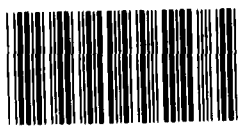
UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

PROCUREMENT, LOGISTICS,
AND READINESS DIVISION

October 20, 1981



B-205228

The Honorable Carl Levin
United States Senate

Dear Senator Levin:

Subject: Comments on Senator Levin's Proposed Amendment to the Fiscal Year 1982 Defense Authorization Act (PLRD 82-14)

This report is in response to your letter dated October 15, 1981, requesting our views on your amendment to the Fiscal Year 1982 Defense Authorization Act, Senate bill 815. Conceptually, we agree with the objectives of the amendment, that is, restricting the Department of Defense's (DOD's) use of sole-source, noncompetitive contracting. In our opinion, section 908(a) has merit and would increase opportunities for competition because it would require that offers be considered even when a sole-source award is anticipated. We have found instances where DOD's (as well as various civil agencies') notices in the Commerce Business Daily stipulate that an agency will not accept or consider proposals because the decision has been made to award the contract on a sole-source basis. This has resulted in sole-source awards where competition was feasible. Except in unusual circumstances, we believe agencies should publicize prospective awards to determine if competition is available, rather than reach a sole-source decision before interested potential contractors have been given notice and an opportunity to be considered.

Our primary concern is with certain provisions of section 908 (b)(2) that identify the circumstances under which contracts would be exempt from the requirements to publicize notices of prospective awards. We noticed that while certain exempt situations in your amendment are currently exempted from the publicizing requirement by the Defense Acquisition Regulation 1-1003, your amendment is unclear and has the possibility of being misinterpreted as increasing the number of exemptions.

We believe that several exempt situations are highly undesirable since they are likely to decrease attention to competitive possibilities. Our specific problems concern section 908(b)(2)(F), (K), (L), and (N) and section 908(d).

Item (F) exempts contracts for personal or professional services in an amount less than $500,000. We have found many noncompetitive contracts for studies that could have been performed by other equally qualified researchers. Publication of these proposed contracts will alert other potential sources and may illustrate

that the proposed sole-source contractor does not have unique capabilities.

Item (K) concerns products covered by patent rights, copyrights, or proprietary information. We do not believe the existence of patent rights or proprietary information necessarily precludes obtaining competition since the Government has authority to idemnify contractors against patent infringements. In addition, other firms may be licensed or can obtain licenses to produce patented articles. Finally, if needs are described functionally, publication may elicit solutions other than the patented methodology.

Item (L) exempts contracts with nonprofit educational institutions. We believe the needs to be fulfilled by proposed contracts with such institutions should be publicized. Competition for the award, at least on a technical basis, should be sought, and we believe there are often many institutions, both nonprofit and profit making, that have the capability needed. Competition would provide the opportunity to select the best and, under certain circumstances, the lower priced, more efficient institution or organization.

Item (N) concerns solicitation of bids, without receiving a responsive bid. We assume the reference to bids means a formal advertised process. We believe that once the decision is made to negotiate the award it need not necessarily be a sole-source contract. It is conceivable that firms will become interested in competing for awards knowing that specifications, terms, and conditions can be discussed and that compromises can be reached under the less rigid negotiated contract procedures.

Section 908(d) defines "sole-source contract" as not including a noncompetitive follow-on contract for related supplies or services subsequent to a contract that was awarded based on design or technical competition. While this definition appears to deal with the situation frequently prevalent in the acquisition of major weapons systems, all follow-on contracts should not be exempt from publication requirements and efforts to obtain competition for the follow-ons. For example, follow-on procurements of additional Army trucks need not be noncompetitive merely because the earlier procurement was awarded based on price or design competition. Also, in the follow-on procurement of spare parts for major weapons systems, there are many opportunities to obtain competition that could be foregone in the future if this definition is enacted.

Our overriding concern is that subsection 908(b)(2) could be misinterpreted as allowing noncompetitive procurement without a specific justification showing that competition is not feasible. Our past work has shown that DOD has missed many opportunities to

obtain competition. If subsection 908(b)(2) were enacted and interpreted in this manner, we believe this bill would do more harm than good because even more opportunities for competition would be missed. This would likely increase costs and would have other negative effects on the DOD procurement process. Consequently, if the bill, including subsection 908(b)(2) were enacted, we suggest that the law or legislative history clearly provide that (1) competition is required, whenever feasible, and (2) a written justification is required for each proposed non-competitive contract.

To summarize, we believe that subsection 908(b)(2) is too permissive in allowing exemptions from the requirement to publicize notices in the Commerce Business Daily and too easily subject to misinterpretation which could cause competitive opportunities to be missed.

We believe your amendment, with the revisions we have suggested, would increase the number of procurements that are publicized, resulting in more contracts being awarded competitively. Some of the competition elicited will produce direct savings, while others may bring forth better ideas or approaches to the Government's problems. Both of these outcomes are desirable and will improve defense procurement.

Sincerely yours,

for Donald J. Horan
Director