However, as discussed throughout this report, this does not mean that MWAA is free to define the requirement for full and open competition as it sees fit. MWAA is not a private entity with authority to operate freely in

[37] For example, see the Brief of Appellees, Metropolitan Washington Airports Authority in *Washington-Dulles Transportation, Ltd., v. MWAA* (C.A. 4th Cir., Rec. Nos. 00-2153 (L), 01-1095, Sept. 7, 2000), pp. 11, 16-17 where MWAA represented to the court that we endorsed MWAA's procurement process, stating:

"Thus, the Authority has adopted and implemented competitive bid procedures as required by the Lease, and the GAO has determined *that in doing so* the 'federal interest' under the [provisions of MWAA's lease] has been satisfied." [Emphasis added.]

the commercial world. Rather, MWAA is a public entity subject to the contracting requirement for full and open competition, to the maximum extent practicable, that was set forth in its lease with the federal government. Thus, while MWAA need not follow federal procurement statutes and regulations, it must comply with the fundamental principles underlying full and open competition. To help avoid future confusion on this point, appendix I provides additional guidance about these principles.

As previously discussed, MWAA agreed to publish its contracting procedures for review and comment by the public and, thereafter, to make the procedures readily available. MWAA also indicated that it would "consider its approach" to pricing contract options when it revises its contracting procedures. However, MWAA did not specifically comment on our other recommendations, which were aimed at correcting the other contracting problems that we identified. Likewise, MWAA did not commit to regularly update and consistently follow the revised procedures that it intends to publish. Finally, MWAA did not comment on our recommendation that the board (1) reevaluate MWAA's use of preestablished thresholds to exclude contractor proposals from award consideration and (2) require periodic reports on, among other things, MWAA's actions to address our audit findings.

Given MWAA's silence on most of our recommendations and its fundamental disagreement with our view about the meaning and applicability of the requirement for full and open competition, it appears doubtful that MWAA will, on its own initiative, take all of the actions that we believe are needed to meet the statutory and lease requirement pertaining to MWAA's contracting practices. This is particularly troublesome given that MWAA recently embarked upon a multibillion-dollar construction program at Dulles. Furthermore, because the 1986 act does not specify the Department of Transportation's role in overseeing MWAA's contracting, it is unclear what the department will do to ensure that MWAA satisfies its obligations under the lease. Accordingly, we added a suggestion that Congress consider clarifying the 1986 act to specify that, as lessor, the department is responsible for ensuring that MWAA (1) fully complies with the contracting requirements imposed in the lease and (2) takes all steps needed to correct the problems that we identified.

We performed our work from November 2000 through January 2002 in accordance with generally accepted government auditing standards. A detailed description of our scope and methodology, including our methodology for selecting contracts, appears in appendixes II and III.

We are sending copies of this report to the secretary of transportation, the chief executive officer of MWAA, and each member of MWAA's board of directors. Copies will also be made available to others upon request.

Major contributors to this report were Alan Belkin; David Bryant, Jr.; Arthur James, Jr.; Bert Japikse; Larry Turman; and Kathleen Turner. If you or your staff have any questions about this report, please contact me on (202) 512-8387 or at ungarb@gao.gov.

Bernard L. Ungar
Director, Physical Infrastructure Issues

Appendix I: Principles of Full and Open Competition

As discussed in this report, Congress required that the Metropolitan Washington Airports Authority (MWAA) award certain contracts by obtaining, to the maximum extent practicable, full and open competition.[1] This requirement embodies a number of fundamental principles that we discuss below. We have also provided information on the principles that apply to ordering goods and services under contracts that were awarded using full and open competition.

Background

Decisions of the comptroller general dating back to the 1920s and 1930s employed the term "full and open competition" and used it interchangeably with the phrase "full and free competition."[2] More recently, legislative reference to "full and open competition" appears in the Office of Federal Procurement Policy Act Amendments of 1979.[3] That act declared it to be the policy of Congress to promote economy, efficiency, and effectiveness in the procurement of property and services by promoting the use of full and open competition by the government. Congress reiterated the policy in 1983, again using the phrase "full and open competition."[4] The following year, Congress revamped the federal procurement statutes by enacting the Competition in Contracting Act of 1984, which also promoted full and open competition.[5] At the same time,

[1] The complete requirement as defined in the Metropolitan Washington Airports Act of 1986, P.L. 99-500, title VI, § 6005(c)(4), 100 Stat. 1783-376 (1986), creates an obligation to "obtain, to the maximum extent practicable, full and open competition through the use of published competitive procedures." As required by the act, this language was incorporated in and agreed to by MWAA as Article 11.D of its lease with the federal government. Section 6005(c)(4) is codified at 49 U.S.C. § 49104(a)(4). The codified language uses the phrase "complete and open competition" and otherwise differs slightly from the wording in the original legislation. Throughout, we refer to the requirement as it appears in the original act because (1) that is the language that appears in MWAA's lease and (2) by the terms of the codification, the codified language is not to be construed as making any substantive change in the law. P.L. 105-102, §§ 4(a), (b), 111 Stat. 2204, 2216 (1997).

[2] The first published use of the term "full and free competition" by the comptroller general appears in 1 Comp. Gen. 688, 689 (1922); the first use of "full and open competition" is found at 16 Comp. Gen. 404, 409 (1936). Also, see 20 Comp. Gen. 903, 907 (1941). The phrases "full and fair competition," "fair and open competition," "open and free competition," and "fair and free competition" have also been used to express similar thoughts, although less often.

[3] P.L. 96-83, § 2, 93 Stat. 648 (1979).

[4] Office of Federal Procurement Policy Act Amendments of 1983. P.L. 98-191, § 3, 97 Stat. 1325 (1983).

[5] P.L. 98-369, div. B, title VII, 98 Stat. 494, 1175 (1984).

Congress amended the Office of Federal Procurement Policy Act to declare that "full and open competition, when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."[6] Two years later, upon consideration of the 1986 Metropolitan Washington Airports Act (which provided for the lease of Dulles and Reagan National), a senator from Virginia introduced the requirement for full and open competition at the airports. He explained that the "amendment represents both good government and good management…. It…is fully consistent with the efforts [of Congress] to guarantee the proper and prudent procurement of goods and services."[7]

Although the precepts of competitive public contracting owe much to the federal government's experience, the fundamental principles outlined here are not unique to federal contracting practice. The principles find expression, for example, in the American Bar Association's (ABA) *Principles of Competition in Public Procurements*[8] as well as in the ABA's *Model Procurement Code for State and Local Governments*,

[6] 41 U.S.C. § 403(6). Furthermore, Congress adopted the Small Business and Federal Procurement Competition Enhancement Act of 1984, to further eliminate "procurement procedures and practices that unnecessarily inhibit full and open competition for contracts." P.L. 98-577, § 101, 98 Stat. 3066 (1984).

