UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-221550

March 31, 1986

The Honorable Edward J. Markey
Chairman, Subcommittee on Energy
Conservation and Power
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

By letter dated December 10, 1985, you requested on behalf of the subcommittee that our Office evaluate the legality of the Federal Emergency Management Agency's (FEMA) noncompetitive award of two contracts to Theodore Barry and Associates (TBA). By letter of December 19, to Mr. Richard Udell of your subcommittee staff, we stated our preliminary view that it was questionable whether a noncompetitive award was justified under the circumstances. We then requested, by letter dated December 19, that FEMA furnish our Office a thorough statement of its position. FEMA furnished its statement on February 7. We have completed our review and conclude that the contracts, both of which FEMA advises have been completely performed, were awarded improperly.

Contract No. EMW-85-C-2204

Your inquiry primarily concerned a contract awarded to TBA noncompetitively on September 29, 1985, for technical assistance, resources and support in developing and exercising a radiological emergency plan for the Long Island Lighting Company (LILCO) nuclear facility at Shoreham. FEMA's justification for this sole-source award was the urgency exception to competitive requirements in the Competition in Contracting Act of 1984 (CICA), 41 U.S.C.A. § 253(c)(2) (West Supp. 1985). That exception provides that an agency may use other than competitive procedures when,

> ". . . the executive agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals. . . ."

FEMA determined that delaying a contract award in order to conduct a full and open competition could leave the government open to a lawsuit by LILCO based on negligent or arbitrary public administration. As the cost to LILCO of licensing delays was estimated by FEMA as in excess of $1 million per day, FEMA concluded that the award was urgent due to the possibility of serious financial harm to the government.

One of Congress' principal purposes in enacting CICA was to restrict noncompetitive contract awards to those limited situations where they are "truly necessary." See H.R. Rept. No. 861, 98th Cong., 2d Sess. 1425-7 (1984). We find no support for FEMA's argument that a noncompetitive award to TBA or any other firm was necessary here. FEMA states that it had received no threats of legal action by LILCO; that it never performed any legal analysis which indicated that conducting a competitive procurement could render FEMA liable for negligent or arbitrary action; and that it made no judgment as to the actual merits or likelihood of a potential lawsuit. We do not think the mere possibility of a lawsuit which the government may or may not lose constitutes "serious injury" so as to render an agency's need so unusually and compellingly urgent that a noncompetitive award is justified.

FEMA cites several court decisions in an attempt to establish that its concerns regarding a possible unsuccessful lawsuit were reasonably founded. The circumstances and holdings in these cases, however, appear to have little relevance to the situation here. In General Public Utilities Corp. v. United States, 745, F.2d 239 (3d Cir. 1978), for example, the court held that suits by nuclear plant owners against the Nuclear Regulatory Commission (NRC) for failing to warn them of equipment defects were barred under the Federal Tort Claims Act. In another case cited by FEMA, Union of Concerned Scientists vs. United States Nuclear Regulatory Commission, 757, F.2d 1437 (D.C. Cir. 1984), the court held that the NRC exceeded its authority in ruling that the results of an emergency preparedness exercise need not be considered in a licensing hearing. FEMA cites no cases, and we are aware of none, supporting the proposition that the government may be sued for damages for delaying a contract award pending the conduct of a competitive procurement as required by law and regulation.

FEMA asserts that there was a short timeframe for making an award here since the NRC's request that FEMA

conduct an exercise came on June 20; the exercise tentatively was set for mid-December; there is a customary 75-day preparation period for exercises, meaning award had to be made by October 1; and FEMA's competitive procurements were taking 7 months to complete. FEMA seems to imply that these circumstances evidenced urgency. We disagree. While FEMA's policy of proceeding with emergency preparedness exercises expeditiously, within certain time guidelines, may be sound, the need to meet such guidelines simply is not an exception to CICA that justifies bypassing competitive procurement procedures. Instead of making a noncompetitive award in order to meet its time guidelines, FEMA therefore should have amended its timeframe to accommodate competitive procedures; the agency has not shown that this could not have been done.

Portions of FEMA's response suggest that TBA may have been considered uniquely qualified to perform since TBA previously had dealt successfully with New York state and local authorities and was viewed as lacking any pro-utility bias. This perceived impartiality was deemed significant because state and local cooperation in implementing the emergency preparedness plan was desirable, if not necessary. It thus seems FEMA may believe a noncompetitive award was justified under another CICA exception to competition, at 41 U.S.C.A. § 253(c)(1), which permits noncompetitive awards where the required property or services are available from only one responsible source.

While FEMA determined that TBA was qualified to perform, FEMA never determined that TBA was the only qualified firm. The contracting officer had prepared a questionnaire that would have been used in evaluating other firms' qualifications, but it was never used due to the perceived urgency. Moreover, FEMA states that the decision to make a noncompetitive award was based not on TBA's impartiality or other qualifications, but on the lack of sufficient time--due to the possible LILCO lawsuit--to find other similarly qualified firms. Thus, FEMA appears to have proceeded with a noncompetitive award based on urgency, without ever taking the steps necessary to establish that TBA was uniquely qualified so as to warrant invoking that exemption from CICA's competition requirements.

April 1985 Purchase Order

Purchase Order No. EMW-5-4411 called for development of a methodology for dealing with the refusal of state and

local governments to participate in the emergency preparedness planning process. The purchase order was issued to TBA, without competition, in the amount of $24,375. FEMA states that it proceeded without competition in accordance with regulations governing small purchases, that is, purchases of supplies or services for $25,000 or less. Specifically, FEMA relied upon Federal Acquisition Regulation (FAR), 48 C.F.R. § 13.106 (1984), which, while generally requiring the solicitation of a reasonable number of sources to promote competition and insure a favorable price, does permit a noncompetitive small purchase where "only one source is reasonably available." FEMA determined that TBA was the only source reasonably available due to its expertise in emergency planning and organizational diplomacy, especially in New York state, and because TBA already had been selected by the Department of Energy (DOE) to perform other work related to preparedness planning. FEMA determined it would be impracticable to interface another contractor with TBA on this work.

We find FEMA's justification for not soliciting other sources inadequate. As with the September 1985 contract discussed above, FEMA determined that TBA was the only qualified available source when, in fact, TBA appears to have been only one of an unknown number of potential sources. TBA was the only known source, perhaps, but only because FEMA never took steps to identify the other potential sources. While FEMA may have proceeded with a sense of urgency, we find no indication in the materials furnished us by FEMA that the award to TBA was so urgent that at least two potential alternate sources could not have been solicited orally. See FAR, 48 C.F.R. § 13.106(b)(5) (soliciting three sources is considered to satisfy requirement for maximum practicable competition in a small purchase situation). Indeed, the record indicates that funds for this project originally were requested in January 1985, nearly 3 months before issuance of the purchase order, leaving sufficient time for FEMA to comply with the minimim competitive requirements.

FEMA's position that the impracticability of having TBA work with another contractor warranted award to TBA is unsupported in the record. FEMA has not attempted to explain why contracting with a second firm or having two contractors work together was deemed impracticable, and it is not evident to us why this would be the case. Nor has FEMA described the purpose of the DOE contract or its precise relation to FEMA's requirement here, leaving it

unclear how, or even whether, two contractors would have had to coordinate their efforts on the two contracts.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel