FOREWORD

This audit guide is intended to assist Federal officials in evaluating the appropriateness of noncompetitive contract decisions. GAO hopes the guide will encourage Federal inspectors general, internal audit staffs, and other evaluators to take a more active role in questioning the use of noncompetitive contracts. The guide could also be helpful to Federal procurement officials, including those responsible for reviewing the adequacy of sole-source justifications. GAO believes that significant benefits, such as cost savings, better solutions to the Government's problems relating to its needs for goods or services, and increased public confidence in Government, can result from its use.

Chapters 1 and 2 provide background information for an understanding of competitive requirements and procedures; chapter 3 is the heart of the audit guide. It covers all the essential information needed to determine the adequacy of efforts to seek competition in awarding noncompetitive contracts for goods or services. The structured format used should be particularly helpful in systematically identifying problem areas in representative samples of these contracts. Most of the questions in chapter 3 include a list of the answers anticipated and, where necessary, explanations of important concepts. Although this approach has lengthened the guide, it should greatly increase its usefulness. In addition, chapter 3 has been designed to help the user easily identify and skip those questions which do not apply to particular contracts.

In commenting on this guide, some agency officials inquired about how long it would take to complete the work steps. This information is provided on page 7.

GAO wishes to thank the private sector experts and Federal officials who reviewed a draft of this guide. They provided many helpful comments and suggestions. The following Federal offices commented: the Office of Federal Procurement Policy, Office of Management and Budget; the Assistant to the Secretary of Defense (Review and Oversight); and the Offices of Inspector General of the National Aeronautics and Space Administration and the Departments of Energy, Health and Human Services, and Transportation.

Charles A. Bowsher
Comptroller General
of the United States

Contents

APPENDIX

ABBREVIATIONS

CBD	Commerce Business Daily
C.O.	contracting officer
D&F	determination and findings
DAR	Defense Acquisition Regulation
DOD	Department of Defense
FPRs	Federal Procurement Regulations
GAO	General Accounting Office
IFB	invitation for bids
NASA	National Aeronautics and Space Administration
PR	procurement regulation
RFP	request for proposals

CHAPTER 1

INTRODUCTION

This audit guide is intended to assist Federal officials, such as inspectors general, auditors, evaluators, and procurement officials, in reviewing agencies' decisions to contract noncompetitively for goods or services. It is designed for evaluating the adequacy of agency efforts to obtain competition, whether it be (1) price competition or (2) technical, design, or other nonprice competition. The guide recognizes various conditions for which noncompetitive procurement is appropriate. It is not our intent to impose competitive procurement in situations where this is inappropriate.

REQUIREMENT FOR COMPETITION

The Congress has historically required that the Government purchase its goods and services by using full and free competition to the maximum extent practicable. For example, Public Law 96-83 (41 U.S.C. 401 *et seq*. (Supp. III 1979)) states that it is the policy of the Congress to promote economy, efficiency, and effectiveness in procurement of property and services by and for the executive branch by promoting the use of full and open competition. Consequently, Federal regulations require agencies to award all contracts competitively to the maximum extent practical.

In general, the concept of competition in Government procurement refers to situations in which two or more firms contend for a contract award by submitting offers to the Government.

An award is considered to be based on adequate price competition if (1)offers are solicited, (2) at least two responsible offerors 1/ independently contend for the contract by submitting offers that can meet the solicitation requirements, and (3) the contract is awarded to the offeror meeting the above criteria and submitting the price evaluated as lowest according to the solicitation's evaluation criteria.2/

For negotiated procurements, technical, design, or other nonprice competition exists when competition is not based to a significant extent on the lowest price, but rather on the highest demonstrated competence or technical capability or the best

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1/A responsible offeror is one that is capable of satisfactorily performing the work required by the Government.

2/Frequently, Government officials have a great deal of discretion and need to exercise good business judgment in developing the evaluation criteria which is used to select the winning contractor. In many cases, overreliance on lowest price or acquisition cost as an evaluation factor would not be most advantageous to the Government.

design proposal. For example, nonprice competition is typical on contracts such as those for research and development that are cost reimbursable because costs cannot be accurately predicted.

BENEFITS OF COMPETITION

Competition is a prominent factor in Government procurement law and policy for good reasons. All qualified potential contractors should have the opportunity to do business with the Government and the right to compete with others equally. Contracts should not be awarded on the basis of favoritism but should go to those offering the most advantageous contracts to the Government. Offering all qualified contractors the opportunity to compete also helps to minimize collusion. In addition, competition is intended to insure that the Government pays, and the contractor receives, reasonable prices.

The benefits of competition go beyond short-term price advantage. The competitive process provides a means for finding out what is available to meet a particular Government need and choosing the best solution. The most important benefits of competition can often be the improved ideas, designs, technology, delivery, or quality of products and services that potential contractors are motivated to produce or develop to obtain Government contracts. The chance of winning a Government contract or the threat of losing it provides a key incentive for greater efficiency and effectiveness. When competition is restricted, the Government loses opportunities not only to obtain lower prices but also to increase the productivity and the effectiveness of its programs.

PROCUREMENT REGULATIONS

Two statutes provide the foundation for Federal contracting and the authority for issuing procurement regulations. The Armed Services Procurement Act of 1947 (10 U.S.C. 2301 *et seq*.) applies to the procurement activities of the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard. Titles II and III of the Federal Property and Administrative Services Act of 1949, as amended (the Federal Property Act) (title 41 U.S.C. (1976)), generally govern the purchasing activities of civil agencies.

Detailed rules on purchasing supplies and services commercially are provided by the Defense Acquisition Regulation (DAR) for defense agencies and the Federal Procurement Regulations (FPRs) for civilian executive agencies. In addition, NASA is covered by its own procurement regulations. Other agencies have their own regulations which are intended to implement and supplement the DAR or the FPRs. However, such regulations must be consistent with the DAR or the FPRs, except where specifically authorized by statute.

DOD, the General Services Administration, and NASA, under the guidance of the Administrator for Federal Procurement Policy, Office of Management and Budget, are developing the Federal Aquisition Regulation to replace the DAR and the FPRs as the primary Federal procurement regulation. This is a major step toward the goal of a single Government-wide regulation.

PROCUREMENT METHODS

The two basic methods by which the Government procures supplies and services are (1) formal advertising and (2) negotiation. The law requires that Government agency purchases be made by formal advertising for bids whenever feasible and practicable. A formally advertised procurement consists of four distinct steps:

1. The issuing of an invitation for bids (IFB) which contains specifications describing the Government's minimum needs (and generally the publicizing of the prospective procurement).

2. The potential contractors' submission of sealed bids.

3. A public opening of the sealed bids at a specified time and place.

4. The award of the contract to the lowest responsible bidder whose bid is responsive, that is, conforms in all material respects to the requirements of the IFB.

Negotiation, on the other hand, involves a more flexible set of procedures and may be defined to include all methods of procurement other than formal advertising. Negotiated procurement may be either competitive or noncompetitive (sole source). In negotiated procurements, notices of the prospective awards are usually required to be publicized and potential contractors are given requests for proposals (RFPs) which state the Government's requirements and criteria for evaluating offers. After interested potential contractors are allowed sufficient time to prepare and submit offers, discussions (or negotiations) with those in the competitive range may follow. The competitor submitting the offer most advantageous to the Government, price and other factors considered, is awarded the contract. In negotiated noncompetitive procurement, the Government negotiates with only one source. In either case, negotiated procurement allows the Government to discuss the features of offers with the offerors, in contrast to formal advertising.

Exceptions to formal advertising: competition still required

The statutes set forth 15 exceptions to the use of formal advertising for civilian agencies (41 U.S.C. 252(c)) and 17 exceptions for defense agencies (10 U.S.C. 2304(a)) permitting contracting officers (C.O.s) to negotiate contracts. When a procurement office decides to use negotiated procurement, a written determination and findings (D&F) is required to justify its use under certain exceptions. 1/ However, the exceptions are very broad, and negotiated procurement is used extensively. For example, in fiscal year 1980, civilian and defense agencies both reported that they used negotiation in awards totaling more than 80 percent of their procurement dollars.

The use of an exception to the requirement for formal advertising is a separate issue from the requirement for competition. That is, if negotiation is used instead of formal advertising, agencies are still required to base awards on competition to the maximum extent practical. This distinction is not always clearly understood. 2/

MAGNITUDE OF NONCOMPETITIVE CONTRACTING

In fiscal year 1981, Federal contract awards of over $10,000 each totaled $125.7 billion, according to the Federal Procurement Data System, which is the official Federal procurement data base. About $69 billion (or 55 percent) of the total was categorized as "negotiated noncompetitive." Of this amount, about $54.2 billion (or 79 percent) was awarded by the Department of Defense and about $14.8 billion (or 21 percent) was awarded by Federal civil agencies. About $22.3 billion (or 32 percent) of the $69 billion was obligated by defense and civil agencies for new contract awards and the remaining $46.7 billion (or 68 percent) was for contract modifications, definitizations of initial letter contracts, 3/ and orders under the General

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1/Seven of the 15 exceptions to formal advertising as covered in the FPRs require D&Fs: numbers 2, 7, 8, 10, 11, 12, and 13. (See FPRs 1-3.201 to 1-3.215 for exceptions.) Ten of the 17 exceptions to formal advertising in the DAR require D&Fs: numbers 2, 7, 8, and 10 to 16. (See DAR 3-201 to 3-217 for exceptions.)

2/For example, a decision of the Comptroller General, Bethlehem Steel Corporation, B-202880, August 4, 1981, 81-2 CPD 91, states "by its terms 41 U.S.C. § 252 (c)(2) does not, in itself authorize a sole-source award. Rather the statute only justifies the use of negotiated procedures instead of formally advertised ones * * *. It does not relieve an agency of the requirement to conduct the procurement in a manner that will generate the maximum practicable competition. * * *"

3/An initial letter contract is a preliminary agreement authorizing the contractor to immediately begin manufacturing supplies or performing services. Such contracts should be used only when necessary in the interest of the Federal Government. Letter contracts must be definitized at a later date.

Services Administration's Federal Supply Schedule contracts or other existing contracts. In fact, only $16.5 billion (or 24 percent of the $69 billion) was categorized as awards which normally should be competed (that is, new "other negotiated noncompetitive" awards, which excludes noncompetitive Buy Indian, 1/ 8(a), 2/ and follow-on awards after competition). 3/

The low percentage of funds obligated for new sole-source contract awards masks their importance, because the other 68 percent of the funds was obligated, usually under essentially the same basic contracts, to contractors which were initially selected for new sole-source awards. These new actions are especially significant because they generally limit the Government to the use of the same contractor when contract modifications or follow-on contracts are necessary.

1/The Buy Indian Act (25 U.S.C. 47 (1976)) authorizes and encourages the Government to buy Indian goods, services, and labor to enhance tribal economic development. This act allows the Bureau of Indian Affairs to deal exclusively with Indian tribes or firms to purchase many goods and services that may be available through non-Indian sources.

2/The Administrator of the Small Business Administration is authorized under section 8(a) of the Small Business Act (15 U.S.C. 631), as amended, to help small businesses which are owned and controlled by socially and economically disadvantaged persons. The agency enters into procurement contracts with other Federal agencies and subcontracts the work to disadvantaged small businesses.

3/According to the Federal Procurement Data System's uniform reporting requirements, a "follow-on contract" is a new noncompetitive acquisition (whether by separate new contract or modification outside the scope of the original contract) placed with a particular contractor to continue a specific program, where placement was necessitated by prior decisions. An example is one that by force of circumstances had to be awarded to a contractor that was just completing a research and development contract in the same program. Other examples include contracts for support equipment, maintenance support, technical representatives, or spare parts that have been awarded without competition to the contractor that furnished the original equipment. A "follow-on after competition" is a follow-on award for which selection of the contractor at the beginning of the program was based on competition. (See p. 12, #3.)

SUGGESTIONS FOR REVIEWING CONTRACTS 1/

It is advisable for initial reviews of noncompetitive procurement decisions to focus on contract actions categorized as:

--"New awards" (either new definitive contracts 2/ or initial letter contracts, 3/ rather than modifications of or orders under existing contracts), because this will narrow the range of issues and circumstances being analyzed, simplify the evaluation, and properly emphasize these important initial decisions (as discussed in the previous section).

--"Other negotiated noncompetitive awards," 4/ which is one of the four categories of noncompetitive awards used in the Federal Procurement Data System. This category is preferable to the other three for the following reasons. The Governmnent purposely restricts competition relating to two of the other categories--8(a) and Buy Indian contracts--to achieve certain socioeconomic objectives. Contracts in the remaining category, noncompetitive follow-on awards after competition, are likely to be more difficult to evaluate in terms of the feasibility of competition.

Because of the large amounts of Federal funds involved and the potential for abuse, agencies will also want to consider having more experienced auditors conduct reviews which examine whether (1) follow-on contracts are being misused to fund work that should be competed for and (2) modifications to either competitive or noncompetitive contracts are being misused to fund work outside the scope of existing contracts that should be competed for. (See note 1, p. 49.)

Although large dollar contracts should be given significant attention, it is also advisable, at least periodically, to

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1/For guidance on the various strategies and alternatives for achieving competition on production contracts, see "Guidelines for the Application of Competition" (APRO 905) dated June 1982, by William B. Williams, Army Procurement Research Office, Fort Lee, VA 23801.

2/A new definitive contract is a new binding agreement for goods or services.

3/See footnote 3, p. 4.

4/As used in this guide, the term "sole-source contract" is synonymous with "other negotiated noncompetitive contract."

evaluate random samples selected from all contracts above the small purchase threshold.

Subcontracts are outside the scope of this audit guide.

In commenting on this guide, agency officials responsible for audit resource planning inquired about how long it would take to complete the work steps. GAO used essentially the same work steps as provided in chapter 3 in reviewing a random stratified statistical sample of about 200 contracts, each of which initially obligated over $10,000. To do this work, many different GAO evaluators in various regional offices and locations evaluated contracts of six major civil agencies. It took about 8 staff-days on the average for an evaluator to review each contract and complete the work steps, except that each evaluator was allowed (1) 10 staff-days for orientation and training on the background information and work steps and (2) several additional staff-days of learning time for each of the first two contracts reviewed. The 8-day average did not include supervisory, administrative, and report-writing time.

Some agency internal audit and inspector general officials suggested that they could also use certain individual sections of the guide in planning and programing other procurement work. GAO encourages any useful adaptations of the guide.

CHAPTER 2

CRITERIA FOR REVIEWING SOLE-SOURCE DECISIONS

This chapter provides background information on some of the most important criteria for evaluating sole-source decisions. To put this information in perspective, we have also summarized our findings, and included examples, from our most recent reviews of defense and civil agencies' sole-source contract awards.