[7] 132 Cong. Rec. S 3931-01 (1986).

[8] *Principles of Competition in Public Procurements* (Approved by ABA's House of Delegates, 1998). Also, see the ABA Section of Public Contract Law, *Report to Accompany Principles of Competition in Public Procurements* (1998). (Hereafter, *ABA Report*.)

adopted in 1979 and updated in 2000.[9] Sixteen states, including Virginia, have adopted the model code.[10]

Fundamental Principles for Competitive Public Procurements

To achieve full and open competition, prospective contractors must be able to prepare and submit appropriate bids or proposals in response to an identified contract requirement. Moreover, bids or proposals must be judged solely on their merits. To help ensure that contract awards are not arbitrary or preferential and to protect the integrity of the competitive process, specific procedures must be written and followed.[11] The following text explains the fundamental principles underlying full and open competition.

- Contracting organizations must conduct procurements using a solicitation that clearly identifies the requirements to be met as well as the process that the organization intends to follow to select a contractor.

  The solicitation plays an essential role in defining an organization's requirements and in establishing the framework for a competitive procurement. To accomplish its purpose, a solicitation must be sufficiently

[9] The fundamental principles of full and open competition are embedded in the rules stated in both the 1979 and the 2000 versions of the model code. Indeed, the 1979 version was founded upon the principle enunciated in the concept of "fair and open competition," words intended to convey much the same meaning as the phrase "full and open competition." The authors of the 2000 version observed the following:

"The 1979 Code offered states and local jurisdictions…a basic formulation of the fundamental principles upon which durable procurement systems rest…. The Revision Project did not result in any major changes to these basic principles. Indeed, these principles have become *bedrock notions in American law associated with public procurement*." (Emphasis added, 2000 *Model Code*, p. iv).

For materials related to the development of the model code, see *Model Procurement Code for State and Local Governments, An Orientation and Forward Look*, The Model Code Colloquia Program, Commonwealth of Pennsylvania (American Bar Association, 1976).

[10] *Annotations to the Model Procurement Code for State and Local Governments With Analytical Summary of State Enactments, American Bar Association Section of State and Local Governmental Law*, p. vii (3d Ed., 1996). (*Model Code Annotations*.) Also, see 3 Va. Code § 11-35, *et seq*., revised and relocated to § 2.2-4300, *et seq*., by Virginia Acts 2001, c. 844, *eff.* Oct. 1, 2001. According to the *National Association of State Purchasing Official's 1992 Survey of American Bar Association Model Procurement Code States, Model Code Annotations, supra*, 273, Virginia adopted approximately 75 percent to 80 percent of the content of the model code.

[11] *ABA Report*, §§ B.8, 10.

clear to permit the preparation and evaluation of bids or proposals on a common basis.[12]

- Contracting organizations must publish their solicitations in a manner that reasonably ensures that those who might be qualified to compete for a contract can learn of the solicitation and respond to it.

  To obtain full and open competition, a contracting organization must provide all responsible sources with the opportunity to compete for the award. This stipulation is achieved if the contracting organization makes a diligent, good faith effort to inform prospective contractors about a solicitation and allows the firms to obtain any supplementary information needed to submit a responsive bid or proposal in time for it to be considered.[13] At a minimum, this requirement mandates some kind of public announcement of the contract's availability. Additionally, the notice must adequately inform prospective contractors about (1) the nature of the procurement and (2) how to proceed with their offers if they want to compete for the contract.[14]

- Contracting organizations cannot impose restrictions that do not reasonably pertain to their needs.

  Contracting organizations need not accept products or services that do not meet their needs. On the other hand, they cannot impose unnecessary limitations that restrict the field of prospective contractors or the products or terms that contractors might offer to meet an organization's needs. Thus, a specification requiring the use of a specific material, for example, unduly restricts competition if another, potentially cheaper, material would also meet the organization's needs.[15]

- Contracting organizations must specify in their solicitations the factors that they intend to use to evaluate proposals.

[12] *Harris Corp.*, B-194151, April 22, 1980, 80-1 CPD ¶ 282; *M. J. Rudolph Corp.*, B-196159, Jan. 31, 1980, 80-1 CPD 84. Also, see *ABA Report*, § B.4.

[13] *All Cape Corp.*, B-275736, Mar. 20, 1997, 97-1 CPD ¶ 119. Also, see *ABA Report*, § B.5.

[14] Cf. *Trans World Maintenance, Inc.*, 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239.

[15] See *BBR Prestressed Tanks*, 56 Comp. Gen. 575 (1977), 77-1 CPD ¶ 302; *Carolina Concrete Pipe Co.*, B-192361, Mar. 4, 1981, 81-1 CPD ¶ 162, recognizing that the rule against undue restrictions on competition is fundamental to a requirement for full and open competition. *ABA Report*, § B.3.

Prior to World War II, public contracts were generally awarded to the firm that submitted the lowest-priced responsive bid. The rules were simple. A firm had to meet the requirements of the solicitation at a fixed or determinable price and, thereafter, was awarded the contract if its price was the lowest. In the post-World War II period, however, public contracting has increasingly relied on negotiated procurements and "best value" selection techniques that emphasize both price and technical merit in selecting a successful firm. Competition cannot be considered full and open if prospective contractors, lacking sufficient information, base their proposals on different assumptions about how they will be evaluated and, consequently, tailor their proposals differently.[16] Thus, if a contracting organization intends to use multiple evaluation criteria, it must provide prospective contractors with enough information to permit the firms to compete on an equal basis.[17] We have long recognized, therefore, that the basic criteria to be followed in selecting contractors (and some characterization of their relative importance) must be disclosed in the solicitation.[18] Moreover, the criteria listed in a solicitation cannot include irrelevant factors that could mislead potential offerors.

- Contracting organizations must treat all firms equally.

  Full and open competition is achieved, in part, through fairness and equal treatment. Thus, a contracting organization must establish and follow common closing dates and processing procedures. Similarly, if a contracting organization provides information to one firm that could affect the preparation of its proposal, it must provide other prospective contractors with the same information. Likewise, if a contracting organization provides any firm with an opportunity to participate in negotiations or to modify its proposal, it must provide all firms in a similar circumstance—that is, those in the competitive range—with the same opportunity.

- Contracting organizations must evaluate bids and proposals and award contracts using the criteria and process they specified in their solicitation.

[16] *Harris Corp.*, *supra*.

[17] *ABA Report*, § B.6.

