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# PROCUREMENT REFORM

# H.R. 1670, Federal Acquisition Reform Act of 1995

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Chairman Clinger, Chairman Spence, Ms. Collins, Mr. Dellums, and Members of the Committees:

I am pleased to be here to discuss H.R. 1670, the proposed Federal Acquisition Reform Act of 1995, introduced last week by Chairman Clinger, Chairman Spence, and others. Like other procurement reform proposals under consideration, H.R. 1670 is founded on a single theme: the complexity of the procurement system has resulted in unacceptably high levels of transaction costs and user dissatisfaction. We must take every opportunity to address the issues reflected in that theme. The American people deserve a federal government that costs less, and is efficient, flexible, and responsive.

Each year, our government spends about $200 billion on goods and services. Studies have shown that the government pays a substantial premium on what it buys because of government-unique requirements. And the government's own administrative system confronts our contracting officials with numerous mandates that leave little room for the exercise of business judgment, initiative, and creativity. The taxpayer today is, simply, paying too much money for too little product.

Over time, our system for acquiring goods and services has become overwrought with tension between the very basic goals of efficiency and fairness. The procurement system's users - the government employees who rely on it to provide the tools they need to do the government's business, and the sellers of those tools - have been sending a clear message that the system is out of balance. It is not working in everyone's interest.

The last Congress took a significant step towards addressing the tension and restoring the balance with the Federal Acquisition Streamlining Act of 1994 (FASA). The Act established a simplified acquisition threshold (SAT) and a preference for commercial items, as well as addressing a wide spectrum of issues regarding the administrative burden - on all sides - associated with the government's specialized requirements. These ranged from socio-economic laws to the government's oversight tools, which over the years have resulted in major differences between the government and commercial marketplaces.

As required by FASA, we have been reviewing the regulatory implementation of the Act. Even before the Act was signed, the Administration assembled interagency drafting teams, which have completed the task of issuing proposed regulations for public comment. The teams will be reviewing all the comments over the next few months, and final regulations then will be issued. In addition, individual agencies have efforts underway to draft regulations, policy memoranda, and other changes needed to

implement agency-unique FASA provisions. We will be reporting the results of our assessment of this process later this year.

As important as the FASA effort was, most of those involved believe that it represented a continuation rather than a culmination of reform. There are currently a number of reform proposals under discussion, in addition to H.R. 1670, such as the Administration bill, suggestions from industry groups, and provisions in the Department of Defense authorization. The proposals basically involve two issues: how to simplify the process further, and how to resolve disputes over the selection process.

H.R. 1670 contains a number of excellent ideas for improving the government's acquisition system, some of which I will address today. It is important to emphasize that although we have conducted audits and evaluations addressing virtually every phase of the acquisition system, and review almost 3,000 bid protests yearly, we do not have data or work on many of the bill's provisions. Nevertheless, it is clear that, on the whole, H.R. 1670 shares a common objective with the other reform initiatives: to allow industry to offer, and empower our acquisition professionals to acquire, maximum value for the taxpayer with the minimum of transaction costs.

## SIMPLIFYING THE PROCESS

### Competition

H.R. 1670 would replace the existing requirement that agencies obtain full and open competition with a requirement for "maximum practicable" competition. The effect of the change would be to state the competition requirement in terms that applied prior to the Competition in Contracting Act (CICA). Before CICA, agencies were required to solicit offers from the maximum number of qualified sources consistent with the nature and requirements of the equipment or services being procured.

Competition brings the government the benefits of the free marketplace – lower prices and higher quality. CICA was enacted after years of congressional concern that, rather than seek competition, executive agencies relied on sole-source contracts to an unacceptable extent. We recognize that some will contend that the proposed change would represent a step backward in the government's efforts to promote competition in its procurements. However, under H.R. 1670, agencies still would be required to get competition in all procurements when practicable. The real problem is that at some level of competition, the costs of administration can begin to outweigh the benefits. The issue before the Congress therefore is whether the costs incurred in requiring full and open competition in all procurements have come to outweigh the benefits. The users of the system are asking for increased flexibility in

this area, and the Congress ought to give serious consideration to accommodating that request.

## Commercial Items

FASA established a preference for the acquisition of commercial items and provided for an expanded exemption for such items from the requirement for certified cost or pricing data contained in the Truth in Negotiations Act (TINA). To finish the initiative, we have suggested exempting all commercial items as defined in FASA from the certified data and audit requirements of TINA and from the corresponding requirements of the cost accounting standards. This is the approach taken by H.R. 1670. We recognize that there are arguments that market forces may not have sufficient impact on some items contained within the FASA definition - those items not yet in the commercial market, but that evolve out of existing commercial items - to ensure fair and reasonable prices without the assistance of certified data. The question for the Congress is whether the impact of the free market on the basic item will be sufficient. Clearly, the more the government is willing to bear the same risks as any other large customer, the more advantage it can take of the commercial market.

## FACNET

FASA established the Federal Acquisition Computer Network, or FACNET, a government-wide electronic commerce architecture that will allow firms to receive notice of government acquisitions by computer and be able to submit offers in response electronically. The implementation of FACNET will transform the current cumbersome, paper-driven process into a modern, computer-based system readily accessible to government and private sector users. This should significantly reduce staff time for all parties using the system and result in substantial reduction in transaction costs.

Ensuring early implementation of FACNET will require sustained commitment of senior management, as well as continued oversight by the Congress. The Administration should be encouraged to pursue vigorously the development and implementation of full FACNET capability on the schedule set forth in FASA.