MANY UNWARRANTED SOLE-SOURCE DECISIONS

Two fairly recent GAO reports based on statistical samples of new sole-source contracts showed that major defense and civilian agencies frequently had not based their contract awards on competition to the maximum extent practical, though required by Federal regulations. A July 29, 1981, report, "DOD Loses Many Competitive Procurement Opportunities" (GAO/PLRD-81-45), stated that competition would have been feasible on 25 (or 23 percent) of the 109 new DOD sole-source contracts reviewed. We estimated that DOD had lost opportunities to obtain available competition on about $289 million in new noncompetitive contract awards during fiscal year 1979. In an April 7, 1982, report, "Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting" (GAO/PLRD-82-40), we estimated that for the six agencies reviewed, competition would have been feasible on 32 percent of their new sole-source contracts. An additional 8 percent could have been competitive with better agency planning or management. These contracts represent an estimated $148.5 million, or 28 percent of the dollar value covered. Since the dollar amounts for both defense and civil agencies were initial contract obligations, in some cases they may have been substantially increased through later contract modifications.

These reviews showed that (1) many contracts had been awarded sole source unnecessarily and (2) specific actions should have been taken to insure that competition was obtained when available. We recommended specific actions to improve management controls and reduce the number of unwarranted sole-source procurements. (App. I lists selected GAO reports on Federal agencies' sole-source contract awards.)

MARKET RESEARCH: THE KEY TO REDUCING UNWARRANTED SOLE-SOURCE AWARDS

Before negotiating with only one source, agencies should maximize competition by conducting a market search for competitive sources, unless the evidence clearly demonstrates that competition is not feasible. Federal regulations state that, whenever property or services are to be procured by negotiation, proposals should be solicited from the maximum number of qualified sources, consistent with the nature of and requirements for the supplies and services to be procured.

The Comptroller General's decisions in bid protest cases have established the principle that Federal agencies should conduct a market search, to the extent reasonable in the circumstances, to insure that contract awards are based on competition, where feasible. (See p. 34 for some suggestions on identifying potential competitors. Also, see FPR 1-3.107(b), effective May 9, 1983.)

Our reviews of both civil and defense agencies have shown the lack of market research to be a problem. A related issue is the need for agencies to effectively use the Commerce Business Daily (CBD), a publication which gives industry notice of current Government contracting and subcontracting opportunities.

Preaward notices inviting competition should be publicized

Federal regulations require that, to increase competition, all proposed defense procurement actions of $10,000 and above and all proposed civilian agency actions of $5,000 and above be published promptly in the CBD, unless one of several specific exceptions applies. (These exceptions are listed in apps. II and III.) This requirement is based on the Small Business Act (15 U.S.C. 637(e) (Supp. III 1979)). The Director of the Federal Procurement Regulations Directorate, General Services Administration, which is responsible for the FPRs, interpreted this requirement to mean that, unless an exception applies, (1) a notice which invites competition on the prime contract must be placed in the CBD and (2) agencies were not in full compliance with the requirement when they publicized preaward synopsis notices which did not encourage or invite competition on the prime contract. The Director emphasized that the requirement is intended to promote the use of competition.

We believe that the market search, whether by a civil or defense agency, should include publicizing a preaward synopsis notice in the CBD inviting competitive offers on the specific prime contract award, unless a regulatory exception to the publicizing requirement applies. We also believe it is important that the notice be published on a timely basis.

We make an important distinction between (1) preaward notices in the CBD, which request proposals or invite inquiries intended to obtain competition on the prime contract, and (2) preaward sole-source notices, or intent-to-negotiate synopses, which do not. In our view, the latter type of notice, which is published for such worthwhile informational purposes as alerting potential subcontractors to subcontracting opportunities, does not encourage additional proposals on the prime contract. (For an example of a preaward sole-source notice, see app. IV.)

In the only indepth analysis (GAO/PLRD-82-40) we have performed on agencies' use of the CBD, we found that civil agencies reviewed publicized a preaward notice in the CBD inviting competition on only 2 percent of their prospective noncompetitive contract awards. They publicized only a preaward sole-source notice instead on 39 percent of the awards. No preaward notices at all were publicized for the remaining 60 percent of the sole-source awards and there was usually no valid exception to the requirement to publicize in these cases. We believe this resulted in potential competitors being effectively restricted from competing. Moreover, confusion existed among agency personnel regarding what type of notice fulfills the requirement to publicize prospective procurements. (The General Services Administration has clarified its requirements: see FPR 1-1.10, effective May 9, 1983.)

Sources-sought synopsis can effectively test the marketplace

In addition to the two types of preaward notices cited above, auditors may come into contact with a third type, the sources-sought synopsis notice.

The sources-sought synopsis, which has been used effectively by the Department of Health and Human Services, is designed to determine whether a proposed noncompetitive procurement is justifiable. The Department's procurement regulations (HHSPR §3-3.5303) state:

> "* * * If the contracting officer or the approving official concludes that support offered to justify a noncompetitive procurement is not convincing, or where there is some unresolved doubt, a sources sought synopsis should be issued to test the marketplace. * * * The sources sought synopsis does not permit potential sources to request solicitations and, therefore, is merely an opportunity for the marketplace to indicate its interest in submitting bids, offers or quotations * * *. If there is only one source identified as a result of the sources sought synopsis, this data may be used to support a justification for noncompetitive procurement. As each justification for noncompetitive procurement is reviewed * * * the reviewer should ask: why the procurement cannot be competed, are there sufficient grounds for excluding all other actual or potential offerors, [and] what action can be taken to obtain competition * * *?"

While stating that sole-source procurement is justified when only one source can meet the contract requirements, the regulations stipulate that the existence of one source (1) should be a matter of fact, not a matter dependent on the relative and limited knowledge of the project or contracting officers, and (2) may not be used to justify a noncompetitive procurement before testing the marketplace by issuing a sources-sought notice. One advantage of using a sources-sought notice is that it tests the market before an RFP is prepared, so that unnecessary effort can be avoided if only one source is identified.

If other agencies followed this procedure whenever there was a question of the availability of competition, they not only would greatly increase their chances of avoiding unnecessary sole-source awards but also could obtain strong evidence for sole-source procurement when they did not identify potential competitors. 1/ (For an example of a sources-sought synopsis, see app. V or FPR 1-1.1003-7(b)(7) and (b)(12).)

NEED FOR GUIDANCE ON WHAT CONSTITUTES A VALID SOLE-SOURCE JUSTIFICATION

The DAR and the FPRs 1/ have provided little guidance on what justifies a sole-source decision. However, GAO, through Comptroller General's decisions in bid protest cases 2/ and other legal opinions, has established or approved the basic principles for making these determinations.

Valid justifications

GAO accepts the following reasons as valid justifications for defense or civil agencies to contract noncompetitively (from sources outside the Federal Government) when the facts and circumstances substantiate an agency's claims:

--The agency has statutory authority to award the contract noncompetitively. (However, agency officials sometimes incorrectly claim this authority because they mistake authority to award negotiated contracts for authority to award noncompetitive contracts.)

--The Government's need for a product or service is so urgent that there is not enough time to obtain competition. That is, a serious emergency will not permit the delay inherent in obtaining competition. Urgency in

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1/In response to our report, GAO/PLRD-82-40 cited above, the General Services Administration has amended the FPRs, effective May 9, 1983, to provide for the use of sources-sought synopses (FPR 1-1.1003-3) and to set forth specific guidance on what constitutes a valid justification for noncompetitive procurement (FPR 1-3.107(a).)

2/The Comptroller General, as head of GAO, renders legal decisions when an interested party, such as an individual or a firm doing business or seeking to do business with the Government, protests against the award of a contract in accordance with GAO regulations (4 C.F.R. Part 21, 1982). (See also FPR 1-2.407-8.)

itself, however, does not necessarily justify a noncompetitive decision. A search for other sources, to the extent reasonable in the circumstances, is required. 1/ (See p. 62, app. VI.)

--The sole-source justification demonstrates there is a reasonable basis for concluding that only one contractor is capable of and interested in meeting the Government's minimum requirements (only those features which are essential to meeting the Government's needs). (See p. 61, app. VI.) This may include situations in which:

1. There is existing equipment and only one source can satisfy the Government's legitimate need for an item compatible with it. However, if other sources can modify or adjust their products to produce acceptable items, they must be given the opportunity to compete. For automatic data processing requirements, see FPR 1-4.1109-12. (See also p. 65, app. VI.)

2. The agency head determines that it is in the public interest to procure technical equipment or parts which require standardization and interchangeability and, in addition, agency officials have a reasonable basis for concluding that (a) only one source can provide such standardization and interchangeability and (b) it is neither practical nor economical to establish more than one source. These criteria shall not be used for initial procurement of equipment and spare parts which ultimately will be standardized or for the purpose of arbitrarily selecting the equipment of certain suppliers. (See p. 66, app. VI.)

3. A follow-on award must be directed to a specified source because it is not feasible to obtain competition for follow-on procurements. In such a case, it must be demonstrated that a noncompetitive award is necessary to avoid (a) duplication of costs to the Government for the property or service being procured (that is, a substantial investment of some kind would have to be duplicated at Government expense by another source entering the field and because of the magnitude of these costs, recovering them through competition would be highly unlikely) or (b) unacceptable delays in accomplishing the agency's mission objectives. The fact that the Government would

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1/The interest of the Government is not well-served when urgency is caused by lack of proper procurement planning, a defective acquisition strategy, or unnecessary delays in decisionmaking.

incur some costs by changing contractors is not, in and of itself, a sufficient reason for noncompetitive procurement.

--Data such as drawings or other specifications needed for competition is not available and there are no alternative ways of obtaining competition, such as redescribing the requirement in terms of function or performance required. (However, we believe the agency is responsible for (1) avoiding such noncompetitive situations by making sure that adequate data is available for competition or (2) demonstrating that obtaining such data is not in the Government's best interests.) (See p. 63, app. VI.)

--The Government needs to award the contract to a particular source for creation or maintenance of an essential industrial capability or for industrial mobilization. 1/ (See p. 64, app. VI.)

--The terms of an international agreement or the directions of any foreign government reimbursing the executive agency for the cost of procuring property or services being purchased for such government require a noncompetitive contract. 2/

--Disclosure to more than one source of the property or service to be obtained would jeopardize the national

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1/This exception is adopted from the Armed Services Procurement Act (10 U.S.C. 2304 (a) (16)), although its focus has been narrowed to justify only noncompetitive procurements. It is an approach advocated by defense experts to address the problem of the deteriorating U.S. defense industrial base. The Office of Federal Procurement Regulations, General Services Administration, has concluded that this exception to the requirements for competition relates essentially to defense, rather than to civil, agency procurements (under the Federal Property and Administrative Services Act of 1949).

2/This exception deals with two separate situations. The first situation in which noncompetitive procurements are justified is when an international agreement is made, e.g., one between two North Atlantic Treaty Organization countries, to purchase a weapons system from one source. The second situation involves U.S. procurements of goods and services to be sold in another country. In this case, the foreign government chooses the contractor. The Office of Federal Procurement Regulations, General Services Administration, has concluded that this exception to the requirements for competition relates essentially to defense, rather than to civil, agency procurements (under the Federal Property and Administrative Services Act of 1949).

security. This exception is to be used only under very limited circumstances and is to be approved at a high agency level.

In addition, Federal regulations do not require competition on procurements of $500 or less. (See app. VII, note (a).)

Unacceptable sole-source justifications

According to the Comptroller General's decisions, each of the following reasons is unacceptable, in and of itself, as a basis for making a noncompetitive award:

--Unsolicited proposals. (See pp. 16-17 and p. 67, app. VI.)

--Administrative convenience of the Government. (See p. 68, app. VI.)

--Government officials' belief that the sole-source contractor can provide the product or service at the lowest cost. (See p. 69, app. VI.)

--The proposed sole-source contractor being either a nonprofit organization, a tax exempt entity, or a volunteer citizens group. (See p. 70, app. VI.)

--Patented rights or proprietary information. (See p. 71, app. VI.)

THE JUSTIFICATION FOR NONCOMPETITIVE PROCUREMENT

When a proposed procurement appears to be noncompetitive, the C.O. is responsible for insuring that competitive procurement is not feasible. This should include examining the reasons for the procurement being noncompetitive. 1/

Agencies should provide written justification for all proposed noncompetitive procurements. In some cases, the justification is part of the D&F permitting negotiations; frequently it is a separate statement. However, sometimes agency officials neglect to prepare a sole-source justification.

The requesting program office usually prepares the justification and submits it to the C.O. for approval. The justification should adequately document why a sole-source procurement is necessary.

In our reviews of defense and civil agencies, we often found that approved sole-source justifications were inadequate.

1/See app. VII, note (c).

Auditors should question and carefully analyze justifications which claim that a proposed contractor is "the only known source" or is "unique to the best of our knowledge" or which use similar wording without documenting an adequate market search. Moreover, sole-source documentation may include jargon and technical terminology. The auditor should not allow this to cloud the real issue: Does the evidence adequately support a noncompetitive procurement?

REVIEW OF THE C.O.'S SOLE-SOURCE DECISION

The FPRs and the DAR state that, except for procurement of utility services and educational services from nonprofit institutions, contracts of more than $10,000 shall not be negotiated on a noncompetitive basis without prior review at a level higher than the C.O. to insure that

--negotiated procurements are awarded competitively to the maximum extent practical,

--competitive procurement is not feasible on proposed noncompetitive procurements, and

--subsequent noncompetitive procurements are avoided, whenever possible, after previous sole-source procurement.

The NASA regulations have a similar provision but use a higher dollar threshold. (See app. VII, note c.)

Agencies do not always comply with this requirement. In our review of civilian agencies' sole-source procurements, we concluded that most of the sole-source awards in our statistical universe which were not exempted from competition either (1) should have been reviewed by a higher level official or sole-source review board in accordance with this requirement but were not or (2) were not adequately reviewed. In many of the inadequate reviews, the reviewing officials accepted justifications for the sole-source awards that we demonstrated to be inaccurate. (See the section on market research on p. 8.)

INCLUDING ONLY THE GOVERNMENT'S MINIMUM REQUIREMENTS IN CONTRACT SPECIFICATIONS

Federal agencies need to insure that purchase descriptions, statements of work, and other forms of contract specifications are not unnecessarily restrictive. The procurement regulations state that purchase descriptions, as well as other forms of specifications, must accurately reflect the Government's minimum needs. Purchase descriptions should not specify features, such as dimensions, materials, or other characteristics, peculiar to the product of one contractor unless the user has determined in writing that

--those features are essential to the Government's requirements, and

--other contractors' similar products, which lack those features, would not meet the Government's minimum requirements.

However, past Comptroller General decisions have stated that "* * * where the legitimate needs of the Government can be satisfied from only one source, the law does not require that those needs be compromised to obtain competition." (Electronic Instrumentation Division, B-161700, Sept. 5, 1967.)

UNSOLICITED PROPOSALS

The Government's policy is to encourage the submission of unsolicited proposals. An unsolicited proposal, a written offer to do a proposed task under contract, is initiated by a prospective contractor and submitted to the Government without Government solicitation. 1/

The FPRs, the DAR, and the NASA procurement regulations state that unsolicited proposals

--are a valuable means by which unique or innovative methods or approaches from outside the Government can be made available to Government agencies for use in accomplishing their missions,

--should not be merely advance proposals for specific agency requirements which would normally be procured by competitive methods, and

--should be prepared independently of Government supervision.

