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PROCUREMENT REFORM

Opportunities For Change

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Chairman Smith, Senator Bingaman, and Members of the Subcommittee:

I am pleased to be here today to discuss a subject that is always timely and pressing: reform of the government's acquisition system.

Each year, our government spends about $200 billion on goods and services, ranging from weapons systems to computer systems to everyday commodities. In December of 1994, a report prepared for the Secretary of Defense found that, on average, the government pays an additional 18 percent on what it buys solely because of the requirements it imposes on its contractors. That confirmed the average estimate by major contractors surveyed by GAO that the additional costs incurred in selling to the government are about 19 percent. While some of the government's unique requirements certainly are needed, we clearly are paying an enormous premium for them - billions of dollars annually.

And that is only part of the government's inflated cost of doing business, for it includes only what is paid to contractors, not the cost of the government's own administrative system. The government's contracting officials are confronted with numerous mandates of their own, often amounting to step-by-step prescriptions that increase staff and equipment needs, and leave little room for the exercise of business judgment, initiative, and creativity. Too often, the burden of the "how to" imposed on the people charged with fulfilling the government's needs impedes their ability to do the job effectively and efficiently.

The requirements on the government's sellers and buyers are well-intentioned. They generally reflect an almost constant effort to correct wrongs or add particular initiatives. It is inevitable that after a while, often-uncoordinated incremental efforts can tilt the system out of balance, until the costs of requirements outweigh benefits. That is where we are today: the acquisition system is an unbalanced mosaic of requirements that lead, simply, to too much money for too little product. It is particularly important in these times of declining budgets to continue the process of bringing the system into balance.

The last Congress took a significant step in that direction 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 to date have nearly 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, the Department of Defense has established teams internally to draft regulations, policy memoranda, and other changes needed to implement Defense-unique FASA provisions. We will be reporting the results of our assessment of this process later this year.

In addition to implementing FASA, the Department of Defense has a number of other initiatives underway to improve the acquisition process. Five process action teams have reviewed areas such as specifications, contract administration, and program oversight. Also, we are planning a series of reviews of the changes needed in the Department's major systems acquisitions. We will focus on identifying and evaluating the application of commercial "best practices" in areas such as manufacturing, quality assurance, and cost and schedule management. We plan to brief Subcommittee staff on the scope of our work later this month.

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 additional reform proposals under discussion, including an Administration bill and suggestions from industry groups. We also understand that the Department of Defense will be seeking additional changes in connection with this year's authorization bill. Many, if not most, of these proposals represent a common theme: to allow industry to offer, and empower our acquisition professionals to acquire, maximum value for the taxpayer.

The proposals under discussion basically involve three issues: (1) how to simplify the process further, (2) how to select the best contractor, and (3) how to resolve disputes over the selection process. We have organized our testimony around these issues. It is important to emphasize that although we have conducted audits and evaluations addressing virtually every phase of the acquisition process, and review almost 3,000 bid protests yearly, we have not had the opportunity to study the proposals in depth, and we may not have data useful in evaluating them. What we express today is our preliminary analysis of some of the proposals that we believe merit further consideration and study.

SIMPLIFYING THE PROCESS

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, serious consideration ought to be given to 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. 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.

Simplified Acquisition Threshold

The concept of a simplified acquisition threshold set forth in title IV of FASA, under which streamlined procedures are to be used and government-specific requirements are to be waived, is a positive one, and could even be expanded. Raising the simplified acquisition threshold from $100,000 set forth in FASA to $200,000 would result in simplifying an additional 11,000 procurements worth over $1.5 billion, based on fiscal year 1994 data. The micro-purchase threshold ($2,500) also could be raised. Under FASA, such micro-purchases are exempt from the small business reservation applicable to all other SAT purchases and are configured so as to enable non-procurement professionals to make them. This would result in considerably simplifying significant numbers of low-dollar value procurements.

FACNET

FASA established the Federal Acquisition Computer Network, or FACNET, a government-wide electronic commerce architecture whereby firms will 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 savings.

We have been reviewing the Administration's implementation of FACNET for a number of months now, and it is apparent to us that the Administration is committed to bringing FACNET fully on-line just as soon as it is practical to do so. The challenge of doing that is, however, considerable. Among the difficult issues that must be addressed, we have been focusing much of our attention on the need to assure adequate security. Other issues relate to the registration of vendors, developing standards, creating a single

face to industry, and of course, the adequacy of resources devoted to the effort.

