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The Honorable John D. Dingell
Chairman Subcommittee on Energy and Power
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman

We have reviewed the legality of two types of contracts in which you recently expressed interest. Quick Reaction Work Order (QRWO) master contracts and task order contracts the Department of Energy's use of such contracts was discussed in our recent report on that agency's practices for awarding and administering contracts EMD 80-2 November 2. 1979.

While we conclude that the contracts are legal in theory. we believe DOE should modify its use of them in order to achieve a greater degree of competition as contemplated by the procurement statutes and regulations.

QUICK REACTION WORK ORDERS BACKGROUND

QRWO contracting is a relatively new procurement method (although it has been used by the National Aeronautics and Space Administration's Goddard Space Flight Center since 1963) and is not described in current procurement regulations. DOE states that it uses QRWO master contracts to purchase data gathering and analytical services which it cannot perform in-house and which it expects to need so urgently that they could not otherwise be procured competitively.

QRWO master contracts encompass broad, functional areas of work. On the basis of technical, business/ management, and cost proposals for such areas of work, DOE awards both a firm-fixed-price master contract and

a cost-plus-fixed-fee master contract to each of a limited number of qualified offerors, and agrees to issue work orders totaling at least $2,500 per contract over a three-year period (each master contract is for one year with two "firm" one year options). DOE indicates that the $2,500, which is obligated at the time a master contract is awarded, comes from no-year appropriations. Such funds need not be used during a particular year, but remain available until obligated or expended.

Master contracts are not used automatically. When a DOE program office identifies a specific requirement in the general area of work covered by a master contract, it must first consider using a conventional method of procurement, since QRWOs are "not a substitute for the normal procurement process." Before a QRWO can be issued, program personnel must determine, in writing, that the specific task (1) will cost $250,000 or less; (2) falls within the area of work covered by the master contract; (3) will result in a discrete deliverable; and (4) is urgently required, due to circumstances beyond the control of the program office. In addition, there must be a certification that the Government will be adversely affected if a QRWO is not issued; a contracting officer must concur in these determinations.

A work order, when issued, serves as the vehicle for solicitation, submission of proposals, and placement of work requirements. According to DOE, three master contractors, selected by a program office, generally will be asked to submit proposals. Following evaluation of these on a quick, informal basis, DOE will modify the master contract of the lowest-priced, technically acceptable offeror to include the specific task to be performed. If only one master contractor is solicited, a justification for noncompetitive procurement is required. If the parties are unable to agree on cost or price, a contractor may be directed to begin work and the cost or price will be determined in a Disputes Clause proceeding. DOE indicates that it expects to issue work order solicitations, evaluate proposals, and have contractors begin work within a period of 30 days.

In August 1979, DOE issued a QRMO solicitation under which it may award up to $45 million over a three-year period. Work areas include (1) support for program planning, program monitoring, and energy analysis; (2) DOE staff support; and (3) general tasks. An area (1) contractor, according to the solicitation, may be required to maintain current knowledge and report on the state of science and technologies or programs; identify gaps in current research and development programs; or recommend criteria for program selection, using such techniques as cost/benefit, environmental, financial and statistical analyses.

All area (3) master contracts under this solicitation were set aside for small business. In this area, contractors may, for example, be required to develop surveys, questionnaires, and other sampling tools, conduct program, scientific, and technology workshops and conferences, or provide clerical, transcription, editing, and logistical services for public meetings. In addition, 25 percent of the master contracts in work areas (1) and (2) were to be awarded to small business firms if a sufficient number of technically acceptable proposals were received from such firms. A prospective contractor could propose in any or all of the three work areas. The estimated value of all contracts to be awarded under this solicitation was $25 million, with a ceiling of $45 million; individual work orders were limited to $250,000 per contractor per master contract and total work orders to $5 million per contractor per master contract.

In another QRMO solicitation, issued in June 1979, DOE sought technical support in the areas of environmental, socioeconomic, and industrial health for its Office of Environmental Activities under the Assistant Secretary for Energy Technology. The maximum amount for all contracts under this solicitation was $3 million.

The two procurements described above appear to be typical of the use which DOE will make of QRMO master contracts, although the agency has indicated that it

may, in the future procure goods and supplies, as well as studies and consulting services, in this manner.