These regulations also provide that, when a document qualifies as an unsolicited proposal, it "shall not be acceptable" if the substance:

> "(1) is available to the Government without restriction from another source, or (2) closely resembles that of a pending competitive solicitation, or (3) is otherwise not sufficiently unique to justify acceptance * * *." 1/

When procurement is intended and competition is feasible, the proposal should be returned to the offeror. Also, a favorable comprehensive evaluation of an unsolicited proposal is not, in itself, sufficient justification for a sole-source award.

1/See app. VII, note b, for regulations on unsolicited proposals.

Our reviews of defense and civil agencies have shown widespread noncompliance with these requirements. Federal agencies frequently did not obtain competition on contracts evolving from unsolicited proposals even though competition was feasible. When competition is feasible, the Government's minimum requirements and evaluation criteria should be incorporated into a formal solicitation, such as an RFP, in such a way that

--any proprietary information or unique ideas in an unsolicited proposal are not disclosed, 1/ and

--other potential offerors have an opportunity to compete equally.

We believe that market research on alternative sources and solutions can often be conducted without disclosing any proprietary information or unique ideas in the unsolicited proposal. However, competition is not always feasible, especially when truly unique and innovative ideas unavailable to the Government from another source have been submitted without solicitation by Government officials.

Another recurring problem was that agency officials did not identify the Government's minimum requirements for the contract which the unsolicited proposal was funded to satisfy (or the Government's problem that needed to be solved). The procurement regulations clearly require that, if others can solve the Government's problem or satisfy its need, the award be based on competition. The competition can be structured to emphasize either cost or technical factors through the evaluation criteria in the Government's RFP. Instead of using this approach and allowing all capable and interested sources an opportunity to compete, agency officials often adopted the unsolicited proposal as representing the Government's minimum requirements. As a result, contracts were awarded sole source unnecessarily. Moreover, by not using competition, the Government may have missed opportunities to obtain lower prices as well as to discover better ways of meeting its needs.

1/The Government should not transfuse the technical knowledge of one source to others. It should merely communicate its own needs as nonrestrictively as possible.

CHAPTER 3

THE WORK STEPS

Each section in this chapter is designed to help you gather specific information about the noncompetitive award. We suggest that you follow, as closely as possible, the structure and format of the work steps.

OVERVIEW

The following is a brief overview of this chapter:

--Special instructions for using this guide, which are self-explanatory.

--Sections A ("Contract Information") and B ("Other Information on the Contract") seek to obtain basic information on each contract reviewed.

--Section C ("Information on the Agency's Noncompetitive Decision") is important because it is intended to identify the reason(s) for deciding to award the contract noncompetitively. Each reason is examined in a later section.

--Section D ("Statutory Authority To Contract Noncompetitively") seeks to identify all contracts being reviewed which have been statutorily exempted from the requirement for competiton. Such contracts are exempt from most of the remaining work steps.

--Section E ("Problem/Need Identification, Search for Alternative Solutions, and the Chosen Solution") is intended to determine whether alternative solutions to the agency's need or problem which might have resulted in a competitive procurement were explored.

--Section F ("Government's Minimum Requirements") seeks to identify any unnecessarily restrictive requirements or specifications which limited competition.

--Section G ("Information on Time") is intended to help you systematically collect information on the sequence of events leading to the noncompetitive decision. This information is often essential for understanding and assessing the adequacy of the efforts to obtain competition or the validity of the noncompetitive justification.

--Section H ("Information on the Agency's Market Search") seeks to examine the agency's efforts to search the market for potential competitors. As noted in chapter 2, such market research is frequently the key factor in avoiding unnecessary noncompetitive awards.

--Section I ("Auditor's Independent Market Search for potential Sources") helps you make an independent market search to check the reasonableness of the agency's efforts described above. This independent effort can effectively demonstrate that potential competitive sources should have been given the opportunity to compete.

--Section J ("Analysis and Assessment of the Sole-Source Decision") is intended to help you assess each reason given for the noncompetitive award (except for statutory authority examined in section D). The results of all the previous sections should be used in completing those questions in section J which apply to the contract reviewed.

--Section K ("Injury to the Government") seeks to determine if the agency had a valid reason for avoiding the competitive process.

--Section L ("Advance Procurement Planning and Related Management Controls") is intended to examine the effectiveness of advance procurement planning procedures and related management controls which have often been causes of unwarranted noncompetitive decisions.

--Section M ("Efforts To Foster Competition Since Prior Sole-Source Awards") seeks to identify whether proper efforts have been made to avoid repeated noncompetitive contracts.

--Section N ("Various Time-Related Problems") seeks information on any time-related problems identified.

--Section O ("Documentation Problems and the Overall Assessment of the Validity of the Noncompetitive Decision") calls for an overall assessment of the noncompetitive decision, based on the information obtained in the previous sections, and seeks to identify documentation deficiencies.

--Section P ("Review of the Noncompetitive Decision at a Higher Level Than the C.O.") is intended to examine whether the noncompetitive decision was properly reviewed.

--Section Q ("Contract Modifications") seeks to obtain information on contract modifications.

--Section R ("Assessment of the Feasibility of Competition") provides for an overall assessment of the feasibility of competition on each contract.

--Section S ("Possible Causes of the Failure To Obtain Competition, as Required") is intended to identify the causes of the failure to obtain competition, when applicable.

--Section T ("Assessment of Whether a Contract Was the Appropriate Instrument") is intended to help you identify awards for which a contract was not the appropriate instrument. In some cases activities contracted for would probably not have been funded if the appropriate assistance procedures had been used.

--Section U ("Other Problems") seeks comments on other problems identified.

SPECIAL INSTRUCTIONS

In planning assignments, you should (1) check whether agencies have effective systems for minimizing sole-source procurements, which include tracking progress in reaching appropriate objectives, and (2) analyze available historical trend data on noncompetitive procurements.

We recommend that you thoroughly familiarize yourself beforehand with the kind of information requested in the audit guide. This will save time once the audit begins.

We suggest you complete the work on each noncompetitive contract by following these procedures in the order given:

1. Review the contract file and answer those work step questions that can be fully answered.

2. Interview the C.O. (or other appropriate procurement personnel).

3. Interview the technical and program personnel.

4. Interview potential competitors that may have competed for the procurement if the opportunity had been available.

5. Analyze the collected information. (A thorough and professional analysis is needed. Decisionmakers should be held to a standard of acting reasonably in the circumstances. It is not our intent to encourage needless "second-guessing" in situations where this standard has clearly been met.)

6. Answer all the applicable remaining questions, including whether competition was feasible.

Please note that for many noncompetitive contracts, these procedures can be performed fairly quickly and easily if you are familiar with the work steps and their interrelationships. For example, this will be true whenever at least one of the reasons for awarding the contract noncompetitively (see question C. 3) is clearly valid. When a particular question does not apply, indicate "N/A." Responses to questions such as "Is there evidence * * *?" or "Did you find evidence * * *?" should be based not only on the review of the contract file, but also on the results of interviews with agency officials, etc. Be sure to provide your assessment of the evidence on those questions for which it is requested, such as in section J.

Answer all "tabulatable" or structured answers, such as "N/A," "yes," "no," etc., by circling the correct number.

The structured questions which follow will enable you to systematically evaluate noncompetitive contracts selected for review. In addition, they will aid in collecting standardized data on a group of sole-source contracts. This feature should be especially useful on reviews which include random statistical samples, because it will facilitate making projections of significant individual findings to (1) an entire statistical universe, (2) organizational units, and/or (3) individual strata based on contract dollar value ranges. Such projections can provide a representative picture of what is happening on an agency's noncompetitive awards and a sound basis for suggested changes to correct significant problems identified. (For more information on sampling from a computerized Federal procurement data base, see pages 8 and 9 and chapter 5 in our April 7, 1982, report (GAO/PLRD-82-40)).

A. CONTRACT INFORMATION

Most of the questions in this section are designed to record information from the contract file, primarily the contract face sheet. (Note: GSA Standard Form 26, dated July 1966, and GSA Standard Form 33, dated March 1977, are used by civil agencies and DOD, respectively.) You may want to copy the contract's cover sheet and other essential sections.

Before starting to collect any data, obtain a copy of the agency's individual procurement action report for the contract action being reviewed. This is the input form for the agency's computerized procurement reporting system as well as the Government-wide Federal Procurement Data System. This form provides information on the product or service procured, extent of competition, type of contract used, type of business receiving the award, and other important information. Also, be sure to verify the accuracy of the data on that form to the contract file and discuss any disrepancies with appropriate procurement personnel. (See GAO/PLRD-82-40, p. 8 and ch. 5, for an example of the results of this effort.)

A.1 Contract number ______________________

A.2 "Effective date" per contract ______________________

A.3 Action date ______________________
(The action date of the contract is the date a mutually binding agreement was reached. That is the date of the written obligation of funds. As a general rule, this occurs when a notice of award or a fully executed document is manually delivered or placed in the mail to the contractor. In the case of letter contracts, the date to be entered is the date when the signed copy is received from the contractor if the contractor signed after the contracting officer. For contracts awarded in one fiscal year and not effective until the next because they are contingent on the availability of funds or for other reasons, the date shall be the date the funds are obligated. (See Federal Procurement Data System Reporting Manual, Oct. 1982, p. 16.)

A.4 (a) Contract issued by ______________________
(b) Payment by (if different from "issued by") ____________

A.5 Contractor (and address) ______________________

A.6 Amount obligated at the time of the award $______________
(Note: An obligation of an appropriation occurs when a legal liability is incurred to pay funds from the appropriation. You may have to check with appropriate accounts

payable personnel to make this determination. (See app. IX.)

A.7 Original total contract amount (This may or may not be the same as A.6.) $__________

A.8 Total number of contract modifications (See G.21.) ________

A.9 Net contract amount, including mods (A.6 or A.7 plus the net amount involved in the mods cited in A.8) $__________

A.10 Compare the sole-source price with the most recent prior and/or first following competitive price(s) for the same product or service (and give action dates). In making the comparison, consider such factors as unit price (if appropriate) or total price, the number of items procured, the period of performance, and urgency or other special factors which varied from one contract situation to another. Write "N/A" if a valid comparison cannot be made.

Sole-source price, this contract $________
Competitive price, prior contract 1/ $________
Competitive price, following contract 1/ $________

Was this the same contractor?
1. Yes.
2. No.

A.11 Contracting officer and phone number

B. OTHER INFORMATION ON THE CONTRACT

B.1 Planned agency user of the deliverables (Identify organizational unit, contact person, position, etc.)

B.2 Government technical and/or contracting officer's representative (Identify the person's name, position, organization, and phone number.)

B.3 Government contract negotiator (name and phone number)

C. INFORMATION ON THE AGENCY'S NONCOMPETITIVE DECISION

C.1 As background information, give the number and briefly summarize the exception to the requirement for formal advertising used. The reason cited for not using formal advertising should be examined because it may be the same as, and should be consistent with, the rationale for not using competition, covered in question C.2. However, the use of an exception to the requirement for formal advertising is a separate issue from the requirement for competition. In other words, if negotiation is used instead of formal advertising, agencies are still required to base awards on

1/Also, obtain the contract number of the competitive contract.

competition to the maximum practical extent. This distinction is not always clearly understood. If 41 U.S.C. 252 (c)(10) or 10 U.S.C. 2304 (a)(10) was used, give the subcategory that applies. (Obtain a copy of the D&F relating to the exception to formal advertising.) (See either FPR 1-3.201 to 1-3.215, DAR 3-201 to 3-217, or NASA PR 3.201 to 3.217 for exceptions to formal advertising.)

C.2 (a) Obtain a copy of the justification for noncompetitive procurement, which should contain the agency's rationale for negotiating with only one source. If the contract file does not contain a written sole-source justification, ask agency officials to explain why competition was not feasible.

C.2 (b) Carefully analyze and summarize the justification (written or oral) given to support the sole-source decision. The justification, which is critically important since it provides the basis for your analysis of the sole-source decision (see sec. J), should clearly demonstrate (with verifiable facts) why competition was not legally required or feasible. For example, if agency officials claim that only one source was capable of meeting the Government's needs, the justification should explain how this was known and what efforts were made to identify potential competitors. Specifically, Comptroller General decisions require a market search to the extent reasonable in the circumstances. (See sec. H.) (Before completing this question, become familiar with the reasons which may constitute valid justifications for noncompetitive procurement. (See ch. 2, pp. 11 to 14.))

C.3 The following categories indicate some of the types of arguments agencies have used in either justifying or trying to justify their noncompetitive procurements. Regardless of whether the agency used these exact words, check all of the following which the agency claimed as justification for this sole-source award. Include all official agency justifications--those obtained in interviews as well as those documented in the contract file. Under "other," identify any other types of reasons the agency used. (See ch. 2, pp. 11 to 14, for a more complete explanation of these issues.)

___ a. Legal authority exists to award the contract noncompetitively. (See sec. D.)

___ b. The Government's need is so urgent there is not enough time to obtain (even limited) competition. (See J.1.)

___ c. One contractor has unique capabilities to meet the Government's minimum requirements (or only one source is interested). (See J.2.)

___ d. Compatibility with existing equipment is required. (See J.3.)

___ e. Standardization and interchangeability is required. (See J.4.)

___ f. Placement of a follow-on contract with the contractor previously selected is necessary. (See J.5.)

___ g. The proposal was unsolicited. (See J.6.)

___ h. Data needed for competition is lacking. (See J.7.)

___ i. The Government needs to award the contract to a particular source for creation or maintenance of an essential industrial capability or for industrial mobilization. (See J.8.)

___ j. Disclosure to more than one source of the property or service to be obtained would jeopardize national security. (See J.9.)

___ k. An international agreement or a foreign government requires noncompetitive procurement. (See J.10.)

___ l. Other(s). (Explain each one.) (See J.11.)

D. STATUTORY AUTHORITY TO CONTRACT NONCOMPETITIVELY

Some procurements can be made noncompetitively because a statute allows the agency to do so. If the agency claims statutory authority for a noncompetitive procurement, determine the legitimacy of this claim to avoid unnecessary audit work. Some claims of statutory exemption from competition are not valid. If statutory authority is used to justify a sole-source award (1) obtain a copy of the statute or public law cited by the agency, (2) review it to determine if it does exempt the procurement from competition (and not just from formal advertising, see ch. 2, p. 11), and (3) submit a copy to your legal staff for their opinion.

D.1 Does the agency claim that the procurement was statutorily exempted from competition?
1. Yes. (If so, C.3 (a) should have been checked.)
2. No. (If "no," check "N/A" in D.2 and D.3 and go to sec. E.)

D.2 Provide the statutory citation which agency officials claim permits noncompetitive procurement.
1. N/A, statutory exemption not claimed.
2. Statute claimed is (for example, Indian Self Determination and Education Assistance Act, Public Law 93-638

(25 U.S.C. 450 et seq)). (Include a copy of the statute or public law in the workpapers.)
Name________________________
Citation________________________
Agency official citing the statute________________

D.3 Does the statutory authority exempt the procurement from competition?
1. N/A, statutory exemption not claimed.
2. Yes, the statute does exempt the procurement from competition.
3. No, the statute does not exempt the procurement from competition.

