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Office of the General Counsel

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The Honorable Parren J. Mitchell
Chairman, Committee on Small Business
House of Representatives

Dear Mr. Chairman:

This responds to your letter of March 17, 1986, in which you requested our Office's legal opinion on whether the use of indefinite quantity construction repair contracts ("job order contracts") by the Department of the Army in a test program at five installations complies with relevant procurement laws, regulations and policy. The specific areas of your concern are: the potential undue restriction of competition, particularly with regard to small and minority-owned businesses; the possible negative impact on the section 8(a) program of the Small Business Administration; circumvention of the sealed bid method of procurement; evaluation and proposal pricing methodologies that may result in increased cost to the government; the failure to utilize government estimates; the requirement for proposal bonds; and the potential acquisition of architect-engineering services without following the requirements of the Brooks Act, 40 U.S.C. § 541 (1982).

As discussed in detail below, we conclude that the job order contracts are consistent with applicable laws, regulations and policy.

BACKGROUND

The job order contract concept is a new procurement method that contemplates the award of a competitively negotiated, firm, fixed-price, indefinite quantity contract designed by the Army to be one of several tools available to an installation to accomplish small to medium-sized maintenance and repair and minor construction projects. It is being tested over a 15-month period at Fort Monroe, Virginia; Fort Sill, Oklahoma; Fort Bragg, North Carolina; Fort Ord, California; and Aberdeen Proving Ground, Maryland.

Offerors in each of the five procurements were requested to submit technical and price proposals covering all work contained in the detailed specifications, comprised of approximately 25,000 pre-priced individual construction tasks and items with no designated quantities. The solicitation set forth the unit of measure and a corresponding unit price (that included the cost of labor, equipment and materials) for each specification item. The unit prices were to remain constant during the period of the contract, no matter which firm was awarded the contract. Offerors

were required to submit two coefficients encompassing indirect costs (i.e., overhead) and profit, one for normal work and one for overtime work.

Proposals were to be evaluated on the basis of management ability, subcontracting support capability, contractor's experience, technical staff capability, price, and fiscal management plan, with price weighted no more than 25 percent. The coefficients were the basis for the price evaluation.

The Army received 39 proposals in response to the five solicitations, 31 of which were from small businesses. The contracts at Fort Sill and Fort Monroe were set aside for small business, and were awarded to a small local general contractor and a small woman-owned management company, respectively. The job order contracts for the remaining three installations were awarded to a major national construction company, a large local business in joint venture with a small management firm, and a large international service contractor. The awardees' normal work coefficients were 1.195, 1.21, 1.27, 1.28 and 1.35. The Army's anticipated coefficient was 1.35.

Under the job order contracts, for each specific task that arises the Army and the contractor negotiate the scope of work, performance time, and the total price (determined by multiplying the cumulative price from the pre-priced specifications by the appropriate coefficient). Items not pre-priced (i.e., materials or tasks not set forth in the detailed specifications) are negotiated individually and are limited to $10,000 per order. (The Army anticipates that such items will comprise no more than six percent of the total contract amount.) The Army prepares the design for the task and an independent estimate, and the contractor submits a proposal including an itemized estimate which is compared to the government estimate. Upon agreement on a reasonable price, a delivery order is issued that constitutes the contractor's notice to proceed. Payment is made upon completion of the order. In the event of disagreement as to what constitutes a reasonable price, the Army may either issue a unilateral order or utilize another contracting tool (for example, a separate procurement).

The Army anticipates that the job orders will involve construction work in the $30,000 to $100,000 range, such as roof repair, renovation of facilities, replacement of boilers, road repair, building painting, replacement of gutters, installation of suspended ceilings and road construction. Routine small maintenance (e.g., fixing broken windows) and service-type work (e.g., hedge trimming) will continue to be done by Army personnel. Of the total construction work at a particular base, the Army estimates that 60 percent will be handled through job order contracts, and that 60 to 70 percent of that work will be subcontracted to small business.

The Army believes that the job order contracts will provide the contractor with a continuing incentive to do timely, high quality work, since the contractor will continue to receive job orders only so long as

its performance is satisfactory. As a result, the Army anticipates that response time will be reduced, quality control will be enhanced, cost will be reduced (particularly in the design and claims areas), contract administration overhead will be minimized, and procedures will be streamlined. The Army also expects small business participation to increase through subcontracting because of the uncertain nature of the contractual tasks and the necessity for the contractor to maintain only a small on-site staff.