TASK ORDER CONTRACTS - BACKGROUND

Task order contracts usually are awarded competitively under broad general statements of work, calling for contractor research and assistance in a given area with specific work to be ordered in the future. Once a contract is awarded, and as the need arises, DOE issues individual task orders specifying the actual work to be performed. The contractor then submits a plan specifying the level of effort (usually stipulated in terms of direct staff days or hours) to be utilized in accomplishing the required task, and the contractor's proposed approach. After reviewing the plan and, when appropriate, after negotiations with the contractor, DOE approves the plan. In other words, these contracts [hereafter referred to as level-of-effort task order contracts] establish a relationship between DOE and the contractor whereby DOE purchases a specific amount of contractor time in a given research area, with the contractor usually submitting a report of its findings.

The purpose of these level-of-effort task order contracts, like that of QRWO master contracts, is to permit DOE to obtain assistance in a given area which undoubtedly will be required over a definite period of time but the extent and specifics of which are unknown at the time of the award. Unlike QRWOs, however, there is no competition at the time task orders are placed.

LEGAL DISCUSSION -- QRWO MASTER CONTRACTS

In examining the legality of QRWO master contracts, we considered the nature of the contract and the statutes and regulations dealing with competitive procurement. At the request of your staff, we also considered conflict of interest and small business aspects of QRWO contracting.

Nature of the Contract

We initially reviewed the nature and extent of the parties' obligations to determine whether a QRWO master

tract is actually a valid enforceable contract. DOE dicates that the essence of the QRWO master contract stem is its acquisition of qualified contractor standby pability through the obligation of master contractors submit bona fide proposals when solicited. However, found that as of August 1979 approximately half the firms which held master contracts had not been arded work orders in part because master contractors mitted work order proposals which were not competively priced and in part because master contractors d not submit bona fide proposals in response to work er solicitations. (As indicated in our report, some tractors do not believe they are required to submit offer whenever they are solicited.)

We believe the QRWO master contracts, as presently fted, may not clearly reflect DOE's intent that mas- contractors be obliged to submit work order pro- sals when solicited. (This point is important because there is no such obligation, there may not be an forceable contract. See the discussion of the doctrine mutuality of obligation in Calamari and Perillo, The w of Contracts § 67 (1970).) Although the standard ster contract presently used by DOE states that the tractor "shall" submit bona fide offers when solic- d, the provision could be read as a procedural rather an a substantive one. We believe DOE should revise e master contract to clearly indicate that the pro- sion imposes a substantive requirement on the con- ctor and perhaps specifically spell out the possible tions (such as termination for default) that could imposed if the contractor does not comply with the quirement. In the absence of these revisions, we think is questionable whether any actual contractual obli- tion arises on the part of the master contractor.

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Federal agencies are required to use procurement thods permitting "such full and free competition as consistent with the procurement of types of property

services necessary to meet the requirements of the ...cy concerned." 41 U.S.C. 253(a)(1976). This and ...ilar language in 10 U.S.C. 2305(a)(1976), which ...lies to the Armed Services and NASA, has long been ...d to vest in procuring agencies reasonable discretion ...determine the degree of competition that is consistent ...th their needs. 50 Comp. Gen. 542(1971); 43 Comp. Gen. ...(1963). See also Federal Procurement Regulations ...) 55 1-1.301-1 1-1.302-1(b)(1964 ed. amend. 169); ... 1-3.101(d)(1964 ed. amend. 194).

Despite DOE's statements to the contrary, we find ...ard of QRVO master contracts is a form of pre-...lification of offerors. In most but not all cases ...is an undue restriction on competition, since it ...nts to a premature determination of responsibility. ...Retair Industries 58 Comp. Gen. 149(1978) 78-2 ...410; D. Moody & Co., Inc., 55 Comp. Gen. 1(1975), ...-2 CPD 1. Any system of prequalification, of course,

> * * * * is to some degree in derogation of the principal tenent of the competitive system that bids or proposals be solicited in such a manner as to permit the maximum amount of competition consistent with the nature and extent of the services or items being procured. * * * The * * * pertinent [inquiry however], * * * is not whether it restricts competition per se, but whether it unduly restricts competition." Department of Agriculture's Use of Master Agreement, 54 Comp. Gen. 606, 608 (1975), 75-1 CPD 40 (hereafter Agriculture I).