[18] *Analytical Services, Inc.*, B-202473, Mar. 9, 1982, 82-1 CPD ¶ 214; *aff'd.* on *recon.*, Dec. 6, 1982, 82-CPD ¶ 502.

To maintain the integrity of the competitive process, contractors must be selected using the evaluation criteria and process specified in the solicitation.[19] Moreover, if the contracting activity changes its evaluation criteria and/or process, it must inform prospective contractors and provide them with an opportunity to amend their proposals.[20]

- Contracting organizations must limit the scope of a competitively awarded contract to the work that they originally procured.

  To achieve full and open competition, an organization cannot add work to a contract that was not originally subject to competition. For example, if an organization solicits offers to furnish 1,000 items at a fixed unit price, it cannot later add another 1,000 items at the time of award—even if the contractor consents to the change. Instead, since the organization knew at the time of award that its requirement was for 2,000 items, it must cancel the solicitation and reopen competition for the full 2,000 items using full and open competition. Likewise, an organization cannot award a contract with the intention of materially modifying it later. Thus, in the example given, the organization cannot award a contract for 1,000 items knowing that it will increase the quantity to 2,000 items after the award is made.[21]

Applicability of Principles to Existing Contracts

A requirement for full and open competition establishes a mandate that a contracting organization's practices will comply with fundamental competitive principles for awarding contracts. A requirement to "obtain, to the maximum extent practicable, full and open competition" recognizes that there may be circumstances when it is not practicable to obtain full and open competition, because it would be futile or infeasible, but otherwise requires that full and open competition be obtained.[22] This mandate applies to the award of all work performed under every contract.[23] The following text explains the fundamental principles applicable to competitive public procurements.

[19] *ABA Report*, § B.7.

[20] *Grey Advertising, Inc.*, 55 Comp. Gen. 1111, 1122 (1976), 76-1 CPD ¶ 325; *A. T. Kearney, Inc.*, B-205898, Feb. 28, 1983, 83-1 CPD ¶ 190.

[21] *A & J Manufacturing Co.*, 53 Comp. Gen. 838, 839-840 (1974), 74-1 CPD ¶ 240.

[22] *ABA Report*, § B.2.

[23] Accord, *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir., 1993).

- The scope of a contract is determined by examining the binding promises that are made as well as the obligations assumed by the parties.

  From a contracting organization's perspective, the scope of a contract is measured by its right to unilaterally obtain or order supplies and services under the contract. A unilateral right exists if all of the contract terms pertaining to the contract, including price, are determinable and agreed to by both parties.[24] Contract language that does not create a determinable obligation creates little more than an agreement to negotiate additional items in the future.[25] The need for binding obligations does not preclude the use of contract options or change order processes. Such practices are commonplace in the federal government's procurements. Moreover, ABA's model code recognizes the value of multiyear contracting in obtaining better terms on larger quantities that may be needed in the future.[26] The model code also establishes a change process for contracts that, like the process used by the federal government, provides a method for determining price adjustments when changes occur.[27]

- The scope of permitted changes is limited to those changes that reasonably fall within the terms of the contract.

  The scope of a public contract, including the scope of modifications permitted under a changes clause, is limited to the acquisition of those goods and services that reasonably fall within the contract. The changes clause used in public contracts provides the contracting organization with (1) the ability to order changes during the administration of a contract and (2) a process for paying for changes ordered. However, to achieve full and open competition, the changes ordered may not exceed the scope of the original contract. Changes beyond the purview of those that would have been reasonably anticipated in carrying out the objectives of the original

[24] For example, the changes clause used by the federal government empowers contracting officers to unilaterally determine the price of contract changes subject to accepted procedures for resolving disputes. 48 C.F.R. §§ 6.001(c), 43.201(a), 43.301(a)(1)(ii).

[25] We have not, for example, treated unpriced and unevaluated options in the form of promises to negotiate preplanned, noncompetitive, follow-on contracts as appropriate because such promises do not create a unilateral right to place future orders for supplies or services at a determinable price. *Report to the Secretary of Defense*, B-217655, Apr. 23, 1986.

[26] *Model Code* §§ 3-503.

[27] *Model Code* §§ 5-401(1)(a)(i), 5-401(2)(a)(v), 6-101(1)(a)(i), and 6-101(2)(a)(v).

contract are outside the scope of the contract. Such changes cannot be ordered under the contract because the effect of doing so would be to add work that had not been subject to competition.[28]

- A requirement to obtain full and open competition does not permit the use of preplanned, noncompetitive, follow-on contracts or any extension or expansion of the scope of a contract that was not subject to competition.

  We have used the phrase "preplanned, noncompetitive, follow-on contract" to describe contracts that result from the purported exercise of unpriced and unevaluated options to obtain additional work.[29] Such "options" are merely agreements to negotiate future follow-on contracts that, if exercised, constitute noncompetitive awards.[30]

[28] *AT&T Communications, Inc. v. Wiltel, Inc., supra, following American Air Filter Co.-DLA request for reconsideration* , 57 Comp. Gen. 567, 572-573 (1978), 78-1 CPD ¶ 443.

[29] *Report to the Secretary of Defense, supra.*

[30] *Department of Health and Human Services – Reconsideration*, B-198911.3, Oct. 6, 1981, 81-2 CPD ¶ 279; *Varian Associates, Inc.*, B-208281, Feb.16, 1983, 83-1 CPD ¶ 160.

Appendix II: Scope and Methodology

To determine if MWAA has complied with its obligations under its lease with the federal government, we reviewed the requirements of the 1987 lease and researched the legislative history of the Metropolitan Washington Airports Authority Act of 1986, as amended. As discussed in this report, the statute mandated that specific contracting requirements be included in MWAA's lease with the federal government. To understand the intent of Congress in imposing these requirements, we researched the meaning of the terms used in the statutory lease provision within the context of the fundamental principles of competition in contracting.[1] These principles are reflected in federal laws, such as the Competition in Contracting Act of 1984; federal regulations; and past decisions by the comptroller general; the American Bar Association's (ABA) *Principles of Competition in Public Procurements*; as well as ABA's *Model Procurement Code for State and Local Governments*, all of which we examined.

Having determined the intent of Congress, we examined MWAA's contracting actions to determine if the actions were consistent with obtaining full and open competition. Regarding MWAA's obligation to award contracts for supplies and services exceeding $200,000 and all concession contracts through the use of published competitive procedures, for example, we examined MWAA's notice announcing the publication of its 1993 contracting manual as well as the manual itself. We also searched MWAA's contracting Web site, examined its contract solicitations, and held discussions with MWAA officials to determine how the 1993 manual has been made available to prospective contractors and other interested parties. In addition, we analyzed MWAA's 1998 contracting manual to determine how the internal procedures that MWAA actually uses to award its contracts for goods and services, including construction, compare with the procedures that MWAA published in 1993. With MWAA officials, we also discussed plans to update the 1993 and 1998 manuals and the status of MWAA's actions to develop and publish detailed procedures for awarding its concession contracts.