(Note: If D.3 is answered "yes," then all the following work steps, except 0.3 through 0.5, R, and T, are not applicable on that contract.)

E. PROBLEM/NEED IDENTIFICATION, SEARCH FOR ALTERNATIVE SOLUTIONS, AND THE CHOSEN SOLUTION

The purpose of this section is to (1) identify and define the agency's mission deficiency, problem, or need requiring a solution, (2) determine if alternative solutions were explored, and (3) determine what product or service was purchased. This will enable you to more objectively judge whether the agency's decision to procure noncompetitively was reasonable and whether competition between different solutions or approaches might have been possible. The agency search for sources is discussed in section H.

Problem/need identification

E.1 What was the agency's mission deficiency, need, or problem which required a solution? (Also, specify whether the need was for research, for another service, or for a product.)

E.2 Who identified the deficiency, need, or problem? (Name, position, agency or contractor. If no specific person, explain.)

Search for alternative "solutions" (i.e., the kinds of products, supplies, services, etc., that could satisfy the need)

E.3 Did the agency expore any alternative solutions to the problem or need before awarding this contract? (Note: This procedure is most appropriate before the contract award process, such as in the requirements definition phase of an acquisition and early in the solicitation phase. Also, the search for new solutions is appropriate when the acquisition involves receipt and evaluation of technical proposals.)

1. N/A. (Check "N/A" only if the procurement was statutorily exempt from competition; see sec. D.)
2. Yes. (Explain.)
3. No. (Explain.)

E.4 If "yes" in E.3, who in the agency searched for alternative solutions (person, position, and organization)?

E.5 What was the chosen solution in terms of what was bought? (Check the contract statement of work and sole-source justification for a concise description, and summarize the deliverables required by the contract.)

E.6 Is there evidence that there were any alternative solutions which were not adequately explored and which might have resulted in a competitive procurement? (Note: In reviews of more complex systems, evidence of an alternative solution might be found at system test centers or in the organizations that use, or provide logistics support for, the systems.)

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

E.7 Is there evidence either that the need is not valid or if the need is for other than research that the chosen solution will not satisfy the need? Explain. (Note: Normally, time limitations on reviews of the feasibility of competition will not permit extensive work on this issue. However, if evidence of this type is discovered, note it and discuss it with appropriate officials.)

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes. (Explain.)
3. No.

F. GOVERNMENT'S MINIMUM REQUIREMENTS

After determining the agency's chosen solution in terms of what was bought, identify the Government's minimum requirements. This will assist in determining the reasonableness of the agency's sole-source decision and analyzing whether the agency eliminated competition through specifications or other requirements which were unnecessarily restrictive.

"Minimum requirements" includes only those features which are essential to meeting the Government's need. In the case of supplies, "requirements" covers the performance or use of the end item needed. In the case of services, "requirements" includes the essential skills, talents, or expertise needed to accomplish a mission or task. The minimum requirements must be as unrestrictive as possible, consistent with the legitimate needs of the Government. (See app. VIII for more information on minimum requirements.)

F.1 What are the procurement's "minimum requirements"? (Cite the evidence which verifies these minimum requirements.)

F.2 Based on your analysis, as well as discussion with knowledgeable agency personnel and potential competitors (see sec. I), is there evidence that the specification, purchase description, or statement of work was unnecessarily restrictive and would tend to eliminate competition? (Notes: (1) Determine the origin or source of the Government's specifications or other statement of its minimum requirements because if a single contractor's product or service description was used, this may help identify those situations in which overly restrictive features were used. (2) For some procurements this question may be extremely complex. The time limitations on reviews of the feasibility of competition will not normally permit a time-consuming examination of this issue. However, some problems of this type can be identified fairly quickly. Also, your independent market search (sec. I) should often provide valuable input quickly on whether and in what ways specifications may be unnecessarily restrictive. Carefully cross check and analyze this information. (3) Also, see question J.1(c).)

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes, there is such evidence as explained below.
3. No, there is no such evidence.

G. <u>INFORMATION ON TIME</u>

The following questions are designed to identify the important dates of the procurement from problem identification to contract completion. (Enter "none" if no action was taken. Enter "N/A" if the procurement is statutorily exempt from competition.)

G.1 When did the agency identify the need, mission deficiency, problem, etc., which required a solution? (A specific date may not be available.) Date ______________

G.2 After the problem was identified, when was the decision made to search for a solution? (Do not use the purchase request date.) Date ______________

G.3 What was the time period during which the search for a solution was conducted? — From date ________ To date ________

G.4 When did procurement planning begin? (See sec. L and app. X on procurement planning.) — Date ________

G.5 Purchase request (form or memorandum) date. (Use the date indicating when the request was initiated by the program office or user.) — Date ________

G.6 The "needed" or requested delivery date cited on the purchase request (not the date of anticipated contract award.) — Date ________

G.7 When did the procurement office receive the purchase request document? — Date ________

G.8 Date of the preaward notice inviting bids, proposals, or inquiries (intended to obtain competition on the prime contract) in the CBD. — Date ________

G.9 Date of a preaward notice in any other publication intended to invite competition on the prime contract. — Date ________

G.10 Date of a preaward intent-to-negotiate (sole-source) notice placed in the CBD. — Date ________

G.11 Solicitation issuance date (RFP date, etc.). — Date ________

G.12 Date the solicited proposal or bid was received. — Date ________

G.13 Closing date for receipt of offers. — Date ________

G.14 If this award resulted from an unsolicited proposal, date the unsolicited proposal was received. — Date ________

G.15 D&F date (relating to the exception from formal advertising). — Date ________

G.16 Date of the justification for noncompetitive procurement. (Use the earliest date, such as the requesting official's signature date.) — Date ________

G.17 Date the justification for noncompetitive procurement was approved by an official at a level higher than the C.O. (Use the date the final review and approval were completed.) Date ______________

G.18 Negotiation period a. Start Date ______________

b. Finish Date ______________

G.19 Date of contract award. Date ______________

G.20 Date of notice of contract <u>award</u> in the CBD (FPR: If award exceeded $25,000. DAR and NASA: If award exceeded $100,000.) Date ______________

G.21 Date of the latest known contract modification. (See A.8.) Date ______________

G.22 Delivery date(s) a. Original contract Date ______________

b. Current estimate (or actual) Date ______________

G.23 Completion date a. Original contract Date ______________

b. Current estimate (or actual) Date ______________

G.24 Other important dates (Explain.) (For example, include the date(s) of any precontract cost authorization; also, examine whether it resulted in a premature commitment to noncompetitive procurement. If so, see sec. N.) Date ______________

H. INFORMATION ON THE AGENCY'S MARKET SEARCH

As noted in question C.2, the agency's market search can be an essential factor in demonstrating whether sole-source procurement is appropriate. If agency officials based their noncompetitive decision on the reasons cited in C.3(c) through (g), then the reasonableness of the market search in the circumstances is especially important. It will sometimes also be important on reasons C.3(b) and (h).

The questions in this section are designed to (1) identify what efforts, if any, the agency made to search for other sources and (2) determine the reasons agency officials gave for their actions. Be sure to ask officials if complete evidence is not provided in the contract file. (See ch. 2, p. 8, for background information.)

Questions H.1 through H.6 deal with the requirement to publicize prospective awards in the CBD. All proposed defense procurement actions of $10,000 and above and civil actions of $5,000 and above should be published promptly in the CBD, unless specifically exempt. (See apps. II and III.)

<u>Preaward CBD notice</u>

H.1 <u>Was a preaward notice</u>, <u>which invited competition</u> on the prime contract, placed <u>in the CBD?</u> (Note: a CBD preaward intent-to-negotiate (sole-source) notice does <u>not</u> satisfy this requirement. (See ch. 2, p. 9.)
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes. (Note: Check "N/A" in H.2, H.3, and H.4.)
3. No.

H.2 If H.1 is "no," circle one or more of the following to indicate which exception category, if any, was claimed. (See apps. II and III for the appropriate DAR and FPR exception categories.) Circle "none" if agency officials did not claim an exception to the requirement for placing a preaward notice in the CBD inviting competition on the prime contract.
1. N/A
2. DAR 1 2 3 4 5 6 7 8 9 10
3. FPR 1 2 3 4 5 6 7 8 9 10
4. NASA 1 2 3 4 5 6 7 8 9 10
5. None

H.3 If one or more of the exception categories was claimed, analyze and assess whether at least one of them was appropriate and explain why.
1. N/A.
2. Yes, at least one was appropriate.
3. No, none were appropriate.

H.4 If agency officials did not <u>claim</u> an exception, in your assessment is there at least <u>one</u> exception that is appropriate? (Note: Answer "N/A" if an exception was claimed in H.2.)
1. N/A.
2. Yes, the exception that is appropriate is:
   FPR exception_______________, or
   DAR exception _______________, or
   NASA exception_______________.
3. No.

H.5 Was a preaward intent-to-negotiate (sole-source) notice placed in the CBD?
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

H.6 What is the agency's reason for not placing a preaward notice inviting competition on the prime contract in the CBD? (Check all that apply.)

1. N/A, the procurement was statutorily exempt from competition.
2. N/A, the agency <u>did</u> place a notice inviting competition in the CBD. (<u>Check</u> this response only if H.1 was "yes.")
3. The agency claimed one of the exceptions to the requirement for publicizing in the CBD.
4. Agency officials mistakenly believed that an exception from the requirement for formal advertising justified a sole-source contract.
5. Agency official(s) believed that the preaward intent-to-negotiate (sole-source) notice which was placed in the CBD fulfilled the requirement to publicize.
6. Agency official(s) believed no preaward notice inviting competition was necessary because they decided competition was not feasible.
7. Agency official(s) failed to publicize due to their heavy workload.
8. Agency official(s) failed to publicize due to administrative oversight.
9. Other. (Explain.)

<u>Postaward CBD notice</u>

H.7 <u>Awards of all unclassified</u> contracts to be performed in whole or in part within the United States, exceeding $25,000 for civil agencies and $100,000 for DOD and NASA are required to be publicized in the CBD. Was the award publicized in the CBD?

1. N/A. (Explain.)
2. Yes.
3. No.

<u>Other information on the agency's market search</u>

H.8 <u>Was any other market research performed before</u> approval of the noncompetitive justification? (Note: "Market research" includes (1) telephoning or otherwise contacting more than one potential contractor to discuss their capability and/or interest in meeting the Government's needs, (2) sending more than one contractor a copy of the RFP before award, or (3) placing notices inviting inquiries in technical journals, magazines, etc.)

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes. (Explain.)
3. No.

H.9 Based on contract file documentation and discussions with agency officials and <u>excluding</u> inquiries from the sole-source contractor, how many inquiries relating to this contract award did the agency receive? (Note: Inquiries may be a response to a preaward intent-to-negotiate (sole-source) notice or any other preaward activities.)

1. N/A (only if the procurement was statutorily exempt from competition).
2. None.
3. One or more. (Give details. Analyze whether the inquiries indicate the existence of unnecessary restrictions on competition.)

H.10 If H.9 is "#3," did any inquirors indicate a willingness to do the work (disregarding the issue of whether the firm is "responsible")?

1. N/A.
2. Yes.
3. No.

H.11 How many other bids or proposals, excluding the one submitted by the sole-source contractor, did the agency receive on this award?

1. N/A (only if the procurement was statutorily exempt from competition).
2. None.
3. One or more. (Explain why this did not result in a competitive award.)

H.12 Identify when agency officials stopped considering competition (by asking the C.O. and technical or program officials).

H.13 Based on all of the above, as well as the results of section I, assess the adequacy of the agency's market search (or lack of a market search) and categorize it as (1) "adequate," (2) "inadequate," or (3) "other." (Note: "Adequate" means "reasonable in the circumstances" for insuring that competition was not feasible. Thus, for example, a truly urgent procurement could justify a less extensive search.) Explain why the category selected is appropriate.

1. Adequate.
2. Inadequate.
3. Other. (Explain.)

I. AUDITOR'S INDEPENDENT MARKET SEARCH FOR POTENTIAL SOURCES

This section is important because it is difficult to demonstrate the feasibility of competition without identifying other sources capable of meeting the Government's minimum requirements.

The purpose of this section is to detail the means for conducting an independent market search by (1) identifying potential competitors and determining whether they would have (or may have) responded to a solicitation and (2) obtaining additional assurance that the sources which claimed to be interested and capable could, in fact, have met the Government's minimum requirements. (Notes: (1) A contractor's statement that it could meet the Goverment's minimum requirements should not be accepted as true without obtaining additional assurance confirming its validity; see section on "additional assurance" below. (2) Be careful to insure that potential alternative sources are not falsely led to believe either that the procurement was improper or that the Government will be obligated for the costs they incur in responding to the market search.)

Identifying potential competitors

Consider the following in identifying potential competitors.

1. Agency bidders lists or General Services Administration schedules.
2. Parts catalogs, telephone directories, yellow pages.
3. Standard registers of suppliers.
4. Suggestions of agency officials, including appropriate procurement, program, and technical personnel.
5. Suggestions of other contractors; trade and professional organizations; or independent experts, such as those at other agencies and universities.
6. Information available by Federal product and service codes from computerized procurement data systems.

What to communicate to potential competitors

The auditor's market search should communicate to potential competitors (1) the reason for the search, (2) the agency's mission deficiency, etc., needing a solution, (3) the minimum requirements, which might be the contract statement of work, and (4) question I.2. (Normally this can be effectively done by telephone. If the minimum requirements are too complex to handle by phone, send the necessary information and follow up by phone later.)

Market search for a contract
evolving from an unsolicited proposal

The same basic information should be communicated to potential competitors when the award evolved from an unsolicited proposal. However, any proprietary information or unique ideas, which were contained in the unsolicited proposal, may not be disclosed. (See FPR 1-4.911, as revised, effective May 9, 1983.)

Additional assurance

To gain additional assurance that the potential competitor(s) could have met the minimum requirements, obtain appropriate agency officials' views on whether (1) the competitive source(s) identified could have met the minimum requirements and (2) competition was feasible. Appropriate officials normally include contracting and requesting officials. In some cases, you might also need the assistance of other program or technical personnel, such as engineering or production technicians, in determining or confirming the validity of alternative sources. If agency officials involved in the procurement maintain that the competitive sources identified could not have met the Government's minimum requirements, analyze and assess the validity of their reasons.

Alternative ways of gaining reasonable assurance that competition was feasible include:

--Agreement by knowledgeable agency officials, other than those involved in the award, that at least one of the alternative sources could have met the minimum requirements.

--Confirmation by knowledgeable independent individuals or experts outside the agency of the alternative source's ability to meet the minimum requirements.

--Presentation of convincing evidence (such as prior experience) by the alternative source of its ability to meet the minimum requirements.

I.1 Were you able to identify any potential sources that would have been able to meet the Government's minimum requirements?

1. N/A (only if the procurement was statutorily exempt from competition.)
2. Yes. 1/
3. No. (If "no," check "N/A" in I.2 through I.5.)

