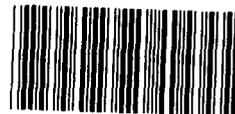


GAO

Testimony



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Contracting Out-Federal Employee Bid
Protest Rights

Statement of
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Office of the General Counsel

Before the
Subcommittee on Readiness
Committee on Armed Services
House of Representatives



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Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss our position on the proposed amendment to H.R. 2461 which allows federal employees affected by a decision of the Department of Defense (DOD) to contract for services to file a bid protest with the General Accounting Office (GAO) and to file suit in federal court challenging the decision.

We believe that there should be a forum for federal employees to question contracting out decisions. However, we think that Congress should select one forum for the resolution of these questions.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551 et seq. (1988), GAO decides bid protests concerning alleged violations of law or regulation brought by interested parties, defined in CICA as any actual or potential bidder or offeror whose direct economic interest would be affected by the award or failure to award the challenged contract. With regard to agency decisions whether to contract out for services under Office of Management and Budget Circular (OMB) A-76, GAO generally does not review such decisions under its bid protest authority as they involve matters of executive branch policy rather than statutory or regulation provisions. However, we

apply a limited exception to this rule and do review certain aspects of a contracting out decision when an agency, using the procurement system to aid in its decision, seeks offers to use as a basis for comparing the cost of in-house performance with the cost of contracting out. See Cara, Inc., B-233844; B-233845, Mar. 15, 1989, 89-1 CPD ¶ 275.

In this situation, we review protests brought by disappointed bidders or offerors who challenge an agency's decision not to contract out when the protester alleges that the resulting comparison with the cost of performing the work in-house is faulty or that there has not been compliance with the basic procurement rules applicable to the competition. Contract Servs. Co., Inc., 65 Comp. Gen. 41 (1985), 85-2 CPD ¶ 472. In this context, we review the agency's decision solely to ascertain whether the agency adhered to the established procedures for the cost comparison, and we do so, when the cost comparison itself is challenged, only after the protester has availed itself of the agency's own appeal process. We do not, however, review the underlying determination of whether the work should be performed by government personnel or by a contractor. That determination is, as I have indicated, a matter of executive branch policy.

We understand that the proposed amendment is intended to expand the class of parties who are entitled to seek such a review. Currently, we do not consider protests brought by federal employee unions or groups of federal employees adversely affected by an agency decision to contract out, since they are not bidders or offerors and thus do not fit within the CICA definition of interested parties entitled to protest. Jacksonville Naval Air Station Ass'n, B-227365, June 8, 1987, 87-1 CPD ¶ 581. The expansion of the class of interested parties eligible to file bid protests to include affected federal employee groups or unions is consistent with our goal of providing an impartial forum to those who have a legitimate economic interest in the outcome of the contract award process. Further, we believe that by allowing affected federal employee groups or unions to file protests at GAO, Congress would be rectifying a perceived inequity in the current process, which allows affected contractors access to our forum while denying the same access to affected federal employees.

If the proposed amendment is adopted, federal employees will be able to challenge decisions to contract out both before GAO and in the federal courts. We are concerned that the availability of more than one forum for challenging contracting out decisions may preclude the quick and efficient resolution of disputes concerning those decisions.

In our view, it is important to resolve decisions concerning contracting out quickly and efficiently, both to maximize the possible savings available from contracting out, and to minimize the negative effect on employee moral resulting from prolonged uncertainty with respect to the performance of their jobs. Further, the selection of one forum to hear these challenges will ensure that they are reviewed and resolved in a consistent manner. As mentioned previously, GAO has experience in reviewing protests challenging certain aspects of agency decisions in this area, and we believe that GAO can provide an effective forum for federal employees to challenge agency decisions to contract out.

We nevertheless recognize that our experience and expertise is primarily in the area of resolving what could be termed the more traditional contract formation issues, such as claimed violations of procurement laws or regulations, including such subjects as late bids, responsiveness, and responsibility. The agencies themselves have the most experience and expertise in conducting contracting out studies, and in creating the necessary performance work statements and performing the required cost comparison analyses. Thus, we think that the appeals process for federal employees affected by contracting out decisions proposed in the Commercial Activities Contracting Procedures Act of 1990, H.R. 4015, introduced February 20, should be

considered as a viable alternative to either GAO or the courts. This legislation sets up an agency appeal process for those aggrieved by contracting out decisions. The appeals process gives the right to appeal adverse cost comparison analyses to employees, labor organizations, and unsuccessful offerors. These appeals are to be heard by the agency head pursuant to the Administrative Procedure Act. The legislation also permits employees who are adversely impacted by the agency's performance work statement to appeal its terms to "the appropriate review board."

The process established by H.R. 4015 appears to contemplate a broader remedy than that offered by GAO in that the review would not necessarily be limited to procedural matters. We think that this process offers an acceptable alternative and deserves serious consideration.

In conclusion, we support that portion of the amendment which would expand the class of parties who can challenge DOD decisions to contract out, but suggest that Congress provide only one forum to hear challenges to these decisions. We also believe that the agency appeals process that would be established by the Commercial Activities Contracting Procedures Act of 1990 is an acceptable alternative and deserves consideration.

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That concludes my prepared statement, Mr. Chairman. My
colleagues and I would be pleased to respond to questions.