To determine if MWAA has obtained full and open competition, to the maximum extent practicable, for contracts estimated to exceed $200,000, we examined two distinct groups of contracts that either exceeded

[1] Terms such as "full and open competition," "maximum extent practicable," and "through the use of published competitive procedures" have specific meanings within the context of contracting by public entities.

$200,000 on the date of award or that had exceeded $200,000 as of December 31, 1999. As discussed in more detail in appendix III, the first group consisted of 13 contracts. We reviewed each of these contracts in detail to determine how MWAA solicited, awarded, and modified the contracts and compared these actions with MWAA's contracting policies and procedures and to long-standing principles for obtaining full and open competition. In addition to the initial awards, we examined all 240 subsequent modifications to the 13 contracts. The modifications changed the terms of the original contracts by, among other things, adding work to the contracts.

The second group of contracts consisted of all 22 contracts that, according to MWAA's database, exceeded $200,000 and that MWAA awarded in 1998 and 1999 without full and open competition. We reviewed these contracts to determine the purpose of each acquisition and to review documentation supporting the justification and approval of each of the contracts. We compared this information with MWAA's requirements for awarding and approving contracts using less than full and open competition—that is, awards that were based on limited competition and sole-source awards—to determine if the procurements were appropriately approved and reasonably justified, given the particular circumstances of each procurement.

We visited Ronald Reagan Washington National Airport and Washington Dulles International Airport to familiarize ourselves with work conducted under various contracts that we reviewed, including MWAA's contract for installing supplemental communications systems at the airports and various contracts with the airlines for airport improvements. For projects undertaken by the airlines, we also examined MWAA's use and lease agreements, which govern the airlines' use and lease of airport premises.

We coordinated our work with MWAA's Office of Audit and reviewed 26 audits issued between 1994 and 1999. Finally, because the secretary of transportation represents the interests of the executive branch in ensuring that MWAA complies with the requirements of the lease, we also discussed our findings with Department of Transportation officials.

Appendix III: Contract Selection Methodology

MWAA awarded 2,843 contracts for supplies and services, including construction, between January 1, 1992, and December 31, 1999, according to its contracting database.[1] Another 17 contracts were awarded before January 1, 1992, but were still active as of December 31, 1999, for a total of 2,860 contracts. We performed a limited analysis of the integrity and reliability of MWAA's contracting database, including checks to (1) identify and eliminate duplicate contract entries and (2) identify and obtain missing information related to the estimated value, award amount, and the actual value of the contracts as of December 31, 1999. After duplicate contract entries were deleted and missing data were added, we considered the database suitable for use in selecting contracts for our detailed review.

To determine whether MWAA's contracts were awarded, to the maximum extent practicable, using full and open competition, we focused on contracts that either exceeded $200,000 when awarded or had exceeded $200,000 as of December 31, 1999. Of the 2,860 contracts, 646 met these criteria. We used the database to select two distinct groups of contracts from this universe. The first group consisted of 13 contracts that generally (1) were awarded between 1992 and 1999 using full and open competition and (2) exhibited the highest cost growth.[2] The second group included 22 contracts that, according to MWAA's database, had been awarded either using limited competition or on a sole-source basis. In total, the 35 contracts that we examined were valued at about $408 million and represented 5 percent of the 646 contracts awarded and 19 percent of the value of the 646 contracts as of December 31, 1999.

To select the first group of contracts, we sorted the 646 contracts according to their value at award. After identifying and listing those contracts valued at $1 million or more and those valued at less than $1 million, we (1) calculated the percentage of increase between each contract's initial award value and its value as of December 31, 1999, and (2) sorted the two groups of contracts from highest to lowest in terms of cost growth. For each of the two monetary stratifications—contracts

[1] We selected this period to account for MWAA's contracting activities since the issuance of our 1993 report, which examined contract awards between 1989 and 1991. See *Contract Award Practices: Metropolitan Washington Airports Authority Generally Observes Competitive Principles* (GAO/RCED-93-63, Feb. 8, 1993).

[2] Two of the 13 contracts that we selected for review were awarded before 1992 but were still open as of December 31, 1999.

awarded for $1 million or more and contracts awarded for less than $1 million—we chose (1) 2 construction-related contracts, (2) 2 contracts for non-construction-related services, and (3) 2 contracts for supplies. These 12 contracts generally represented the largest percentage of increase in value as of December 31, 1999, compared with their initial amount.[3] Finally, we added 1 contract for insurance services, which had been awarded for less than $1 million, because we had already substantially examined it during our audit design work.[4] In total, the 13 contracts had an initial award value of about $51 million and a value of about $368 million as of December 31, 1999.

To examine the appropriateness of MWAA's justifications for using less than full and open competition and to determine if these contracts had received appropriate approvals, we used MWAA's database to select a second group of contracts. Specifically, we chose all 22 contracts over $200,000 that the database identified as having been awarded using either limited competition or on a sole-source basis in 1998 and 1999.[5] We performed limited work to evaluate the integrity and reliability of these data, including checks to confirm that the 22 contracts had, in fact, been awarded using less than full and open competition. These contracts, had an award value of about $35 million and a value of about $40 million as of December 31, 1999.

Because MWAA does not have a centralized database of its concession contracts or documented procedures for awarding these contracts, we did not review concession contracts. Instead, we focused our review on MWAA's contracts for supplies and services, including construction. The

[3] We generally selected the 2 contracts with the highest cost increase within each category—services, supplies, and construction contracts awarded for (1) $1 million or more or (2) less than $1 million. In two categories—contracts for supplies awarded for under $1 million and contracts for services awarded for $1 million or more—we skipped contracts with higher cost increases to avoid selecting contracts that were for similar supplies and services—for example, two contracts for cleaning services. The alternative contracts we selected had the third highest and fifth highest cost increases within their respective selection categories. We focused on contracts experiencing a high percentage of cost increase, as reflected in MWAA's database, to determine if the work associated with the cost increase had been subject to full and open competition.

[4] This contract experienced the sixth highest cost increase among service contracts awarded for less than $1 million.

[5] Our contract selections were limited to 1998 and 1999 because, prior to 1998, MWAA's database did not routinely include information on the form of contract award—that is, full and open competition, limited competition, or sole-source award.

results of our contract analyses are not projectable to the universe of MWAA's contracts for supplies and services.[6] However, because MWAA permits several of the contracting practices that we questioned as a matter of policy or practice, similar problems are likely to exist in MWAA's other contracts.