I.2 If "yes," does at least one of the sources say it would have (or may have) made an offer in response to a solicitation during the period the procurement was made?

1. N/A.
2. Yes, it would have made an offer. 1/
3. Yes, it may have made an offer. 1/
4. No, it would not have made an offer because it believed it could not have matched the awardee's offer.
5. No, it could not have made an offer because it did not have the resources or staff to perform the contract during the performance period. (Analyze whether inadequate agency procurement planning in the timing of the procurement may have been a factor.)

1/In some cases you will need to verify specific prior contract awards or performance data to determine a potential source's ability to meet the minimum requirements.

6. No, for other reasons. (Explain.) 1/
7. Other. (Explain.)

I.3 If I.2 was answered "yes" (#2 or #3), do agency requesting officials or the technical officer think the potential competitor(s) could have met the minimum requirements and that competition was feasible?
1. N/A.
2. Yes, the official believes that at least one potential competitor could have met the minimum requirements and competition was feasible.
3. No, the official does not believe that any potential competitor could have met the minimum requirement and we agree with this assessment.
4. No, the official does not believe that any potential competitors could have met the minimum requirements, but we disagree with this assessment.
5. The official thinks that competition might have been obtained, but is not sure.
6. The official does not know whether competition could have been obtained, but agrees that competition should have been sought.
7. Other.

I.4 If I.2 was answered "yes" (#2 or #3), does the C.O. think the potential competitor(s) could have met the minimum requirements?
1. N/A.
2. Yes, the C.O. believes that at least one potential competitor could have met the minimum requirements and competition was feasible.
3. No, the C.O. does not believe that any potential competitors could have met the minimum requirements, and we agree with this assessment.
4. No, the C.O. does not believe that any potential competitors could have met the minimum requirements, but we disagree with this assessment.
5. The C.O. thinks that competition might have been obtained, but is not sure.
6. The C.O. does not know whether competiton could have been obtained, but agrees that competiton should have been sought.
7. Other.

1/This could include an agency, a program, or a procurement office reputation which deters industry interest in competing for the business. Examples include a reputation for "wired" procurements, cozy relationships, auctions, excessive program turbulence, unclear and badly organized RFPs, inadequate time allowed for response to RFPs, and wrong and burdensome contract-type awards.

I.5. If you checked "#4" in I.3 and "#4" in I.4, then pick the answer that best describes your reasons for disagreeing with the agency officials' views.

1. N/A.
2. Other knowledgeable official(s) in the same agency besides the requesting official or technical officer and the C.O. agreed that at least one alternative source that expressed interest in competing in question I.2 could have met the minimum requirements.
3. Knowledgeable independent individual(s) outside the agency corroborated that at least one alternative source that expressed interest in competing in question I.2 was capable of meeting the minimum requirements.
4. The alternative source(s) that expressed interest in competing in question I.2 have provided credible evidence of (1) their prior work in providing essentially the same product or service and (2) their capability of meeting this procurement's minimum requirements.
5. Although other answers do not apply, agency officials' reasons for the infeasibility of competition do not appear reasonable after close examination.
6. Other.

J. ANALYSIS AND ASSESSMENT OF THE SOLE-SOURCE DECISION

This section provides guidelines for analyzing and assessing the justifications used for awarding contracts noncompetitively. Seek factual answers to the questions from agency officials and others, not generalities. Federal regulations require that negotiated procurement be on a competitive basis to the maximum practical extent. The burden of proof is on the agency to show that there was a reasonable basis for the sole-source decision. Agency officials should not be permitted to shift the burden of proof onto you to demonstrate that competition was feasible. Nevertheless, the stronger your case, the more convincing will be the argument that improvements are needed.

The results of sections H and I will be especially important in analyzing and answering J.2, J.3, J.4, J.5 and J.6 because the reasons agency officials claimed in these cases involve the basic assertion that only one source is available that can realistically meet its needs. Evidence from the marketplace is needed to test these claims. Sections H and I may also be important in reviewing J.1 and J.7 depending on the circumstances, such as the degree of emergency (on J.1) or the type of part, component, etc. (on J.7).

Review work step C.3 to determine what reason(s) were claimed to justify the noncompetitive decision. Also, review pages 11 to 14, chapter 2, to find out what reasons may constitute valid justifications for noncompetitive procurement. The questions in section J are in the same order as listed in question C.3, except for legal authority, which was discussed in section D.

J.1 <u>Urgency</u>: If this reason was not claimed in C.3(b), answer the following questions in J.1 "N/A" and go to J.2. (See app. VI, p. 62, and ch. 2, pp. 11 and 12, for background information.)

J.1 (a) Cite the specific evidence put forth by the requesting official and other agency personnel that the product or service was urgently needed by a certain date.

J.1 (b) Evaluate the adequacy of that evidence as proof that competition--even expedited procedures for obtaining at least limited competition--was not feasible. (Note: Consider the information obtained in sec. G.) Is the evidence adequate to sustain the claim of urgency?

1. N/A.
2. Yes. (If so, then noncompetitive procurement was appropriate.)
3. No.

J.1 (c) Did you find evidence that competition was restricted because the time of delivery or performance established was not realistically or effectively designed to meet the true minimum requirements of the procurement? (Consider such factors as urgency of need, production time, market conditions, transportation time, industry practices, and time for obtaining and evaluating offers and awarding contracts.) (Also see F.2.)

1. N/A.
2. Yes.
3. No.

J.2 <u>Unique capabilities</u>: If this reason was not claimed in C.3(c), check "N/A" in J.2 below and go to J.3. (See app. VI, p. 61, and ch. 2, p. 12, for background information.)

Do not answer this question until your independent market search (sec. I) has been completed.

Based on your assessment of the evidence, did the sole-source contractor possess unique capabilities making it the <u>only</u> one capable of meeting the Government's minimum requirements? (Note: Answer "yes" to this question if only one source is <u>interested</u> in competing, but not if (1) the results of section F or question J.1(c) indicate that this situation was due to unnecessarily restrictive requirements which inhibited competition or (2) inadequate procurement

planning or market research impeded proper timing of the procurement to obtain competition.) (Explain your answer.)
1. N/A.
2. Yes. (If so, then noncompetitive procurement was appropriate.)
3. No.

J.3 Compatibility with existing equipment is required: If this reason was not claimed in C.3(d), check "N/A" in J.3 and go to J.4. (See app. VI, p. 65, and ch. 2, p. 12 for background information.)

Based on your analysis of the procurement's minimum requirements (sec. F) and the results of your market search (sec. I), is there a reasonable basis for concluding that the sole-source contractor was the only one capable of satisfying the Government's legitimate need for an item compatible with the existing equipment? (Notes: (1) If other sources were able to modify or adjust their products to produce items meeting the Government's minimum requirements, they should have been given the opportunity to do so. (See sec. H.) (2) If the requirement involved automatic data processing, see FPR 1-4.1109-12.)
1. N/A.
2. Yes. (If so, then noncompetitive procurement was appropriate.)
3. No.

J.4 Standardization/interchangeability: If this reason was not claimed in C.3(e), check "N/A" in J.4(a) and (b) and go to J.5. (Note: This reason shall not be used for initial procurement of equipment or spare parts which ultimately will be standardized or for the purpose of selecting arbitrarily the equipment of certain suppliers. (See app. VI, p. 66, and ch. 2, p. 12, for background information.))

J.4(a) Has the agency head or another appropriate agency official determined, in accordance with the appropriate regulations, 1/ that it was in the public interest to negotiate for technical equipment or parts which require standardization and interchangeability?
1. N/A.
2. Yes.
3. No.

J.4(b) In your assessment of all the evidence (including sec. I), was there a reasonable basis for concluding that (a) only one source could provide such standardization and interchangeability and (b) it was neither practical nor economical to establish more than one source?

1/See DAR 3-213, FPR 1-3.213 and 1-3.107(a)(6), and NASA PR 3.213.

1. N/A.
2. Yes. (If "yes" to both J.4(a) and (b), then noncompetitive procurement was appropriate.)
3. No.

J.5 Placement of a follow-on contract with the contractor previously selected is necessary: If this reason was not claimed in C.3(f), check "N/A" on J.5(a) and (b) and go to J.6. (See ch. 2, pp. 12 and 13, for background information.)

J.5(a) Was this award a follow-on contract?. (For a definition see footnote 3, p. 5.)
1. N/A.
2. Yes. (If the original award was also noncompetitive, check whether that award was properly justified. See pp. 11 through 14.)
3. No.

J.5(b) If J.5(a) was answered "yes," was this award demonstrated to be necessary because no other source was available that could meet the Government's minimum requirements without (1) duplicating substantial costs to the Government in terms of the goods or services being obtained (that is, a substantial investment of some kind would have to be duplicated at Government expense by another source entering the field and because of the magnitude of these costs, recovering them through competition would be highly unlikely) or (2) unacceptably delaying accomplishment of the agency's mission objectives?
1. N/A.
2. Yes. (If so, noncompetitive procurement was appropriate.)
3. No.

J.6 Receipt of an unsolicited proposal: (Note: This can be a legitimate basis for a noncompetitive procurement only if no other contractor is interested and capable of meeting the Government's minimum requirements.) (See note 1 on p. 41.) (See app. VI, p. 67, and ch. 2, pp. 14 and 16, for background information.)

J.6(a) Regardless of whether or not C.3(g) was claimed, did the contract evolve from an unsolicited proposal? (Note: "Evolve from" includes cases in which a previous related award was based on an unsolicited proposal. If "yes," see app. VII, note b, for a list of Federal regulations relating to unsolicited proposals.)
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes, an unsolicited proposal was submitted for this award.
3. Yes, an unsolicited proposal was submitted and funded on a prior award and this procurement evolved from that earlier award.

4. No, this award did not evolve from an unsolicited proposal. (If "no," answer "N/A" in J.6 (b) through (e) and go to J.7.)

J.6(b) Prior contact with agency technical personnel is permissible and should be encouraged with the limited objectives of conveying to the prospective offeror an understanding of the agency mission and needs relative to the type of effort contemplated. Was prior contact limited to conveying an understanding of the agency mission and needs?

1. N/A.
2. Yes.
3. No. (Examine the improprieties, including whether the award was properly made.)

J.6(c) "Unsolicited proposal" means a written offer to perform a proposed task initiated and submitted to the Government by a prospective contractor (offeror) without a solicitation by the Government. Was the "unsolicited" proposal initiated and submitted without Government solicitation?

1. N/A.
2. Yes.
3. No. (Assess the improprieties.)

J.6(d) If the unsolicited proposal did not contain any proprietary information, check "N/A" on this question and go to J.6 (e). If it did contain proprietary information, is the use of this proprietary information necessary to solve the Government's problem and meet its true minimum requirements so that competition among other possible solutions is not feasible? 1/

1. N/A.
2. Yes. (If so, then noncompetitive procurement was appropriate.)
3. No.

J.6(e) In your assessment does the contractor that submitted the unsolicited proposal possess any unique capabilities (such as knowledge) which make it the <u>only</u> one capable of meeting the Government's minimum requirements? 1/

1. N/A.
2. Yes. (If so, then noncompetitive procurement was appropriate.)
3. No.

1/To answer this question, it is necessary to identify the Government's actual need or problem in terms of minimum requirements (that is, requirements which are as nonrestrictive as possible in terms of alternative solutions) instead of treating the unsolicited proposal as if it were necessarily the minimum requirements. (See sec. F.)

J.7 Lack of data needed for competition:
If this reason was not claimed in C.3(h), answer "N/A" in the following questions in J.7 and go to J.8. (See app. VI, p. 63, and ch. 2, p. 13, for background information.)

J.7(a) Is there reasonable evidence either that the data that was available (including a less detailed level of data than is claimed necessary for competition) was sufficient to obtain competition or that alternative ways of obtaining competition existed? (Note: This step could require considerable technical engineering assistance.)
1. N/A.
2. Yes. (Answer "N/A" on J.7 (b) through (d) and go to J.8.)
3. No. (Note: If the product or service has been purchased noncompetitively in the past (see sec. M) and this same justification was used, then the answers to questions J.7 (b), (c), and (d) should also consider why agency officials have not taken action in connection with or subsequent to those previous procurements to obtain sufficient data permitting competition. (See also R.2.)

J.7(b) If the previous answer is "no," why is the technical data, etc., not available?
1. N/A.
2. Data not purchased by the Government on prior award.
3. Data was proprietary.
4. Other.

J.7(c) Is a technical data package being developed which would insure future competitive opportunities?
1. N/A.
2. Yes.
3. No. (Explain.)

J.7(d) Has any analysis, such as a cost-benefit analysis, been conducted to determine whether it is advantageous to the Government to procure or develop such information?
1. N/A.
2. Yes. (What are the results?)
3. No. (Why not and what evidence is available to demonstrate that such an analysis is not needed?)

Note: If agency officials have demonstrated that (1) the data needed for competition was not available, (2) obtaining such data was not in the Government's best interest, and (3) there were no alternative ways of obtaining competition, then noncompetitive procurement was appropriate.

J.8 Industrial mobilization: If this reason was not claimed in C.3(i), check "N/A" in J.8 and go to J.9. (See app. VI, p. 64, and ch. 2, p. 13, for background information.)

If the agency based its noncompetitive decision (at least partially) on the need for creation and maintenance of an essential industrial capability or for purposes of national industrial mobilization, was the agency's claim valid and appropriate?
1. N/A.
2. Yes. (Explain.) (If "yes," then noncompetitive procurement was appropriate.)
3. No. (Explain.)

J.9 National security: If this reason was not claimed in C.3(j), check "N/A" below and go to J.10. (See ch. 2, pp. 13 and 14, for background information.)

If this reason was used, was the agency's claim that disclosure to more than one source of the property or service to be obtained would jeopardize the national security valid?
1. N/A.
2. Yes. (If so, then noncompetitive procurement was appropriate.)
3. No.

J.10 Required by international agreement or a foreign government: If this reason was not claimed in C.3(k), check "N/A" below and go to J.11. (See ch. 2, p. 13, for background information.)

If the agency based its noncompetitive decision (at least partially) on the terms of an international agreement or the directions of any foreign government reimbursing the agency for the cost of the procurement of property or services being purchased for such government, was the agency's claim valid and appropriate?
1. N/A.
2. Yes. (If so, then noncompetitive procurement was appropriate.)
3. No.

J.11 Other: If other reasons were not claimed in C.3(l), check "N/A" below and go to J.12.

Agencies often claim other reasons, which were not covered in sections J or D, to justify their sole-source decisions. However, we know of no other reasons which may justify noncompetitive procurement, except that competition is not necessarily required on purchases of under $500. (See p. 14 for common examples of unacceptable justifications.) Nevertheless, other reasons given should be considered.

Based on an analysis of the facts, decisions of the Comptroller General, and a legal opinion from the agency's Office of the General Counsel, was any other claim a valid justification for noncompetitive procurement?

1. N/A.
2. Yes. (Explain.)
3. No.

J.12 Automatic data processing: If the procurement does not involve automatic data processing equipment, software, or maintenance, check "N/A" below and go to section K.