POTENTIAL RESTRICION OF COMPETITION

You question the potential of the job order contract concept to restrict competition unduly, particularly with respect to small and minority-owned businesses, due to the creation of a single large requirement through the aggregation of tasks traditionally procured separately by sealed bidding. You believe small and minority-owned businesses may not be able to compete effectively for these large contracts.

As a general matter, where it appears that a particular solicitation method may restrict competition by a particular group of contractors to some extent, the determinative consideration as to the propriety of the challenged contracting method is whether it reasonably relates to the government's minimum needs. See International Security Technology, Inc., B-215029, Jan. 2, 1985, 85-1 C.P.D. ¶ 6. Because the determination of these minimum needs and the best method of accommodating them is primarily the responsibility of the contracting agency--reflecting the fact that government procurement officials are the ones most familiar with the conditions under which supplies, equipment, or services have been used in the past and will be used in the future and, therefore, generally are in the best position to know the government's actual needs--the determination of minimum needs must be shown to be unreasonable before the procurement approach adopted to satisfy those needs can be legally challenged as unduly restrictive.

Here, the Army has identified a need to try to reduce the cost and time involved in contracting for repair, maintenance and small construction work on installations. As noted, the Army has determined that the job order contract could be an effective means of streamlining these procurements. The test program has been emplaced to determine whether this is the case, and we have no basis on which to find this approach unreasonable. While it may be that the aggregating of these tasks in a single contract could make it more difficult for some small businesses to compete effectively for the prime contracts, we do not believe that this possibility alone renders the program illegal or improper.

The Federal Acquisition Regulation (FAR) does require that agencies take steps to assure that small businesses will have an equitable opportunity to compete for contracts that they can perform, to the extent consistent with the government's interests. FAR, 48 C.F.R. § 19.202-1. When applicable, for example, contracting officers should divide proposed acquisitions of supplies and services into small lots to permit offers on quantities less than the total requirement; plan acquisitions such that,

if practicable, more than one small business concern may perform the work; ensure that delivery schedules are established on a realistic basis; and encourage prime contractors to subcontract with small business concerns. The FAR also requires, at 48 C.F.R. § 19.502-2, that procurements be set aside exclusively for small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that awards will be made at reasonable prices.

It appears from the record that the Army has taken steps to assure small business participation in the test program. Specifically, the first in-progress review conducted by the Army on May 21-22, 1986, shows that at three of the five test installations (Fort Monroe, Fort Bragg and Aberdeen Proving Ground), all of the delivery orders issued have been subcontracted to small, minority and women-owned businesses. As for the remaining two installations, 80 percent of the work at Fort Ord was subcontracted, 48 percent going to small and minority subcontractors, and 40 percent of the work at Fort Sill was subcontracted, 95 percent going to small businesses. In addition, the prime contracts at Fort Monroe and Fort Sill were set aside for, and are held by, small businesses. Thus, although the Army's sample of work contracted out so far is small ($921,024), 40 percent of the prime contracts have been awarded to small business, and the percentage of work subcontracted to small and disadvantaged businesses is averaging 80.5 percent. It thus would appear that, overall, the job order contract test program has not had a negative impact on participation by small and minority-owned businesses in these Army requirements.

SECTION 8(a) PROGRAM

You have expressed concern that the job order contract concept may have a negative impact on the section 8(a) program of the Small Business Act, 15 U.S.C. § 637(a) (1982), which authorizes the Small Business Administration (SBA) to enter into contracts with government departments and to arrange for performance by letting subcontracts to socially and economically disadvantaged business concerns upon terms and conditions agreed to by the procuring agency and the SBA. The 8(a) program is designed to insulate participants from open price competition with established firms.

The Army maintains in the information paper appended to its March 14 letter to the Committee that the job order contracts are not intended to replace the existing 8(a) program, and that they will not be used to reduce the socio-economic goals for installations testing the job order contract concept. Thus, we do not find the contracts legally objectionable on this ground.

CIRCUMVENTION OF SEALED BID PROCUREMENT METHOD

You express the view that the job order contracts circumvent the sealed bid method of procurement because they are awarded through competitive negotiations, where price is not the primary consideration, instead of

through the traditional method of soliciting sealed bids for individual orders. You believe that it violates congressional intent to use job order contracts when it is expected that the majority of orders under such a contract would otherwise meet the criteria for a sealed bid procurement.