[6] To project our results to the universe of MWAA's contracts, we would have had to randomly select a large number of contracts for detailed analysis. Time did not permit such an exhaustive review.

Appendix IV: Comments from the Metropolitan Washington Airports Authority

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

January 4, 2002

Mr. Bernard L. Ungar
Director, Physical Infrastructure Issues
United States General Accounting Office
441 G Street, N.W.
Washington, DC 20548

RE: GAO Draft Report No. 02-36

Dear Mr. Ungar:

The Board of Directors of the Metropolitan Washington Airports Authority ("Authority") has reviewed Draft Audit Report No. 02-36 ("Draft Report") prepared by the General Accounting Office ("GAO"). The Authority respectfully disagrees with the major conclusions because:

See comment 1.

1. The Authority has satisfied its requirement to obtain full and open competition, when required. The Authority's procurement system is based on competition and was used to award 2,843 contracts between January 1, 1992 and December 31, 1999 using competition, when required. The Draft Report is based on a review of 35 contracts. Of these 35 contracts, competition in the selection process was conducted for the original scope of work, where required, in all but three instances. These three contracts were awarded to airline tenants to make improvements at the airports. The Authority believes that the nature of the aviation industry makes the use of additional competitive procedures for these types of awards impracticable.

   Consequently, the conclusions of the Draft Report inappropriately draw the inference that there is an absence of the use of competition in the overall procurement system when data for the procurement system and findings of the Draft Report on the 35 contracts reveal that the Airports Authority uses competition, where required.

2. The Draft Report uses an inappropriate sampling methodology. The sample selection criteria should yield a sample that is representative of the universe of contracts in the Authority's

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overall procurement system. Instead, the auditors preselected the Authority's most complex procurements involving limited competition, multiyear options and modifications. The conclusions in the Draft Report are questionable because the preselection precludes the use of an analytical technique that is applicable to the entire procurement system.

3. The Draft Report neglects the significant fact that the Authority has relied upon a 1993 GAO Report, which concluded that the Authority's approach and understandings were acceptable to develop policies, implement recommendations and execute a successful procurement system for the last seven years. (*See* General Accounting Office Report 93-63, *Contract Award Practices, Metropolitan Washington Airports Authority Generally Observes Competitive Principles* at page 2, Feb. 1993).

The Authority provides its response in three parts: 1) Audit Methodology; 2) General Comments; and 3) Specific Comments. Each is addressed below.

I. The Authority questions the GAO Audit Methodology

The Authority believes that the audit methodology, as described by the Draft Report, does not meet the statutory requirements imposed upon GAO by the Metropolitan Washington Airports Act of 1986 and does not comply with generally accepted governmental auditing standards. *See* 49 U.S.C. § 49104(a)(7) (GAO audits must be conducted "in accordance with generally accepted management principles"). The audit methodology departs from generally accepted governmental auditing standards. A performance audit must be a systematic examination of evidence for the purpose of providing an independent assessment of a function or activity. This standard cannot be achieved when the selection process is purposefully skewed to include only those contracts with highest growth (Group B). The Draft Report is based on only 35 contracts preselected by the auditors as potentially problematic procurements, out of a total universe of 2,843 contracts for goods or services. See Draft Report at page 47. Indeed, the Draft Report acknowledges **that the contracts examined "were not selected on the basis of a statistically valid sampling approach . . .."** Draft Report at page 15 (emphasis added).

See comment 2.

Now on p. 57.

Now on p. 18.

Because of this methodology, the specific observations set forth in the Draft Report are, in the Draft Report's own words: **"not projectable**

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Now on pp. 4, including footnote 4; 6; and 59.

to the universe of the Authority's contracts for goods and services." See Draft Report at page 4 and note 4 and page 49 (emphasis added).[1]

Now on pp. 6 and 59.

Nevertheless, the Draft Report speculates that "similar problems are likely to exist in the Authority's other contracts," and thus, that in large part, the Authority has violated the Lease. *Id*. at pages 4 and 49. This conclusion is an abrupt departure from the prior audit and the follow-up actions taken by the Authority in response to the initial 1993 audit.

The Authority questions the foundation for such a fundamental change in light of the absence in the last seven years of any intervening audits, monitoring, or pattern of complaints relating to the Authority's programs. Consequently, the Authority strongly believes that the standards and policies articulated in its published competitive procedures are consistent with applicable statutes, the lease with the federal government, and prior guidance provided by the GAO and relied upon by the Airports Authority. The success of the Airports Authority's programs over the last seven years is the best evidence of the implementation of a sound procurement system.

II. General Comments

See comment 3.

First, with respect to the legal "yardstick" to be applied to the Authority, **the Draft Report is inconsistent with the only other GAO guidance provided to the Authority** on the issue. The current Draft Report consistently looks to procurement law applicable to an "agency." But,

- the Authority is **not** an "agency"
- the Authority is **not** subject to federal government contract statutes and regulations, and
- the Authority is **explicitly exempt** from the procurement law of the Commonwealth of Virginia and the District of Columbia.

Indeed, as the GAO observed in 1993:

> Since the airports are no longer under the control of the federal government, [the Authority] is not required to follow federal

Now on pp. 6, 13, and 31.

[1] Even under the inappropriate legal standards used in the Draft Report, see General Comments below, the Draft Report acknowledges that the Authority's approach on 20 of the 35 contracts reviewed was "acceptable." See Draft Report at pages 6, 11, and 28. Thus, the conclusions in the Draft Report are based on 15 handpicked contracts out of a universe of 2,843.

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> procurement statutes, such as the Competition in Contracting Act and the Brooks Act, or the Federal Acquisition Regulations (FAR) in procuring goods and services. As a result, [the Authority] has developed its own procurement policies and procedures, which incorporate some federal procurement terms and principles. [The Authority] applies these terms and principles differently. (General Accounting Office Report 93-63, *Contract Award Practices, Metropolitan Washington Airports Authority Generally Observes Competitive Principles* at page 2, Feb. 1993).

See comment 4.

Second, with respect to the Draft Report's factual and legal conclusions, the Draft Report largely ignores, or quotes out of context, the Authority's detailed comments on an earlier draft report. A copy of the Authority's June 29, 2001, and July 9, 2001, comments are provided as Attachments 1 and 2.

See comment 5.

Third, the Authority specifically requests that the final report clearly note that it does not apply to the Authority's concession contracts. See Draft Report at pages 4 and 48.

See comment 6.
Now on pp. 4 and 58.