If the procurement involves automatic data processing equipment, software, or maintenance, were the appropriate DAR, FPR, or NASA regulations (cited in appendix VII, note d) met?

1. N/A
2. Yes.
3. No. (Explain.)

K. INJURY TO THE GOVERNMENT

(Note: "Injury" means (1) the agency's failure to accomplish one of its missions, (2) a critical delay in accomplishing an agency mission, or (3) anything that would cause the agency to incur substantial additional costs.)

Would the Government have been injured if the procurement had been made only after going through the "competitive process" (for example, more than one source solicited; notice publicized in the CBD, if appropriate; proposals evaluated)? Assess the evidence of injury and explain whether it is adequate to demonstrate that the competitive process could not be used.

1. N/A (only if (1) the agency went through the competitive process before awarding the contract noncompetitively or (2) the procurement was statutorily exempt from competition).
2. Agency officials claim substantial injury and you agree.
3. Agency officials claim substantial injury but you disagree.
4. Agency officials' claim of injury amounts only to administrative inconvenience (or normal administrative costs.)
5. Agency officials did not claim injury.
6. Other.

L. ADVANCE PROCUREMENT PLANNING AND RELATED MANAGEMENT CONTROLS

According to the Office of Management and Budget's Policy Letter 81-1, "Procurement Procedures, Advance Procurement Planning, and Review of End-of Year Purchases," agencies shall establish certain management controls and issue procedures that require an Advance Procurement Planning System for each activity. (See app. X.)

L.1 Has the activity responsible for this procurement implemented procedures that comply with OMB Policy Letter 81-1 and related agency requirements (see app. VII, note (h))?
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No. (Explain.)

L.2 Was this procurement included in the required advance procurement planning system?
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No. (Explain.)

L.3 Is there evidence that the agency's failure to perform effective advance procurement planning (or related procedures, such as market research) may have been a factor in the absence of competition on this award?
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes. (Explain.) (Also, see S.1, #15.)
3. No.

M. <u>EFFORTS TO FOSTER COMPETITION SINCE PRIOR SOLE-SOURCE AWARD(S)</u>

Federal regulations state that agencies should act, whenever possible, to avoid the need for repeated noncompetitive contracts and take steps to foster competition for subsequent procurements. (See app. VII, note e, for regulatory requirements.)

M.1 Was this item or service <u>previously</u> procured noncompetitively? (Note: If "no," check "<u>N/A</u>" in questions M.2 through M.4.)
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

M.2 If "yes" in M.1, how often?
1. N/A
2. Once.
3. Twice.
4. Three or more times.
5. Not sure, but more than once.

M.3 In what months and years?

(1)______	(5)______	(9)______
(2)______	(6)______	(10)______
(3)______	(7)______	(11)______
(4)______	(8)______	(12)______

M.4 If "yes" in M.1, were the steps taken before this award adequate in accordance with the regulatory requirements?

1. N/A.
2. Yes, adequate.
3. No, inadequate.

M.5 Based on the information available, including that obtained in M.1 to M.4, was this contract a follow-on after an original noncompetitive award, as opposed to a follow-on after competition? (Note: A follow-on contract is a new noncompetitive acquisition (whether by separate new contract or a modification outside the scope of the original contract) placed with a particular contractor to continue a specific program, where placement was necessitated by prior decisions. Also, see footnote 3, p. 5.)

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

N. VARIOUS TIME-RELATED PROBLEMS

If any of the following time factors was a problem in the contract you reviewed, indicate the most appropriate response in the space provided.

N.1 Was there a yearend spending abuse?

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes. (Explain.)
3. No.

N.2 In your judgment, did the agency fail to allow potential competitors sufficient time to prepare offers?

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes. (Explain.)
3. No.

N.3 Did the contractor start work before contract approval or the contract execution date (either with or without a pre-contract cost authorization)?

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes. (Explain.)
3. No.

N.4 Was the contract awarded before the date of any required sole-source justification approval?

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes. (Explain.)
3. No.

N.5 Was the contractor unable to provide the specified product or service within the contract's original period of performance? (Note: This is especially important if urgency was claimed in C.3(b).)

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

N.6 Describe any other time-related problems or issues. (See sec. G.)

O. <u>DOCUMENTATION PROBLEMS AND THE OVERALL ASSESSMENT OF THE VALIDITY OF THE NONCOMPETITIVE DECISION</u>

Federal regulations require that each contract file contain documentation of actions taken with respect to each contract. (See app. VII, note g, for regulatory requirements.)

O.1 Was there documentation proving that either (1) a preaward notice inviting competition was placed in the CBD or (2) there was a valid exception to the publicizing requirement? (See H.1 through H.4.)

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

O.2 Was there adequate documentation (D&F) of the decision to negotiate? (In the FPRs 7 of the 15 exceptions to formal advertising require D&Fs: numbers 2, 7, 8, and 10 to 13. See FPR 1-3.201 to 1-3.215 for exceptions to formal advertising. In the DAR, 10 of the 17 exceptions to formal advertising require D&Fs: numbers 2, 7, 8, and 10 to 16. See DAR 3-201 to 3-217 for exceptions to formal advertising.)

1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

O.3 Was there documentation in the contract file on the justification for noncompetitive procurement (either separate documentation or a statement in the D & F)?

1. Yes.
2. No.

O.4 Did the contract file documentation contain any valid reason(s), supported by factual evidence, which sufficiently justified a noncompetitive award? (See secs. D and J for those claims covered by the documentation.)

1. Yes.
2. No.

O.5 Do any other claims offered by agency officials, which were not adequately covered in the contract file documentation, justify the noncompetitive award? (Note: Answer "N/A" on O.5, if question O.4 was answered "yes." (See secs. D and J.)
1. N/A.
2. Yes.
3. No.

P. REVIEW OF THE NONCOMPETITIVE DECISION AT A LEVEL HIGHER THAN THE C.O.

P.1 Did either a sole-source review board or an official at a level higher than the C.O. review the sole-source justification for this contract before award to determine whether noncompetitive procurement was justified? 1/
1. N/A (only if the award was statutorily exempt from competition).
2. Yes.
3. No.

P.2 If "yes" in P.1, was the review adequate in accordance with the regulatory requirements? 1/ (Note: If "N/A" or "no" was checked in P.1, answer "N/A" below.) If you determined that (1) competition was feasible or (2) there was inadequate assurance that competition was not feasible, then the appropriate answer normally is "no."
1. N/A.
2. Yes.
3. No.

P.3 If "no" in P.1, was the reason for not performing a review in accordance with the regulatory requirements? 1/ (Note: If "N/A" or "yes" was checked in P.1, answer "N/A" below.)
1. N/A.
2. Yes, adequate.
3. No, inadequate.

1/See ch. 2, p. 15, and the regulations cited in app. VII, note (c), for the compliance criteria and exceptions.

Q. CONTRACT MODIFICATIONS 1/

Q.1 Were there any modifications to the contract? (See A.8 and G.21.) (Note: if "no," answer "N/A" to Q.2 through Q.4.)
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

Q.2 Did the modification(s) change the contract's net cost? (See A.7 and A.9.)
1. N/A.
2. Yes.
3. No.

Q.3 Considering all modifications to date, provide the following information. If a category is not applicable, put "N/A.")
1. Net additional amount obligated by the modifications $__________
2. Net amount obligated, including the original contract award $__________

1/If the procurement action being reviewed is itself a contract modification, rather than a new action, determine whether the modification is within the general scope of work of the contract being modified. The basic standard for deciding this question is whether the modified job is essentially the same as that contemplated and bargained for at the time of contract formation. If the field of competition for the original award would have been materially changed due to the contract modification, then the original contract and the contract to be performed are essentially different. When contract modifications go beyond the limits or scope of the contract--that is, are materially different from the original contract--the new requirement should be competed for instead of modifying the original contract, unless a noncompetitive procurement is justifiable. It is not always easy to determine whether a changed contract is materially different from the original contract. Each case must be analyzed and decided individually, considering its own facts and circumstances, the magnitude and quality of the changes ordered, and their cumulative effect upon the project as a whole. Therefore, we suggest that you consult legal staff on these matters. Relevant Comptroller General decisions include:

B-205439, 7/19/82, 82-2 CPD 54
B-196029.2, 6/30/80, 80-1 CPD 447
B-194087, 8/14/79, 79-2 CPD 120
B-192274, 10/26/78, 78-2 CPD 304
B-188408, 2/16/78, 78-1 CPD 136
B-178701, 7/15/75, 75-2 CPD 36

Q.4 Does the effect of any modification negate the justification for the noncompetitive award? (Such a situation exists, for example, when "urgency" was claimed as the justification for the noncompetitive award, but a modification has extended the schedule to the extent that it appears "urgency" was not a valid claim.)
1. N/A.
2. Yes.
3. No.

R. ASSESSMENT OF THE FEASIBILITY OF COMPETITION 1/

R.1 What is your overall assessment of the contract in terms of the feasibility of obtaining competition? Categorize this contract as:

1. It could have been awarded competitively because you have identified, and received adequate assurance that, at least one other source (1) would or may have submitted an offer and (2) was capable of meeting the Government's "minimum requirements."

2. Although answer #1 does not apply, better agency planning or management could have resulted in competition. (This condition exists, for example, when a contracting officer does not have time to obtain competition because the agency has not adequately planned or managed the procurement request in earlier stages of the procurement process.)

3. The noncompetitive contract award was appropriate.

4. It is uncertain which of the previous categories applies. (Explain.)

R.2 If question R.1 was answered "#3" or "#4," is there evidence that there could have been a breakout of individual components for competitive procurement, consistent with good business judgment in the circumstances? 1/ (Note: On complex systems this question can be a separate audit in itself. Among the considerations that in certain cases may justify deferring breakout of individual components for competitive procurement are the urgency of the need for a system to become operational and assurance of proper functioning.)
1. N/A (only if the procurement was statutorily exempt from competition).
2. Yes.
3. No.

1/See ch. 2, p. 14, and app. VII, note (c), for the regulatory requirements.

S. POSSIBLE CAUSES OF THE FAILURE TO OBTAIN COMPETITION, AS REQUIRED

If R.1 was answered "#3" and R.2 was answered either "N/A" or "no," then check "N/A" below and go to section T.

Review your answers to the work steps and supporting documents before completing this section.

S.1 Check all the following which may have been a factor related to the absence of competition on this award.

1. N/A.

Inappropriate reliance of procurement personnel on:

2. A written noncompetitive justification (whether part of a D&F or some other document).
3. Inadequately supported verbal statements of agency program or technical personnel.

Lack of commitment to competition by:

4. The agency head.
5. Other high agency official(s).
6. Program personnel.
7. Procurement personnel.
8. Others. (Please specify.)

There appeared to be a lack of knowledge concerning some procurement matters, 1/ including:

9. Effective use of the CBD.
10. Other market research or use of competitive procedures.
11. Valid noncompetitive reasons, criteria, or justifications.
12. The proper handling of unsolicited proposals.
13. The requirements for competition.
14. Other matters. (Please specify.)

Other

15. Ineffective or nonexistent procurement planning, including insufficient efforts to search the market for potential competitors. (See L.3.)

1/If lack of knowledge is checked, indicate which personnel were involved and whether they were procurement and/or nonprocurement personnel.

16. Procurement function claimed their workload was too heavy.
17. Procurement function claimed they were understaffed.
18. Agency official(s) desired to award the contract before the end of the fiscal year.
19. Agency official(s) desired to award the contract before some date (other than the end of the fiscal year) which was unrelated to a valid claim of urgency.
20. High agency official(s) were perceived as desiring the noncompetitive award.
21. Procurement personnel followed agency policies, procedures, or practices which were inconsistent with the DAR, FPRs, or other legal authority.
22. Agency personnel mistook their authority to award a negotiated contract for authority to award a noncompetitive contract.
23. Clear procedures did not exist (or were not used) for obtaining at least limited competition on an expedited basis when urgency did not permit competition through the normal competitive process.
24. Restrictive specifications or requirements were used. (See F.2 and J.1(c).)
25. Other reason(s) not listed above. (Please specify.)

T. ASSESSMENT OF WHETHER A CONTRACT WAS THE APPROPRIATE INSTRUMENT

The Federal Grant and Cooperative Agreement Act of 1977 distinguished among the use of contracts, grants, and cooperative agreements (41 U.S.C. 501 et seq.). The act requires Federal agencies to use a contract when the principal purpose of the relationship with the recipient is to acquire something for the Government's direct benefit or use. An assistance instrument (a grant or a cooperative agreement) should be used when the principal purpose of the relationship is to accomplish a public purpose of support or stimulation. (See app. XI for this act.)

Agencies have sometimes used sole-source contracts inappropriately when "assistance" rather than "procurement" was involved. In fact, in some cases, agency officials admitted that the activities funded under sole-source contracts probably would not have been funded as grants because they were not a high enough priority. This section is intended to help identify problems of this kind.

T.1 Based on the Federal Grant and Cooperative Agreement Act of 1977, was the agency's use of a contract appropriate?
1. Yes, a contract was the appropriate instrument.
2. No, a grant or a cooperative agreement should have been used.

T.2 Do agency official(s) agree with your assessment that a grant or cooperative agreement should have been used instead of a contract? (Note: If "yes" in T.1, answer "N/A" below.)

1. N/A (a contract was the appropriate instrument.)
2. Agency officials <u>agree</u> that a <u>grant</u> should have been used.
3. Agency officials <u>agree</u> that a <u>cooperative agreement</u> should have been used.
4. Agency officials <u>agree</u> that either a grant or a cooperative agreement should have been used but they are not sure which one would have been most appropriate.
5. Agency officials believe that a <u>contract</u> was the appropriate instrument and they <u>disagree</u> with your assessment that a grant or cooperative agreement should have been used.
6. Agency officials are not sure.

U. <u>OTHER PROBLEMS</u>

Provide your comments on any other problems or issues identified which are not covered above.