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.

We recommend that the Congress consider cutting the link currently in FASA between the implementation of FACNET and the use of the simplified acquisition procedures up to the full dollar limit of the SAT. Under FASA, the simplified procedures can only be used for acquisitions up to $50,000 until FACNET is implemented, at which time the simplified procedures can be used for acquisitions up to the full $100,000. Those procedures will remain in effect at the $100,000 level for 5 years. Then, unless the agency successfully implements a more advanced form of FACNET, the threshold for the simplified procedures reverts to $50,000. While this linkage was intended to encourage the early implementation of electronic commerce through FACNET, we believe that both the simplified procedures under the SAT and the use of electronic commerce are independently meritorious. As each benefits the government and contractors, each should be implemented as soon as possible. If the Congress concludes that both will be pursued by the executive branch without one being tied to the other, then the current link could reasonably be ended.

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.

For example, the Administration has discussed with us its interest in a test of a more limited form of competition than the current standard of "full and open" competition to be used in the acquisition of a continuing requirement where there is a successful incumbent. Another suggestion would entail the use of evaluation criteria providing for an advantage to satisfactorily performing incumbents in order to recognize the importance of longer-term supplier relationships with firms that provide the government with value for its expenditures. Similarly, a disadvantage could be assessed against a poorly performing incumbent that is not actually defaulting on its contract obligations. These concepts could show promise in addressing the dilemma faced by agencies that would benefit from longer-term relationships with high quality, high

value contractors, but may be hampered from doing so under current rules. With the current link with FACNET, the Administration cannot even experiment with these ideas.

Domestic Source Restrictions

In order to better integrate the commercial and government markets the Congress could consider easing the government-unique domestic source restriction in the Buy American Act by replacing the 50-percent domestic component test with the "substantial transformation" test found in the Trade Agreements Act. In order to establish that an item is domestic under the Buy American Act, as it currently is implemented, a firm must be able to show that its domestically produced item is made from domestic components that comprise over 50 percent of the total cost of all components, which is a difficult task in today's global market. Under the Trade Agreements Act test, the company need only be able to establish that the item was "substantially transformed" from its components into its current form domestically.

We also believe that the current domestic restrictions scattered throughout the U.S. Code, as well as in various authorization and appropriations acts, should be revisited to ensure that they reflect today's markets and today's defense needs. Further consideration should be given to creating a comprehensive consolidated statutory provision containing those restrictions considered essential.

SELECTING THE BEST CONTRACTOR

Competitive Range

A critical objective as we move on the path towards a more commercial-type acquisition system is the removal of non-value-added restrictions on the government's acquisition workforce. The government can best use the open market similar to commercial customers if its buyers are empowered to make decisions based upon the particular circumstances presented by each individual acquisition.

One example of a restriction we see frequently in deciding bid protests is the requirement for discussions with all firms in the "competitive range," which has long been held to mean that agencies must conduct discussions with all competing firms that may have a chance of receiving award. A review we made of information technology purchases showed that agencies include 60 to 90 percent of all firms that compete. Also, almost always the award ultimately goes to one of the top three firms submitting initial proposals. The conduct of negotiations with and the evaluation of best and final proposals from all these firms represents an enormous expense on the part of both industry and government. This cost would be greatly reduced if contracting officers could, based

on their assessment of the market conditions and the needs of the agency, limit the competitive range in a particular acquisition to no more than the three top-rated firms.

Small Business

Another area that could prove fruitful for congressional consideration concerns the current rules regarding the participation of small business firms in the acquisition process. First, the Small Business Administration's (SBA) 8(a) program, under which the SBA enters into contracts with small and disadvantaged businesses for work to be performed for other Federal agencies, could be streamlined. Agencies that actually are receiving the performance should make the awards themselves without the need, in every instance, for the SBA to participate in the contracting process.