Fourth, the tone of the draft report is unduly harsh. The title and numerous subtitles and headings within the report overstate and extrapolate the findings to reach a largely judgmental conclusion about the Authority's procurement system and attempts to lead the reading audience, particularly those in the contracting community, to, in our view, unfounded conclusions about the Authority's procurement practices. Indeed, it prejudices the Authority in its dealings with the contracting community.

See comment 7.

III. Specific Comments

The Authority provides the following additional specific comments on the Draft Report.

The Authority agrees with some of the observations in the Draft Report

The Authority generally agrees with the following observations in the Draft Report.

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1. "Congress generally intended the airports to be operated as a business and in a manner similar to other airports" Draft Report at page 2.

2. "Congress provided the Authority with considerable discretion in structuring its procurement process." Draft Report at page 2.

3. "[T]he Authority is not required to follow federal procurement statues and regulations . . . ." Draft Report at page 2.

4. The Authority, pursuant to the Lease, "shall obtain, to the maximum extent practicable, full and open competition through the use of published competitive procedures. By a vote of seven members, the Authority may grant exceptions" to this requirement. Draft Report at page 2 and Lease 11.D.

5. The Audit Report does not cover and is not applicable to concession contracts. Draft Report at page 4.

6. The results of the auditors' analysis of the 35 contracts "are not projectable to the universe of the Authority's contracts for goods and services." Draft Report at page 4.

The Authority's purpose and objective

The Authority's purpose is to plan, provide, and actively manage world-class access to the global aviation system in a way that anticipates and serves the needs of the National Capital area. The Authority is attentive to the business needs of our airports; to our unique business arrangement with the federal government to operate the airports; and to our partners in the aviation industry, the airlines. Within this context, our effort has been to provide full and open competition to the maximum extent practicable through the use of published competitive procurement procedures.

The Authority does have published competitive procedures

See comment 8.

The Draft Report states that the intent of the Lease is that the Authority develop, publish, and follow "an orderly set of procedures for awarding its contracts and concession franchises." Draft Report at page 4. The Authority adopted and published its *Contracting Policies and Procedures Manual* in 1993. A copy was made available to GAO and DOT in 1994. This document is available to the public and was intended to fulfill the legislative and lease requirements for published competitive

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procurement procedures. In addition, all solicitations to purchase goods and services, to construct facilities and for concessions include published procedures in the solicitation document. Pursuant to the general provisions in the manual, the procurement-specific procedures can be challenged prior to contract award. Thus, the manual and the solicitations either individually or collectively satisfy the Lease requirement for published competitive procedures. The statements in the Draft Report to the contrary are made without factual or legal support. *See* Draft Report at page 9 note 8. We respectfully request that the GAO provide the basis for the position taken in the Draft Report that publicly available requests for proposals do not constitute "published competitive procedures."

Now on p. 11, footnote 8.

The Authority is in the process of revising and refining its procedures

The Authority is revising its procurement procedures. Our current Business Plan includes a self-imposed requirement to revise the *Contracting Policies and Procedures Manual*. The update is underway and, upon completion, will include the incorporation of the *Contracting Procedures Manual* that we developed in 1998 for internal use and described in the Draft Report as "more detailed, substantive and prescriptive" than the *Contracting Policies and Procedures Manual* issued in 1993. We anticipate that the incorporation of the 1998 C*ontracting Procedures Manual* and other planned revisions to the manual published in 1993 will adequately address the concern stated in the Draft Report that the manual as published is too general. The revised manual will be printed and available upon request and accessible on the Authority's Website.

The Authority agrees that the Department of Transportation and the public should be an important part of this process

See comment 9.

The Draft Report recommends that the Authority should provide an opportunity for the Department of Transportation ("DOT") and the public to comment on the manual before publication. The Authority agrees. The Authority plans to provide a draft copy to DOT for comment and will develop a process to obtain comments from the public.

The Authority does obtain full and open competition

The Authority is committed to maximizing competition in its procurement process consistent with reasonable business practices

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needed for the respective airport environments. Our contracting actions are guided by and carried out in accordance with all applicable laws including the statutes establishing the Authority, the lease with the United States, sound contracting methods, and the highest standards of integrity and ethical conduct.

See comment 1.

The Authority disagrees with the Draft Report's conclusion that the Authority has not always satisfied its obligation to obtain, to the maximum extent practicable, full and open competition. This conclusion largely ignores that the Authority has successfully completed thousands of contracts using full and open competition as applicable to the Authority.

The Authority is not a federal agency

See comment 3.

Now on pp. 14 to 19, 23, and 26.

The numerous references to the Authority as an "agency" and the tenor of the Draft Report, indicate that the frame of reference for 'full and open competition' is the federal government. See, e.g., Draft Report at pages 12 – 17, 21, and 24. But, the Authority is not a federal agency and is not obligated to conduct its contracting as a federal agency would. While the Draft Report ostensibly acknowledges this, it still persists in evaluating the non-federal Authority as if the federal rules applied – that is incorrect.

See comment 10.

The transfer of the airports out of the federal government in 1987 meant that federal rules of all kinds, including procurement statutes and regulations, no longer applied to the Authority. *See* 49 U.S.C. § 49111(b) (the Authority is "not subject to the requirements of any law solely by the reason of the retention by the United States Government of the fee simple title to th[e] airports"). Accordingly, as the GAO concluded in its 1993 Report, the Authority can have procedures for "full and open" competition that differ from those applicable to a federal agency.[2]

See comment 11.

The Authority's lease requirement for "full and open" competition to the maximum extent practicable is broad by design and provides the Authority with the discretion to achieve Congress's intent to operate the airports in a businesslike manner. The Authority views the language and Congress's intent in the transfer as indicating support for commercial contracting practices that promote businesslike operations. The Authority notes that the statutes of the District of Columbia and the Commonwealth of Virginia establishing the Authority recognize the need for flexibility in contracting and consequently, exempt the Authority from Virginia and

[2] The Authority does agree that the Authority can improve on the articulation of its policies and on what constitutes "full and open" competition in the Authority contracting context. The Authority intends to achieve this in the forthcoming revision of procedures.

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District of Columbia procurement statutes. *See* Va. Acts ch. 598, sec. 23; D.C. Acts 6-90, sec. 24.

At the time the lease was signed, the Authority was vested with the power to use contracting and procurement practices and procedures:

1. that are based on its business needs;
2. that are not "inherently" linked to federal concepts of maximizing competition; and
3. that ensure the financial continuity of the Authority, a self-supporting, independent interstate compact.

In this environment, the Authority must look at more than the short-term least cost alternatives.

As such, the terms of the Lease presented new and perhaps not fully charted territory that, in the view of the Authority and the GAO in 1993, have been navigated successfully by the Authority. If the GAO now wishes to chart a new course, it should do so only after careful consultation with the Authority and the Department of Transportation, so that the Airports Authority may operate in a manner consistent with the business structures utilized in the aviation industry.

The specific criticisms of the Authority's procurement practices are unfounded and/or overstated

The Authority has reviewed the specific concerns raised by GAO on the appropriateness of certain of the Authority's procurement practices regarding the 35 contracts for goods or services reviewed in the Draft Report. These practices include:

See comment 12.

- Placing an emphasis on technical qualifications and considering cost for only those firms deemed the most technically qualified;

See comment 13.

- Including contract options for work that was not priced at the time that the original contract was signed;

See comment 14.

- Working with airlines to perform projects included in the capital construction plan in areas outside of the specific tenant's sublease; and

See comment 15.

- Acquiring additional goods or services through modifications to existing contracts.

See comment 16.

The contracting practices described above have been used when appropriate to further the Authority's primary purpose – to operate well-run airports. The Authority's contracting procedures and practices do permit

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the placement of emphasis on technical quality as a more relevant indicator than cost. The practices also provide more flexible approaches to use options and modify contracts as well as the operational and practical benefits of working with the airlines to have facilities that meet their operational needs. All of these practices support the Authority's need to make timely decisions for the Airports' operations and the delivery of good quality facilities for customer service.

With respect to the 13 specific contracts reviewed in the draft report, the Authority did award the contracts based on full and open competition

See comment 17.

The Authority does not concur with the Draft Report's conclusion that 12 of 13 contracts selected were deficient in one or more aspect. The auditors selected the contracts with the highest cost growth. In doing so, the need to have a representative sample was ignored and, as a result, the conclusions in the report are apt to mislead a reader about the Authority' practices. The observations and our responses are briefly summarized as follows:

See comment 18.

- The Authority does adhere to the evaluation factors and processes.

  The Authority agrees with the Draft Report that staff evaluation teams do not have the latitude to alter published evaluation criteria. But, this is not the Authority's practice. In the particular contracts reviewed, the collective thinking of an evaluation team led to a decision that the factors as initially stated were not adequate to complete an evaluation process. Adjusted evaluation criteria were applied to all proposals and did not limit the ability of any vendor to fully compete for the contract. *See* Attachment 2, Authority letter dated July 9, 2001.

See comment 19.

- The Authority did solicit competition for all of its procurement needs in eight of the 13 contracts.

  The Authority modified eight contracts to obtain either additional work or services from vendors already under contract. Six of the contracts included options for work that in the Authority's view did not require pricing at the time the contract was awarded. None of the competitors objected to this approach. The Authority also obtained additional goods and services that were not stated or priced in the original contract award from three of the eight vendors.

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The Authority's contracting procurement policies currently do not require that all options be priced before contract award. The Authority's 1993 *Contracting Policies and Procedures Manual* does not specifically address the need to pre-price options or the necessity of obtaining and evaluating prices for the entirety of an award.

Option year pricing does not necessarily improve competition or reduce costs because the price is usually a key element, but not necessarily the controlling factor, in a decision to procure goods from a specific vendor.

Moreover, in deferring cost decisions, the Authority maintains the flexibility to negotiate numerous items at the end of the base year, prior to making the decision regarding the exercise of the option year. The Authority does agree that the decisions on the acquisition and pricing of additional goods and services should be documented fully in the contract file. The Authority will consider its approach to options in the course of revising the contracting procedures as discussed above.

See comment 20.

- The Authority did not improperly add work to three of the 13 contracts.

  The Authority modified three of the 13 contracts to include work not envisioned at the beginning of the procurement process. We believe that in each of these instances the contract modification was appropriate and served the Authority's interests. The Authority does agree that decisions to expand the scope of work should be fully documented in the contract file or an alternative approach, such as a sole source award, should be considered.

Conclusion

See comment 21.

See comment 22.

The Authority has run an extensive and successful contracting program and has complied with the lease provision regarding obtaining full and open competition to the maximum extent practicable through the use of published competitive procurement procedures. The federal lease recognizes that full and open competition may not always be the most "practicable" approach for achieving the Airports' business needs and that "full and open" in the context of the Authority is not necessarily the same as "full and open" in the context of a federal agency.

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The Authority published a procurement manual in 1993 and is committed to a revision to the current procedures. Comments by DOT and others will be considered prior to the updated manual being adopted by the Board of Directors and published. The Authority will provide your office with a copy of the updated procurement manual.

The Authority appreciates the time expended by GAO staff on this matter. The Authority response presented herein identifies many points of disagreement between the Authority and the GAO. The Authority is available to discuss the positions taken in this response. If the GAO feels further dialogue would be beneficial to both parties prior to completion of a final report by the GAO, the Authority is available to schedule a meeting among appropriate representatives from the GAO, the Authority, and the Authority's outside counsel for procurement issues, Crowell & Moring LLP.

Thank you for your consideration of these comments.

Sincerely yours,

Carolyn Boone Lewis
NMG, Jr.

Carolyn Boone Lewis
Chairman

Attachments

cc: Authority Board of Directors

The following are GAO's additional comments on the Metropolitan Washington Airports Authority's letter dated January 4, 2002.

GAO's Comments

1. While MWAA's database on contracting indicates that MWAA awarded 2,843 contracts between January 1, 1992, and December 31, 1999, as discussed in this report, the database cannot be used to quantify the extent of MWAA's use of full and open competition. Thus, any inference that MWAA has awarded thousands of contracts using competition to the extent required is, in our view, misleading.

2. MWAA's discussion of the universe of its contract awards (2,843) between 1992 and 1999 is not relevant to this review. This is because only those contracts exceeding $200,000 are subject to the requirement for full and open competition. Thus, as discussed in this report, we focused on two distinct groups of contracts that either exceeded $200,000 on the date of award or had exceeded $200,000 as of December 31, 1999. In total, 646 contracts met these criteria. The 35 contracts that we examined were valued at about $408 million and accounted for 5 percent of the 646 contract awards and 19 percent of the value of the 646 contracts as of December 31, 1999.

3. Our use of the term "agency" in our draft report was in no way meant to infer that MWAA is a federal agency. Thus, instead of "agency," we generally substituted the term "organization."

4. We disagree that we largely ignored or quoted out-of-context the detailed comments MWAA provided in two letters dated June 29, 2001, and July 9, 2001. As reflected in our report, we conducted extensive follow-up on the comments and, thereafter, incorporated the comments and revised the report, as appropriate.

5. We have not attached MWAA's earlier letters to us because, as discussed, we previously incorporated these comments extensively throughout the report. Furthermore, one of the letters contains information that, for business reasons, MWAA asked us not to disclose.