The legislative history of the Competition in Contracting Act of 1984 (CICA), cited in your letter, indicates that Congress intended to remove the preference for sealed bidding (termed "advertised procurements" before CICA) over competitive proposal procedures (termed "negotiated" procedures before CICA). Under CICA and its implementing regulations, FAR, 48 C.F.R. § 6.401(a), sealed bids are required only if four conditions are met:

> "(i) Time permits the solicitation, submission, and evaluation of sealed bids;
> (ii) The award will be made on the basis of price and other price-related factors;
> (iii) It is not necessary to conduct discussion with the responding offerors about their bids; and
> (iv) There is a reasonable expectation of receiving more than one sealed bid."

Those conditions are not met in this case. It is clear that the basis for award of the job order contracts is not restricted to price-related factors alone. The Army's decision to negotiate job order contracts reflected its intent to make base maintenance and repair more efficient and responsive, as well as less costly, by emphasizing management ability and subcontracting support capability as well as price. Thus, in addition to requesting a price coefficient encompassing overhead and profit, the Army sought technical management proposals containing specific information as to the offeror's management, coordination and subcontracting ability, experience, and support capability. Since the Army also anticipated extensive discussions to enable offerors to demonstrate fully that they possessed these capabilities, we find no basis for questioning the Army's determination to conduct a negotiated, rather than a sealed bid, procurement. See Essex Electro Engineers, Inc., B-221114, Jan. 27, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 92.

PRICE AS AN EVALUATION FACTOR

You have expressed concern that the job order contracts will prove to be more costly to the government than contracting separately for each task since price is not the determinative evaluation factor.

While cost to the government always must be considered in selecting a contractor, FAR, 48 C.F.R. § 15.605(6), cost need not be made the sole consideration where the negotiated procurement method is employed. Indeed, the basing of an award partly on factors other than cost is perhaps the most fundamental difference between the sealed bid and competitive proposal procurement methods. See FAR, 48 C.F.R. § 15.605(c). Thus, it was not improper for the Army to emphasize offeror

qualifications ahead of proposed cost in determining which offeror would best meet its needs.

The Army does state that the job order contract concept is intended to be a more cost effective contracting option when the cost for procurement, design, construction, follow-on modifications, and claims are taken into account. The Army also recognizes, however, that cost effectiveness could be a potential problem, and for this reason has limited use of the job order contracts to this test program rather than implementing it on a broad scale. We find this to be a reasonable approach to assessing the cost impact of this contracting method.

PRICING METHODOLOGY

You believe that the pricing methodology for the work under the job order contracts is flawed. The cost of each task is determined by multiplying the relevant unit costs listed in the solicitation by the coefficient from the contractor's price proposal. The coefficient proposed by offerors thus must take into account the 25,000 different units of work that could arise under the contract. You question whether it is reasonable to determine the cost of each separate task using a coefficient based on 25,000 different units of work, at least some of which may never arise under the contract.

The Army concedes that the coefficient pricing method lacks the certainty of sealed bid, fixed-price contracting. It points out, however, that whereas bid prices will fluctuate over time depending on the relative strength or weakness of the construction market, the job order contract coefficients and unit prices will remain constant for the duration of the contract. The Army reports that, to date, the small test sample evaluated indicates that the prices for job orders have been slightly lower than prices and government estimates for similar work. The Army will continue to review the test program results as they are updated to determine whether the coefficient method yields reasonable prices compared to the prices paid under fixed-price contracts.

We find no basis for concluding that the coefficient pricing method is improper or unreasonable. While arriving at a coefficient applicable to 25,000 work units may be significantly more involved than bidding on each individual task separately, there nevertheless is no reason to believe that the coefficients so calculated will not fairly reflect the total cost of performing all tasks over the contract term. While an offeror might be able to perform certain tasks for less than its coefficient, it seems just as likely that it would perform other tasks for more, and that the coefficient will merely serve to eliminate these fluctuations. In any case, we believe the Army's method of evaluating the merits of coefficient pricing through test data is reasonable.

GOVERNMENT ESTIMATES

You express concern that the Army does not appear to be preparing government estimates for work to be performed under the job order contracts, contrary to the express requirement that estimates be used in evaluating proposals on construction contracts, FAR, 48 C.F.R. § 36.402(b).

It is our understanding that an independent government estimate in fact will be prepared for each individual order submitted under the job order contracts. According to the Army, the estimate will be prepared prior to receipt of the contractor's proposal, and will be compared to the contractor's proposed price to determine the reasonableness of that price before issuance of any delivery order. The basis for any adjustments to the government estimate is to be documented. In the event that the contractor's proposal for a given project is found to be unreasonable, not cost-effective, or undesirable, the Army is under no obligation to issue the delivery order to the job order contractor, and instead may utilize any other available procurement procedure (for example, sealed bidding). The Army's use of estimates appears to be consistent with law and regulations.