Similarly, SBA's Certificate of Competency (COC) authority, under which the SBA determines the responsibility of a small business, could be amended to exclude negotiated procurements in which the contracting officer evaluates a firm's past performance as a part of the technical evaluation. Since FASA requires an assessment of each competing firm's past performance during the selection process, the SBA's role in determining this element of responsibility as a part of its COC authority conflicts with the responsibility of contracting officers to make the judgments needed to select the best contractor. If the Congress concludes that SBA's reviews of these evaluations of past performance are no longer necessary, reform would simplify the process.

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. Most will agree that there is a role for a meaningful protest process in order to ensure the perception of fairness of our public acquisition system. We believe that protests 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.

Over the past several decades, contractors have come to expect greater levels of protective process in the protest system. Obvious evidence of this expectation is the existence of four places outside of the agency to protest an acquisition: GAO, the General Services Board of Contract Appeals (GSBCA), the Court of Federal Claims, or a Federal district court. These various forums offer an array of procedures and jurisdictional differences. For

example, the GSBCA may only hear protests related to certain acquisitions of information technology, whereas the Court of Federal Claims covers acquisitions of all types of goods and services, but only if the acquisition happens to be in a pre-award status.

We recently issued a report that examined one measure of the impact of this system on a particularly troubled sector of the acquisition system, information technology. We found that there were significant delays in protested information technology acquisitions of all sizes. Almost half (44 percent) of all large dollar - $25 million and above - information technology acquisitions were protested. Those acquisitions took, on average, 222 days longer (41 percent) than comparable acquisitions that were not protested. Small acquisitions up to $250,000 took 50 days, or 31 percent, longer. While the exact cause of the delays is not clear from the data we collected, it is hard not to conclude that significant delay and bid protests go hand-in-hand. With delay come increased costs.

The solution has been elusive. Some have suggested the creation of a single all-inclusive protest forum. Others have suggested eliminating all forums outside of the contracting agency. Still others have argued for combining the two judicial forums and the two administrative forums, so that there would be one judicial forum and one administrative forum. All of these ideas have their merits and drawbacks as well as their adherents and detractors. I will limit myself to some of the concepts in the Administration's bill, since we believe they are directed towards a better balance between the need to ensure the fundamental fairness of the system and the need to acquire the goods and services in a reasonably efficient manner.

First, the Administration has a suggestion that should help reduce protests no matter what changes are made to the protest resolution system. This is a proposal to 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.

Second, we believe the administrative and judicial forums that hear bid protests would benefit by a single statutory standard of review by which all protest cases would be decided. That would bring needed clarity and consistency in decisionmaking and hopefully would put an end to the constant debate over which forum offers either the government or vendors the best result. The Administration bill takes this approach. The Administration's proposal to establish a single judicial forum in the Court of Federal Claims would build a body of expertise and precedent,

although contractors in some areas of the country might prefer access to their local Federal district court.

Third, the Administration's proposal to revise the cost principles so that the costs of pursuing protests are not reimbursed under cost contracts is a good one. The government currently reimburses successful protesters at GAO and the GSBCA for those costs. Under the cost principles, however, all protesters, successful or not, may have at least a portion of their protest costs reimbursed through cost contracts. We think the payment of protest costs to successful protesters provides sufficient motivation for firms to bring alleged irregularities to the attention of the forums. We see no reason to reimburse firms for bringing unsuccessful protests.

Fourth, while it is important to pursue further reform of the formal protest forums, we have always supported fast and effective agency-level protest procedures. There is great potential here for significant savings of both time and scarce financial resources.

Finally, it may be appropriate to complement the use of simplified procedures under the SAT and the use of FACNET by testing an exemption from the formal protest process of FACNET acquisitions conducted pursuant to those procedures. Our experience is that there have been relatively few successful protests filed in procurements under the pre-FASA small purchase procedures (limited to purchases of $25,000 or less). We, of course, have no protest experience with acquisitions conducted through FACNET. A pilot program limiting protests of SAT acquisitions conducted by FACNET to those filed with the contracting agencies might facilitate a streamlined, commercial-like process for the government's most routine acquisitions. After 3 or 4 years of experience we could conduct an assessment of whether, absent the possibility of bid protests, agencies complied with the applicable procurement statutes and regulations. We recognize that the Administration favors the outright elimination of protests other than those to the agency for such acquisitions. In view of the unknown consequences of these new procedures, we believe that a test would be prudent.

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

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