6. We revised this report to further emphasize that we did not examine MWAA's concession contracts.

7. We disagree that the tone of this report is "unduly harsh" and that our subtitles and headings mislead the reading audience. We also disagree that the report overstates and extrapolates our findings. In our

opinion, both the captions and tone of the report appropriately reflect the problems that we identified. Furthermore, the report repeatedly acknowledges that the results of our contract reviews cannot be projected to the universe of MWAA's contracts. Nevertheless, because MWAA permits several of the contracting practices that we found objectionable, we continue to believe that similar problems are likely among MWAA's other contracts. Our findings and conclusions are based on a combination of factors, including (1) our review of MWAA's contract files, (2) our assessment of MWAA's contracting policies and procedures, and (3) MWAA's interpretation and application of the requirement for full and open competition. As previously discussed, MWAA's interpretation of the requirement is inconsistent with generally recognized principles underlying the concept of full and open competition.

8. MWAA's inference that we reviewed its December 1993 *Contracting Policies and Procedures Manual* is incorrect. The manual did not exist at the time of our last audit and, even if we received the manual in 1994, we had no reason to review it in the period between our audits.

9. We did not specifically recommend that MWAA seek comments from the Department of Transportation prior to publishing its competitive procedures. Nevertheless, we agree with MWAA's plan to do so.

10. We agree that MWAA "can have procedures for 'full and open' competition that differ from those applicable to a federal agency." Nevertheless, as discussed extensively in this report, the procedures must be in conformance with the fundamental principles underlying full and open competition.

11. We agree that the statutes of the District of Columbia and the Commonwealth of Virginia, which chartered MWAA, exempt MWAA from procurement statutes applicable to those jurisdictions. However, the powers conferred in the charter are subordinate to the conditions imposed in MWAA's lease with the federal government.

12. As discussed in this report, if MWAA's solicitations express its intent to consider cost in awarding its contracts, as indicated in its policy, MWAA must do so. On the other hand, if the solicitation indicates that MWAA will evaluate proposals only for technical acceptability (i.e., to establish whether a proposal meets MWAA's minimum requirements), it can request technical proposals from firms and, on the basis of its

evaluation of these proposals, seek cost proposals from only those firms that it finds acceptable. MWAA can also choose to award a contract solely on the basis of technical considerations (i.e., select the most qualified firm). However, given the importance of cost in awarding contracts, public contracting entities generally would avoid such an approach.

13. As discussed in this report, exercising unpriced and unevaluated options is equivalent to the use of preplanned, noncompetitive, follow-on contracts—regardless of whether the initial contract was competitively awarded. Thus, exercising such options is tantamount to making a sole-source award, since the work was not subject to any competition. If sole-source awards are adequately justified, MWAA's board of directors can approve them. However, none of the contracts that we questioned were justified in writing or subsequently approved by the board.

14. As discussed in this report, we do not object if MWAA uses airlines to accomplish work as long as the work is within the scope of MWAA's sublease with the airlines. However, the three projects that we questioned were clearly outside the scope of the airline's sublease and should, in our view, be properly viewed as subject to the requirement for full and open competition.

15. As discussed in this report, there is nothing improper about modifying a contract to obtain additional goods or services as long as the goods and services are within the scope of the contract, including any changes clause. However, modifying a contract to obtain goods and services that are outside the scope of the contract represents a noncompetitive (sole-source) award.

16. We disagree with MWAA's view that the contracting practices that we questioned are appropriate and necessary to operate "well run airports." As discussed in this report, federal, state, and local governments as well as other public entities conduct thousands of competitive procurements annually, expending billions of dollars. Collectively, these procurements have been used to build and maintain the public infrastructure in this country. On the basis of our knowledge of the Ronald Reagan Washington National and Washington Dulles International airports, MWAA's procurements appear to be no more complex or challenging than many of these procurements. Nevertheless, MWAA and other contracting entities are free to use less

than full and open competition when warranted by the situation and properly approved.

17. We continue to believe that 12 of the 13 contracts were deficient with respect to one or more of the principles of full and open competition.

18. MWAA's comment regarding its adherence to evaluation factors and processes appears inconsistent. On the one hand, MWAA stressed that its evaluation teams may not alter published evaluation criteria and that it is not MWAA's practice to do so. Nevertheless, MWAA acknowledged that for the contracts we reviewed, the evaluation team collectively decided to adjust the criteria to more adequately complete the evaluation. According to MWAA, the adjusted criteria were applied to all proposals and did not limit the ability of any vendor to compete. We disagree with MWAA's view. As discussed in this report, MWAA did not (1) notify prospective contractors about its intent to deviate from the evaluation processes specified in its solicitations and (2) provide the contractors with an opportunity to amend their proposals. Thus, it is impossible to discern how contractors might have revised their proposals if they had been advised of changes in the relative importance of the evaluation factors.

19. We disagree with MWAA's assertion that it solicited competition for all of its needs on the contracts that we questioned. While MWAA believes that it does not need to obtain and evaluate the prices for contracts involving options, as discussed in this report, this view is at odds with the principles underlying full and open competition. Moreover, MWAA's point that the contractors involved in the procurements did not object to MWAA's approach is not the correct standard for judging whether any practice is appropriate. In fact, one could expect few if any complaints, since contractors are driven by self-interest and, thus, would likely prefer dealing directly with MWAA to establish the price of their options rather than competing against other contractors in establishing their prices. Finally, as discussed in this report, we continue to believe that obtaining and evaluating pricing for options in awarding contract options does not limit an organization's flexibility.

20. While MWAA contends that the out-of-scope modifications "served the Authority's interest," this does not make MWAA's actions "appropriate." We continue to believe that MWAA's "decisions to expand the scope of work" represented sole-source awards. Furthermore, while we agree with the necessity to document the

reasons for adding out-of-scope work to a contract, such documentation does not change the fact that the actions must be justified and approved on a sole-source basis. None of the out-of-scope modifications that we questioned were justified in writing or subsequently approved by MWAA's board of directors.

21. We disagree with MWAA's view that it "has complied with the lease provision regarding obtaining full and open competition to the maximum extent practicable through the use of published competitive procedures." As discussed throughout this report, MWAA did not obtain, to the maximum extent practicable, full and open competition on 15 of the 35 contracts that we reviewed. Furthermore, it has not yet published the procedures it uses to award contracts competitively.

22. Our report clearly notes that MWAA is not obligated to follow federal procurement statutes and regulations. Thus, as discussed throughout this report, we did not use federal procurement statutes or requirements to assess MWAA's compliance with the statutory lease provision. Instead, as detailed in appendix I, we applied generally recognized principles underlying the concept of full and open competition.

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