PROPOSAL BONDS

You question the reasonableness of requiring a proposal bond on a negotiated procurement, as the Army has required on the job order contracts.

Although bonding requirements in some cases may restrict competition, in appropriate circumstances they are a valid means of assuring that the contractor will fulfill its obligations. Performance and payment bonds generally are required for construction contracts, FAR, 48 C.F.R. § 28.102-1, and proposal bonds are authorized wherever performance and payment bonds are used. FAR, 48 C.F.R. § 28.101-1. Proposal bonds are designed to protect the government from reprocurement costs in the event the successful offeror fails to execute the required contract documents and submit the required performance and payment bonds. Rampart Services, B-221054.2, Feb. 14, 1986, 86-1 C.P.D. ¶ 164.

The Army states that bond requirements are necessary to assure that the contractor will accept job orders that arise under the contract. If the contractor refuses to perform and the government reprocures for the work covered at a price higher than the contractor's proposed price (or, presumably, the government estimate if the contractor does not submit a price), the Army will seek recovery of these costs against the performance bond. We believe the proposal bond requirement is a reasonable means of protecting the government's financial interests by assuring execution by the contractor of performance and payment bonds.

ARCHITECT-ENGINEERING SERVICES

You object to the job order contracts based on your impression that, in some situations, contractors may be required to plan or design projects covered by job orders, and that such planning and design may constitute professional architect-engineering (A-E) services which properly may be procured only under the procedures prescribed by the Brooks Act. Your objection is founded on the requirement in the job order solicitations that the contractor's proposal on each job order be supported by documentation--such as drawings, calculations, catalog cuts, specifications, and architectural renderings--necessary to show that adequate engineering and planning has been done to accomplish the requirement.

The Brooks Act procedures provide for the procurement of professional A-E services based principally on competence, with no real price competition among potential contractors. The procedures apply only to services which uniquely or, to a substantial or dominant extent, logically require performance by a professionally licensed and qualified A-E firm. Such services essentially consist of design and consultant services typically relating to federal construction or related projects. See Department of Energy Request for Decision, B-207849, July 20, 1982, 82-2 C.P.D. ¶ 63.

Nothing in the provisions or legislative history of the Brooks Act indicates that contracts must be awarded to A-E firms under the Brooks Act procedures merely because architects or engineers will perform part of the contract work. Rather, a contracting agency, within the bounds of sound judgment, is free to decide that a particular contract does not require performance by a professional A-E firm to a dominant extent, and that it thus need not be restricted to A-E firms, even where the specifications call for the use of engineers. Association of Soil and Foundation Engineers--Reconsideration, 61 Comp. Gen. 377 (1982), 82-1 C.P.D. ¶ 429.

The Army states that it does not intend to acquire professional A-E service under the job order contracts but, rather, that design work will remain the government's responsibility and that projects requiring formal design work will not be performed under the job order contracts. The Army does not consider the solicitation reference to cuts, drawings and architectural renderings to amount to a requirement predominantly for professional A-E services, and points out that this documentation is no different from that which a contractor must furnish under any fixed-price construction contract.

While certain job orders apparently may necessitate some degree of architectural or engineering planning by the contractor in preparing its proposal, it does not appear that any project under the job order contracts will consist of professional A-E services to a dominant extent such that the Brooks Act procedures would apply. We find no basis for questioning the Army's position that any A-E services which may be necessary to prepare the documentation referenced in the solicitation will be merely incidental to construction projects, and that the job order contracts thus do not conflict with the Brooks Act.

DIGEST July 22, 1986

The Department of the Army's use of indefinite quantity construction repair contracts (job order contracts) does not violate procurement laws, regulations or policies, and thus is not legally objectionable. Specifically, the job order contracting method as implemented by the Army: (1) does not unduly restrict competition by small and minority-owned businesses; (2) is not an improper circumvention of the sealed bidding method of procurement; (3) does not utilize impermissible proposal evaluation and pricing methodologies; (4) is consistent with the requirement that government estimates be utilized in evaluating proposed prices; (5) is consistent with regulations governing bonding; and (6) does not involve the procurement of architect-engineering services covered by the Brooks Act, 40 U.S.C. § 541.