SELECTED GAO REPORTS ON FEDERAL AGENCIES' SOLE-SOURCE CONTRACT AWARDS

1. "Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting"(PLRD-82-40, Apr. 7, 1982)

2. "Labor Needs To Better Select, Monitor, and Evaluate Its Employment and Training Awardees" (HRD-81-111, Aug. 28, 1981)

3. "DOD Loses Many Competitive Procurement Opportunities" (PLRD-81-45, July 29, 1981)

4. "Controls Over DOD's Management Support Service Contracts Need Strengthening" (MASAD-81-19, Mar. 31, 1981)

5. "Government Earns Low Marks on Proper Use of Consultants" (FPCD-80-48, June 5, 1980)

6. "Controls Over Consulting Service Contracts at Federal Agencies Need Tightening" (PSAD-80-35, Mar. 20, 1980)

7. "The Department of Energy's Practices for Awarding and Administering Contracts Need To Be Improved" (EMD-80-2, Nov. 2, 1979)

8. "Increased Competition Can Reduce Elevator Maintenance and Cleaning Service Contract Costs" (PSAD-78-115, June 14, 1978)

9. "Competition for Negotiated Government Procurement Can and Should Be Improved" (PSAD-77-152, Sept. 15, 1977)

10. "More Competition in Emergency Defense Procurements Found Possible" (B-171561, Mar. 25, 1971)

DEFENSE ACQUISITION REGULATION

EXCEPTIONS TO THE REQUIREMENT TO PUBLICIZE

NOTICES OF PROPOSED PROCUREMENT ACTIONS

Chapter 1-- Defense Acquisition Regulation

§1-1003.1 General

(a) Except for procurements described in (b) and (c), every proposed advertised or negotiated procurement, including those basic ordering agreements which:

(i) involve specific supplies or services;

(ii) are supported by appoporiate determinations and findings limiting future orders thereunder to the basic ordering agreement contractor; and

modifications to existing contracts when new funds are obligated for additional supplies and services made in the United States, its possessions, and Puerto Rico which may result in an award in excess of $10,000 shall be publicized promptly in the Commerce Business Daily "Synopsis of U. S. Government Proposed Procurement, Sales and Contract Awards." When an item is assigned or is within a Federal Supply Class assigned for procurement in Section V, Part 12, and is purchased by other than the assigned Department, the synopsis shall cite the applicable purchase exclusion number from 5-1201.1 or 5-1201.2(a). Modifications to an existing contract resulting from price changes, engineering changes, overruns, definitization of letter contracts, orders under a basic ordering agreement which was previously synopsized in accordance with 3-410.2(c)(4), and other similar transactions need not be publicized in the Commerce Business Daily.

(b) Only those classified procurements, where the information necessary to be included in the Synopsis cannot be worded in such a manner so as to preclude the disclosure of classified information, or where the mere disclosure of the Government's interests in the area of the proposed procurement would violate security requirements, shall not be publicized in the Synopsis. All other classified procurements shall be publicized in the Synopsis, even though access to classified matter might be necessary in order to submit a proposal or to perform the contract (see 1-1003.9 (f)(3)).

(c) The following need not be publicized in the Synopsis (Exceptions 1 through 9--Item 13 of the DD Form 350):

(i) see (b) above;

(ii) procurement of perishable subsistence;

(iii) procurement of electric power or energy, gas (natural or manufactured), water, or other utility services;

(iv) procurement (whether advertised or negotiated) which is of such urgency that the Government would be seriously injured by the delay involved in permitting the

the date set for receipt of bids, proposals, or quotations to be more than 15 calendar days from the date of transmittal of the synopsis or the date of issuance of the solicitation, whichever is earlier;

(v) procurement to be made by an order placed under an existing contract other than an order placed under a Basic Ordering Agreement;

(vi) procurement to be made from or through another Government department or agency, including procurements from the SBA using the authority of section 8(a) of the Small Business Act, or a mandatory source of supply such as an agency for the blind under the blind-made products program;

(vii) procurement of personnel and professional services other than architect-engineer services (see 1-1003.4-(b)(1);

(viii procurement from educational institutions to be negotiated under 3-205;

(ix) procurement in which only foreign sources are to be solicited.

FEDERAL PROCUREMENT REGULATIONS

EXCEPTIONS TO THE REQUIREMENT TO PUBLICIZE

NOTICES OF PROPOSED PROCUREMENT ACTIONS

Chapter 1--Federal Procurement Regulations

§1-1.1003-2 General Requirements.1/

(a) In accordance with section 8 of the Small Business Act, all proposed defense procurement actions of $10,000 and above, and all proposed civilian agency procurements actions of $5,000 and above, will be published promptly in the Department of Commerce Synopsis (see §1-1.003-6), except that the following need not be so publicized:

(1) Procurements of a classified nature where the information necessary to be included or referenced in the solicitation (invitation for bids or request for proposals) is in itself of a classified nature and the public disclosure of this information would violate security requirements. All other classified procurements shall be published in the Synopsis if sufficient information of an unclassified nature can be provided in the solicitation to enable a prospective contractor to submit a bid or proposal;

(2) Procurements of perishable subsistence;

(3) Procurements which are for utility services and the procuring agency in accordance with applicable law has predetermined the utility concern to whom the award will be made;

(4) Procurements which are of such unusual and compelling emergency that the Government would be seriously injured if bids or offers were permitted to be made more than 15 calendar days after issuance of the invitation for bids or request for proposals or the date of transmittal of the synopsis, whichever is earlier;

(5) Procurements that are made by an order placed under an existing contract except as provided in §1-4.1109-6 with respect to nonmandatory ADP (automatic data processing) Schedule contracts;

1/For a temporary regulation affecting §1-1.1003-2, see Appendix--Temporary Regulations, appearing at the end of Chapter 1 [of the FPRs].

(6) Procurements which are made from another Government department or agency, or a mandatory source of supply;

(7) [Reserved]

(8) Procurements which are for services from educational institutions;

(9) Procurements in which only foreign sources are to be solicited; or

(10) Procurements for which it is determined in writing by the procuring agency, with the concurrence of the Administrator of the Small Business Administration, that advance publicity is not appropriate or reasonable.

(The term "defense procurement actions," as used in this §1-1.1003-2, shall apply only to procurement made by the Department of Defense.)

(b) The dollar amount specified in §1-1.1003-2(a) is not a prohibition against publicizing procurements below that amount where it is determined that such publication would be advantageous to industry or to the Government.

AN EXAMPLE OF A PREAWARD SOLE-SOURCE NOTICE PLACED IN THE COMMERCE BUSINESS DAILY

COMMERCE BUSINESS DAILY
Room 1304
433 West Van Buren Street
Chicago, Illinois 60607

SYNOPSIS NO. 170-80

NATIONAL INSTITUTES OF HEALTH, PROCUREMENT BRANCH, DAS, BUILDING 31 ROOM 3B-59, BETHESDA, MARYLAND, 20205, AREA CODE 301/496-4281. X--NEGOTIATIONS ARE BEING CONDUCTED WITH THE (XXX) SOCIETY, INC., BOSTON, MASS., FOR PARTIAL SUPPORT FOR THE EIGHTH INTERNATIONAL CONGRESS OF THE [XXX] SOCIETY -- FOR INFORMATION PURPOSES ONLY -- RFP NOT AVAILABLE.

Contracting Officer
Contract Operations

AN EXAMPLE OF A SOURCES-SOUGHT SYNOPSIS PLACED IN THE COMMERCE BUSINESS DAILY

--NORMAL VOLUNTEER PATIENT PROGRAM of the Clinical Center, National Institutes of Health, has a need for interested non-profit organizations in providing healthy volunteers on a year round basis to serve as control patients for a number of on-going biomedical research studies conducted by the Clinical Intramural Programs of the various Institutes * * *. This is not a request for a proposal. Respondents will be notified of the results of the evaluation of information they have submitted. Closing date for submission of responses is 14 days from publication of notice. (190)

National Institutes of Health, DHHS, Procurement Branch
DAS, Attn: Contracting Officer, Building 31, Room 3C-31,
9000 Rockville Pike, Bethesda, MD 20205

COMPTROLLER GENERAL DECISIONS ON SOLE-SOURCE JUSTIFICATIONS

The following decisions reflect our legal position on a variety of sole-source justifications. Our intent is to familiarize auditors with these decisions as they provide additional support and background for assessing the feasibility of competition.

UNIQUE CAPABILITIES

Techniarts
B-193263 April 9, 1979
79-1 CPD 246

"We have recognized that there are certain circumstances under which a sole-source procurement is justified, such as: where the Government's minimum needs could only be satisfied by items or services which are unique * * *."

Power Testing, Incorporated
B-197647 July 11, 1980
80-2 CPD 26

"Where a contracting agency justifies a sole-source procurement on the basis that only one source can meet its requirements * * * the protester must meet the heavy burden of presenting evidence which shows that such action is arbitrary, capricious and an abuse of administrative discretion."

The Artic Company, Limited
B-175953 July 21, 1972

"In determining the propriety of an award under a sole-source solicitation, the standard to be applied is one of reasonableness and unless it is shown that the contracting officer acted arbitrarilly, there is no legal basis to question the award. As noted, Maritime [Administration, Department of Commerce] considered that the proposal demonstrated a 'unique' capability. Your capabilities and resources were examined and found wanting in relation to the resources which [you] bring to bear on the project. An analysis of the record makes clear that the contracting officer acted reasonably and in good faith."

URGENCY

Techniarts
B-193263 April 9, 1979
79-1 CPD 246

"We have recognized that there are certain circumstances under which a sole-source procurement is justified, such as: * * * where time is of the essence and only one known source can meet the Government's needs within the required time-frame * * *."

Las Vegas Communications, Inc.,--Reconsideration
B-195766.2 October 28, 1980
80-2 CPD 323

"This is not to say an agency may not accommodate its urgent needs and still satisfy the statutory and regulatory obligation to obtain competition to the maximum extent practical within the time available. Where time constraints prevent the preparation of definitive specifications, designs and drawings or the conduct of regular competition, urgency may justify an expedited negotiated procurement with as complete a statement of requirements as practical * * * under the circumstances. * * * it is essential that efforts be made to achieve competition and to treat each competitor as fairly as the circumstances will permit."

LACK OF DATA

Environmental Protection Agency sole-source procurements
B-166506 July 26, 1974
74-2 CPD 59

"In the past, our Office has recognized that noncompetitive awards may be made where * * * data is unavailable for competitive procurement * * *."

Metal Art, Inc.
B-192901 Feb. 9. 1979
79-1 CPD 91

"The question * * * is whether DLA [the Defense Logistics Agency] has done everything reasonably possible to obtain data for the procurements involved * * * ."

* * * * *

"Generally, in determining the propriety of a sole-source solicitation, the standard to be applied is one of reasonableness--unless it is shown that the contracting agency acted without reasonable basis, our Office will not question the solicitation * * * . Where adequate data is not available to an agency to enable it to conduct a competitive procurement we will take no exception to a sole-source award even where we recommend that the contracting agency consider initiating efforts to broaden competition in the future."

INDUSTRIAL MOBILIZATION

National Presto Industries, Inc.
B-195679
79-2 CPD 418

December 19, 1979

"In a procurement negotiated under 10 U. S. C. § 2304(a)(16) (1976), the normal concern with insuring maximum competition is secondary to the needs of the industrial mobilization. The award of a contract for current needs becomes not only an end in itself, but a means to another goal--the creation and/or maintenance of mobilization capacity. Contracts are awarded to particular plants or producers to create or maintain their readiness to produce essential military supplies in the future." (Underscoring supplied.)

COMPATIBILITY OF EQUIPMENT

Techniarts
B-193263 April 9, 1979
79-1 CPD 246

"We have recognized that there are certain circumstances under which a sole-source procurement is justified, such as: * * * where it is necessary that the desired item manufactured by one source be compatible * * * with existing equipment * * *."

Hughes Aircraft Company
B-179815 March 14, 1974
74-1 CPD 137

"From our review of the record, we believe the following considerations are determinative:"

* * * * *

"2. The three satellites now being completed * * * must all 'look' the same (in an electronic sense) to the system's ground stations.

"Hughes asserts that it can achieve this compatibility * * *. We are not prepared to question NASA's judgment that this introduces an unacceptable technical risk * * *."

* * * * *

"Accordingly, we do not regard as arbitrary or capricious the determination to negotiate * * * on a sole-source basis."

STANDARDIZATION AND INTERCHANGEABILITY

Stancil Corporation
B-205680 April 20, 1982
82-1 CPD 362

"We have recognized the propriety of a sole-source procurement where only one source of supply can provide an item that is compatible and interchangeable with existing equipment * * *.

"Following the submission of an unsolicited proposal from Stancil, the FAA performed a technical review of the interchangeablility of component parts between the Stancil and Magnasync recorders. The review disclosed that the tape reels on the Magnasync recorder are mounted vertically, while a horizontal mount was used on the Stancil recorder. In addition, the tape transport assemblies and card rack assemblies were different and not mechanically interchangeable and the amplifier circuit board assemblies of each differed in physical size and electronics on the printed circuit boards (PCB's). The FAA points out that the number of pins on the PCB's and the pin connections is different. Therefore, the PCB's are not interchangeable. Moreover, the FAA compared other PCB's in Magnasync's Technical Manual with the unsolicited Stancil proposal and found no common similar PCB's. The FAA concluded that the Stancil recorders did not comply with the standardization requirements of the D&F since its recorders were not mechanically and electrically interchangeable with the Magnasync recorders or spare modules and parts (common and peculiar).

"Based on our review of the record, we find that the FAA has reasonably justified its need for interchangeability and standardization because of the cost saving in maintaining a single manufacturer's spare parts inventory. Moreover, it appears that Stancil's recorders and component parts are not interchangeable with Magnasync's."

RECEIPT OF AN UNSOLICITED PROPOSAL IS NOT A VALID REASON TO AWARD A SOLE-SOURCE CONTRACT

Electronic Systems U.S.A. Inc.
B-200947 April 22, 1981
81-1 CPD 309

"In its Findings and Determinations in support of the decision to procure these systems on a sole-source basis, the FCC states that the procurement 'has its origin in an unsolicited proposal' and that 'the intellectual property of the proposal is proprietary-original in concept, unique to its proposer,' thus, precluding formal advertising of the procurement system.

"With respect to a proprietary unsolicited proposal, FPR §1-4.906 (a) * * * requires the identification of proprietary data as provided by section 1-4.913. Section 1-4.913(a) provides that if the offeror wishes to impose a nondisclosure restriction on its unsolicited proposal, the title page is to be so marked and each page of the proposal which contains proprietary or restricted material is to be marked also.

"Further, the regulations require that an unsolicited proposal contain sufficient technical and cost information so as to permit a meaningful and comprehensive evaluation, FPR § 1-4.909 (b), and that a favorable comprehensive evaluation is not, in itself, sufficient for negotiating on a noncompetitive basis if it is not sufficiently unique to justify acceptance FPR § 1-4.910.

"The * * * proposal, as submitted to this Office * * * contains little technical information and bears no proprietary identification or marking. Furthermore, the * * * systems have apparently been made available to other contractors * * *. Thus, we see no basis for concluding that [the] proposal for the installation and implementation of the system was unique or proprietary. In such an instance, 41 C.F.R. § 1-4.910 (1980) provides that:

> 'When a document qualifies as an unsolicited proposal but the substance (1) is available without restriction from another source * * * the unsolicited proposal shall not be acceptable. When procurement is intended and competition is feasible, the proposal shall be returned to the offeror together with the reasons for the return.'

"In the instant case, the record doesn't support the conclusion that competitive procurement was precluded."

ADMINISTRATIVE CONVENIENCE IS NOT A VALID REASON TO AWARD A SOLE-SOURCE CONTRACT

Department of Agriculture's use of Master Agreement
B-182337 January 20, 1975
75-1 CPD 40

"The Department of Agriculture * * * has indicated only that obtaining maximum competition is administratively burdensome.

* * * * *

"Since the sole justification * * * is administrative expediency, we consider the procedure proposed * * * to be unduly restrictive of competition * * * and, therefore, improper."