FASA made great strides in establishing the framework for testing innovative concepts through pilot programs to be conducted by the Administrator for Federal Procurement Policy. However, the requirement in FASA that the exercise of this authority be delayed until the agency proposing to conduct the test has implemented full electronic commerce - full FACNET - impedes improvements in the acquisition process. As stated earlier, FACNET is an important program that has great merit on its own, and it should be implemented as soon as possible. Testing innovations is also important and could be pursued independently. We support the provision in H.R. 1670 that would eliminate that linkage.

## PROTESTS

An area where further streamlining and reform might reduce the costs of the acquisition process is one with which we at GAO are particularly well-acquainted, bid protests. We receive almost 3,000 bid protests a year. Most will agree that there is a role for oversight of the acquisition system through protests. We believe that protests can provide a relatively inexpensive check against unlawful or arbitrary decisionmaking, and we work hard to avoid needless second-guessing of the discretionary business judgments made by our procurement professionals. The protest process should carefully balance the costs of oversight against the benefits to government contractors, the government itself, and ultimately, the taxpayers.

H.R. 1670 would consolidate the two administrative forums, GAO and the General Services Board of Contract Appeals (GSBCA), along with the other 10 boards of contract appeals, in a single, all-inclusive board. First, I should say that if we were establishing a General Accounting Office today, we probably would not include bid protests as one of its functions. There is no clear relationship between GAO's audit and evaluation function and providing a quasi-judicial forum to hear a frustrated vendor's complaint that an agency failed to follow all the rules in awarding a contract. There have been proposals to lodge the function in the executive branch for as long as I can remember. There are two reasons, I believe, why GAO has continued to perform the function since the 1920's. One is the quality of our decisions. Agencies and protesters all have examples of cases they should have won. But the procurement community historically has relied on the sound analysis and fair judgment of the hundreds of men and women who have been and are now involved in the resolution of bid protests at GAO.

The second reason for bid protests at GAO is the difficulty of finding a location that can withstand pressures to increase the complexity and costs of the process. Those pressures can be high. For example, corporate managers who make bad business judgments, who misjudge the competition and fail to obtain a major contract for their company can claim that they were misled by the description of the agency's needs, or that their product was not fairly evaluated. There is really no limit to the level of discovery and intrusion into the agency's decision process desired by a firm that believes it has been wrongly treated. When such protesters can freeze the agency's ability to obtain what it needs for months, or can require 40 depositions and a 2-week trial preventing agency and the awardee's managers from performing their normal activities for weeks or months, we must ask whether the price is too high. GAO has struggled to craft procedures that balance the need to ensure that the government fairly uses the competitive system to obtain the best possible contracts with the need to keep costs of our oversight low.

We believe that it is essential that this concept of a relatively inexpensive and efficient protest process be preserved. It is from this perspective that we offer the following thoughts on H.R. 1670.

We have no comments on the proposal to combine the boards of contract appeals except to say that the costs of creating a new organization with its own overhead and administrative costs is likely to be higher than several alternatives. The Congress could, for example, merge all of the boards into what is by far the largest board, the Armed Services Board of Contract Appeals, or into the second largest board, the GSBCA, or it could place the new combined board in the Office of Management and Budget, which currently houses the Office of Federal Procurement Policy and the Cost Accounting Standards Board.

Several provisions of H.R. 1670 appear intended to preserve the best of GAO practice and to prevent the inevitable pressure that could come from within and without the new combined board to use the full range of costly and burdensome litigation, discovery, and trial procedures in bid protests. For protests of procurements under $1 million, only document discovery would be permitted and a decision would be required within 35 days. This would encompass only about 37 percent of the approximately 800 annual GAO protests that are not settled or dismissed and go completely through the process to a decision on the merits. In other words, 500 protests that now involve only document discovery and rarely require a hearing could be subject to complete litigation, discovery, and trial procedures. Currently, fewer than 200 GSBCA cases annually are subject to such process. If the Congress elects to use a dollar-value threshold for application of more intensive procedures, we suggest at least $10 million. Over the past 3 fiscal years we estimate that 25 percent, or 200 protests, per year of those that went completely through the GAO process involved procurements of over $10 million.

In addition, we suggest that to help ensure that the forum minimizes discovery in larger procurements, which often involve simple issues of fact or law, the new board should be directed to limit discovery and the use of hearings to the minimum extent necessary to resolve the issues raised in an expeditious and cost-effective manner.

The bill would not follow the current procedures applicable to GAO that allow an agency to decide when the exigencies of public need require it to proceed with a procurement while a bid protest is being considered. This is less cumbersome and expensive than requiring the forum itself to hear and decide all such issues as H.R. 1670 proposes. At GAO, agencies award about 10 contracts a year while protests are pending - out of perhaps 400 pre-award protests that are decided on the merits annually. Not once have they done so where the protest was ultimately sustained. They do

proceed at a higher rate with performance of contracts that had already been awarded before the protest was filed. Successful protesters generally do not suffer in those cases because by statute GAO may not take into account costs to the government in providing a remedy. We believe that the GAO procedure presents a less costly alternative to addressing this issue.

Another area where we believe additional clarity is needed in the bill concerns the standard for review of protests. The American Bar Association will be submitting proposed language for a review standard that we believe more closely approximates the standard used by GAO. We would be happy to work with you or your staffs on this critical language.

H.R. 1670 contains other suggestions that should help reduce protests no matter what changes are made to the protest resolution system. For example, the bill would expand the new FASA debriefing process to include, where appropriate, preaward debriefings for those that have been excluded from the competitive range. This would help eliminate preaward protests that often are filed by offerors primarily because they have been given little or no information as to why their proposals were rejected.

Mr. Chairmen, this concludes my prepared statement. I would be pleased to address any questions you or the Members may have.

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