<u>LOWEST COST TO THE GOVERNMENT IS NOT
A VALID REASON TO AWARD A SOLE-SOURCE CONTRACT</u>

<u>Olivetti Corporation of America</u>
<u>B-187369</u> February 28, 1977
<u>77-1 CPD 146</u>

"<u>Whatever the contracting officer's conclusion as to potential price competition, however, it may not be the grounds for sole-source award of a contract</u>. * * * The contracting officer may not speculate as to potential bidder's willingness to compete in the face of a particular firm's apparent competitive advantage. <u>That willingness may only be tested in the crucible of competition</u>. * * * Even where the contracting officer perceives little or no willingness in the market to supply competitive offers or bids, the administrative costs of preparing and issuing a solicitation are outweighed by the potential costs of losing bidders' confidence in the competitive system." (Underscoring supplied.)

NONPROFIT, TAX EXEMPT, AND VOLUNTEER ORGANIZATIONS

Environmental Protection Agency sole-source procurements
B-166506 July 26, 1974
75-2 CPD 59

"Each of the awards, save one, was justified on the basis that the services would be performed by nonprofit, tax exempt, volunteer citizens organizations * * *.

* * * * *

"We do not, however, believe that the above stated reasons represent proper justifications for obtaining the services on a noncompetitive basis."

* * * * *

"In our opinion, there is no overriding uniqueness in the fact that a firm is either a consortium, tax exempt, or a nonprofit organization. * * * Therefore, while * * * organizations may be able to quote a lower price for these services, other organizations should be afforded an equal opportunity to compete * * *." (Underscoring supplied.)

EXISTENCE OF A PATENT DOES NOT IN AND OF ITSELF JUSTIFY A SOLE-SOURCE CONTRACT

American Sealcut Corporation
B-201573 April 28, 1981
81-1 CPD 327

"* * * To support its argument that a sole-source negotiated procurement is warranted, PBE [Principle Business Enterprises, Inc.] relies principally on the following illustration in FPR § 1-3.210 (a)(2) (1964 ed.) of a situation appropriate for sole-source negotiation:

'When competition is precluded because of the existence of patent rights * * * or similar circumstances (however, the mere existence of such rights or circumstances does not in and of itself justify the use of this authority).'"

* * * * *

"We find PBE's contentions to be without merit. First, there is no support in the record for PBE's assertion that its expertise * * * qualifies it as the sole source * * * . Second, the above-quoted regulation indicates that the existence of patent rights does not in and of itself justify sole-source negotiation. There is no indication in the present case that PBE's patent has eliminated competition * * *.

"Moreover, under 28 U.S.C §1498, Government contractors and subcontractors are relieved of liability for infringing patents embodied in items accepted or to be accepted by the Government pursuant to its contracts. * * * The courts have recognized section 1498 as * * * vest[ing] in the Government the right to use any patent granted by it upon payment of reasonable compensation to the patent holder. * * * The statute was intended to give patent holders an adequate and effective remedy for infringement of their patents while saving the Government from having its procurements thwarted, delayed or obstructed pending litigation of patent disputes. * * *

"Considering the statute and its purposes, this Office has concluded that Government contracts should not be restricted to patent holders and their licensees where patents are held. * * * Instead all potential sources should be permitted to compete for Government contracts regardless of possible patent infringement. * * *

"Accordingly, we conclude that the contracting officer acted contrary to statute and regulation in negotiating on a sole-source basis * * * based solely on the existence of a patent * * *."

REFERENCES TO THE PROCUREMENT REGULATIONS

Note	Subject	FPR	DAR	NASA PR
a	Competition not required for procurements under $500	1-3.603-1(a)(2)	3-604.1	3.604-1
b	Unsolicited proposals	1-4.900-- 1-4.910 1-4.911 1-4.913	4-900-- 4-913	4.900-- 4.915
c	Requirement for competition and for a a higher level review of the noncompetitive decision	1-3.101(d) 1-3.107 1-3.108	3-101(d)	3.102(c) and 3.802-3(d)
d	Automatic data processing	1-4.11, esp. 1-4.1103 1-4.1103-3, 1-4.1104, 1-4.1109 and 1-4.1109-12	4-11, esp. 4-1103 and 4-1104	3.11, esp. 3.1151 3.1152, and 3.1157
e	Requirement for agencies to avoid repeated noncompetitive awards	1-3.101(d)	3-101(d)	3.102(c)
f	Delivery/performance schedules	1-1.316-2(a)	1-305.2(a)	1.305-2(a)
g	Documentation requirements	1-1.313 1-3.308 1-3.107(c)	1-308 3-103	1.308 3.103
h	Advance procurement planning 1/	1-1.342	1-2100	3.852
i	Publicizing notices of proposed procurement actions	1-1.10	1-10	1.10

1/Also see Office of Management and Budget Policy Letter 81-1 (app. X), which applies to all executive agencies.

MINIMUM REQUIREMENTS

Federal Procurement Regulations 1-1.307-1(b) state,

> "Purchase descriptions shall not include either minimum or maximum restrictive dimensions, weights, materials, or other salient characteristics which would tend to eliminate competition by other products which are only marginally outside the restrictions unless such restrictions are determined by the user in writing to be essential to the Government's requirements."

Defense Acquisition Regulation 1-1201 states,

> "Plans, drawings, specifications, or purchase descriptions shall state only the actual minimum needs of the Government and describe the supplies and services in a manner which will encourage maximum competition and eliminate, insofar as possible, any restrictive features which might limit acceptable offers to one supplier's product, or the products of a relatively few suppliers."

The decision of the Comptroller General, Electronic Instrumentation Division, B-161700, September 5, 1967, stated:

> "Notwithstanding the emphasis on obtaining the maximum competition, it must be recognized that the primary objective of specifications is to reflect the actual needs of the Government. Necessarily, the procuring agency has the primary responsibility for drafting specifications which in fact reflect those needs. Where the legitimate needs of the Government can be satisfied from only a single source, we do not think the law requires that they be compromised to obtain competition * * *."

In another decision, Precision Dynamics Corporation, 75-1 CPD 402, the Comptroller General said,

> "However a preference for a particular item, even when that item has proven to be superior to other similar items, cannot support a sole-source award unless only that item can satisfy the Government's needs."

DOCUMENTARY EVIDENCE OF OBLIGATIONS

EXCERPTS FROM 31 U.S.C. 200

§ 200. Documentary evidence of obligations of United States

(a) Requirement; character of evidence. After the date of enactment hereof [enacted Aug. 26, 1954] no amount shall be recorded as an obligation of the Government of the United Staes unless it is supported by documentary evidence of--

(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed * * *.

* * * * *

(b) Report by agency heads in connection with requests for proposed appropriations. Hereafter, in connection with the submission of all requests for proposed appropriations to the Bureau of the Budget [Office of Management and Budget], the head of each Federal agency shall report that any statement of obligations furnished therewith consists of valid obligations * * *.

OFFICE OF MANAGEMENT AND BUDGET POLICY LETTER 81-1

"PROCUREMENT PROCEDURES, ADVANCE PROCUREMENT PLANNING, AND REVIEW OF END-OF-YEAR PURCHASES"

August 13, 1981

To the heads of Executive Departments and Establishments: It is the responsibility of the head of each agency to assure efficient and economical procurement. Consistent with that responsibility is an obligation to reduce wasteful practices resulting from hurried or unnecessary end-of-year procurement. In carrying out these responsibilities, the Head of each Executive Department or Establishment shall establish the following management controls:

1. Procurement procedures providing lead time and cut-off dates. Each agency shall develop procedures that allow sufficient lead time to prepare solicitations, obtain and evaluate bids or proposals, audit, negotiate, and make contract awards in an orderly manner. The procedures shall specify the lead time required and establish firm cut-off dates for submission to procurement offices of requests for contract action to be completed by the end of a fiscal year. The lead times and cut-off dates may vary with the type of contract action and dollar thresholds. Exceptions to the lead time and cut-off date procedures should be kept to a minimum and approved only under extraordinary circumstances.

2. Advance Procurement Planning. Agencies shall issue procedures that require an Advance Procurement Planning System (APP) for each activity. The procedure shall include:

--Establishment of a specific threshold above which procurements are to be considered major;

--Development and maintenance of an advance procurement plan to cover major procurement requirements and other requirements with high waste vulnerability, such as consulting services, certain equipment, periodicals, pamphlets, or audiovisual products. The plan should be developed well in advance of the fiscal year in which the acquisition will be made;

--Flexibility to allow revisions to the plan, but only to reflect budget changes, emergencies, and changes in program direction;

--Procurement planning that begins concurrently with the agency budget process;

--A requirement that needs are specified in a form that permits effective competition and innovation;

--A means to resolve disagreements between procurement and project offices;

--Close control of major and high waste vulnerability purchases to assure that they are consistent with the advance procurement plan; and

--An ongoing program to assess the appropriateness of the methods used to satisfy needs, including cost effectiveness, whether gold-plating will result, and life cycle costing, where appropriate.

3. Review procedures for the last quarter spending. Each agency shall develop review procedures that require: (a) close control of purchases made in the last quarter to assure that they are consistent with the advance procurement plan, (b) reevaluation of the need for purchases made in the last quarter, (c) good procurement practice and accountability to assure that contracts are awarded only if prices are reasonable, and (d) award of contracts on the basis of competition unless award on some other basis is significantly to the advantage of the agency.

4. Contract Action Log. Each procuring activity shall keep a log of major or high waste vulnerability contract actions.

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Effective Date: This Policy Letter is effective August 28, 1981.

EXCERPTS FROM THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977 1/

Sec.2.(a) the Congress finds that--

(1) there is a need to distinguish Federal assistance relationships from Federal procurement relationships and thereby to standardize usage and clarify the meaning of the legal instrument which reflect such relationships;

(2) uncertainty as to the meaning of such terms as "contract", "grant", and "cooperative agreement" and the relationships they reflect causes operational inconsistencies, confusion, inefficiency, and waste for recipients of awards as well as for executive agencies * * *.

USE OF CONTRACTS

Sec. 4. Each executive agency shall use a type of procurement contract as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient--

(1) whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or

(2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate.

USE OF GRANT AGREEMENTS

Sec. 5. Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever--

(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and

(2) no substantial involvement is anticipated between the executive agency acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

1/Public Law 95-224 and 41 U.S.C. 510 et seq.

USE OF COOPERATIVE AGREEMENTS

Sec. 6. Each executive agency shall use a type of cooperative agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever--

(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and

(2) substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

GLOSSARY

Commerce Business Daily: The Commerce Business Daily is published every day except weekends and holidays by the Department of Commerce. It gives industry information on current Government contracting and subcontracting opportunities, including information on the identity and location of contracting offices and prime contractors having current or potential need for certain requirements. This publication is especially effective for reaching potential suppliers outside the local area in which the need arises.

Competition: Adequate price competition is assumed to exist if (1) offers are solicited, (2) at least two responsible offerors independently contend for the contract by submitting offers that can meet the solicitation requirements, and (3) the contract is awarded to the offeror meeting the above criteria and submitting the lowest evaluated price. In the context of a negotiated procurement, technical, design, or other nonprice competition exists when competition is not based to a significant extent on the lowest price, but rather on the highest demonstrated competence or technical capability or the best design proposal. For example, such nonprice competition is typical on research and development contracts that are cost reimbursable because costs cannot be accurately estimated.

Contract: A term describing various agreements or orders for procuring supplies or services. An agreement, enforceable by law, between two or more competent parties to do or not do something not prohibited by law, for a legal consideration. All contracts require the essential elements of offer and acceptance. These elements constitute the means by which a contract is consummated, and the absence of either element prevents the formation of a contract. In Government procurements, the invitation for bids or request for proposals constitutes a request by the Government for offers of a certain nature. The bid or proposal submitted in response to the solicitation is, in fact, the offer, and the subsequent contract award constitutes acceptance. (Also, see app. XI.)

Contract modification: Any written change in the specifications, delivery point, rate of delivery, contract period, quantity, or other provisions of an existing contract.

Contracting officer: Any person who, either by virtue of his/her position or by appointment in accordance with prescribed regulations, is vested with the authority to enter into and administer contracts and make determinations and findings with respect thereto or with any part of such authority. Contracting officers may not pass their responsibility on, even when they must rely on others for information and technical advice.

Cooperative agreement: See appendix XI.

Defense Acquisition Regulation: Details the rules covering procurement by the Department of Defense.

Determination and findings: A written justification by the contracting officer or higher authority often used to justify use of a particular statutory authority to allow negotiation of procurement. The D&F cites the exception to formal advertising.

Federal Acquisition Regulation: Currently being developed by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration, under the guidance of the Administrator for Federal Procurement Policy, Office of Management and Budget, to replace both the Defense Acquisition Regulation and Federal Procurement Regulations.

Federal Grant and Cooperative Agreement Act of 1977: Distinguishes among the types of relationships--contracts, grants, and cooperative agreements--the Federal Government enters into with recipients of Federal awards. (See app. XI.)

Federal Procurement Regulations: The basic document governing Federal civilian agency procurement.

Formal advertising: Formal advertising consists of four distinct steps: (1) the issuing of an invitation for bids which contains specifications describing the Government's minimum needs and generally the publicizing of the prospective procurement award, (2) the potential contractors' submission of sealed bids, (3) a public opening of the sealed bids at a specified time and place, and (4) the award of a contract to the lowest responsible bidder whose bid conforms in all material respects to the requirements of the invitation for bids.

Grant: See appendix XI.

Invitation for bids: The solicitation document used in conventional formal advertising and two-step formal advertising.

Letter contract: A written preliminary contractual instrument that authorizes the immediate start of activity under its terms and conditions, pending definization of a fixed-price or cost-reimbursement pricing arrangement for the work to be done. A letter contract must be superseded by a definitive contract within a specified time.

Method of procurement: Procedures followed to translate requirements into contracts. The Government's two major methods of procurement are (1) formal advertising and (2) negotiation.

Negotiation: Involves a more flexible set of procedures than, and may be defined to include all methods of procurement other than, formal advertising. Negotiated procurement may be either competitive or noncompetitive. (See ch. 1.)

Negotiation authority: The legal authority to use negotiation rather than formal advertising as the method of procurement.

Procurement request: The initiating document that describes the required supplies or services to be procured. It serves as the basis on which the contracting officer issues a solicitation.

Proprietary information: Data owned by a contractor. It is usually obtained before the contractor enters into a contract.

Proposal: A prospective contractor's reply to a request for proposal in a negotiated procurement. The firm submitting a proposal is termed an "offeror."

Request for proposal: A solicitation document used in negotiated procurements.

Requestor (technical/program official): This official (1) identifies and describes the particular need, (2) prepares the purchase request document, and (3) submits the request to the procurement office for contract processing.

Responsible: A term indicating that a contractor has the financial resources, personnel, facilities, integrity, and overall capability to complete a Government contract successfully.

Responsive: A term describing a bid that meets, without any material deviation, the expressed requirements of the Government's solicitation.

Sole source: Characterized as the one and only source, regardless of the marketplace, possessing a unique and singularly available performance capability for the purpose of contract award. (Sometimes used interchangeably with the term "single source.")

Sources-sought synopsis: A preaward notice designed to aid in determining whether a proposed noncompetitive procurement is justified.