Our Office has sustained prequalification of offerors in the rare instances when it was shown that such prequalification was in the best interest of the Government and that it did not unduly restrict competition in the particular circumstances involved. For example, we approved production line certification of manufacturers prior to and independent of any particular procurement by the National Aeronautics and Space

Administration (NASA) because testing of microcircuits to determine the extremely high level of quality and reliability demanded by the space program was either impossible or impracticable. 50 Comp. Gen. 542 (1971). We also approved a Department of Health, Education, and Welfare (HEW) plan to meet urgent requirements placed upon it by Congress and the White House by entering into basic ordering agreements with qualified offerors: we found that since sole-source awards were the only likely alternative for tasks which could not be performed in-house, prequalification actually enhanced competition. Department of Health, Education, and Welfare's use of basic ordering type agreement procedure, 54 Comp. Gen. 1098 (1975), 75-1 CPD 392.

In addition, we approved a Department of Agriculture prequalification scheme after it was modified to provide that all qualified firms in particular skill areas would receive master agreements and that small firms which could not compete for large, requirements-type contracts would be able to compete for individual projects; we found that both costs and pressures for using less competitive methods of procurement would be reduced. Department of Agriculture's Use of Master Agreements, 56 Comp. Gen. 78 (1976), 76-2 CPD 390 (hereafter Agriculture II).

In many other cases, we objected to prequalification schemes because they were not shown to be other than unduly restrictive of competition. See, e.g., Agriculture I (where the only justification was the administrative burden of making large numbers of solicitations available or evaluating large numbers of offers) 53 Comp. Gen. 209 (1973) (involving a National Highway Traffic Safety Administration proposal to establish a Qualified Offerors List without adequate procedures) and 52 Comp. Gen. 569 (1973) (involving the National Park Service's use of the negotiation exception for purposes of prequalification).

DOE has presented many of the same justifications for QRMO contracting as were presented by NASA, HEW,

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Agriculture in support of the prequalification which we upheld. DOE argues that the critical nature of its mission--formulation and execution of national energy policy--as well as the pace of national and international events and the unavailability of civil servants in required disciplines "presently combine to make DOE's needs unique among Federal agencies in degree of urgency." In the past, DOE states, it has met urgent requirements by awarding sole-source or level-of-effort work order contracts, a practice which may have increased costs, produced inferior products, and limited opportunities for competition, particularly for small and minority business firms. In addition, DOE acknowledges, it has sometimes found it necessary to authorize pre-contract costs, enter into letter contracts, or ratify informal commitments by unauthorized personnel. DOE concludes that use of ORWO master contracts should greatly reduce such undesirable procurement practices in exigency situations. DOE further argues that it lacks in-house capability to perform the studies for which it is contracting, and that it has developed adequate procedures for program offices wishing to use ORWOs.

In the HEW and Agriculture II cases, however, all qualified offerors and/or all firms in the competitive range were to be awarded master contracts. In DOE's case, the number of master contracts in any given work area will be limited. In this regard, the agency states:

> "[A]lthough DOE does not articulate the basis of selection in terms of award to all firms within a competitive range, in substance, selection is made on that basis. The number of awards is not established until actual source selection. The selection process is essentially one of choosing firms which, in light of announced criteria, are likely to be competitive with one another in work order competitions. Additionally, the aggregate capacity of potential awardees is taken into account. Factors considered include the expected normal and peak workloads * * *

and other matters which bear on maintaining a viable competitive environment for work order competitions."

In evaluation of technical proposals for master contracts, it appears that DOE emphasizes experience this was the case in the August 1979 solicitation. Cost proposals are evaluated according to the realism of the offeror's weighted hourly cost of doing business, based on direct labor costs for a mix of skills which DOE considers necessary for performance, plus indirect costs, with ceilings on G & A overhead, and profit. In addition, if the total procurement is estimated at $5 million or more, it is conducted according to the procedures outlined in DOE's Source Evaluation Board Handbook. It appears that DOE, in using these evaluation procedures, will award master contracts to all qualified offerors, although the competitive range in some cases may be a narrow one.

In light of this explanation, plus the other justification advanced by DOE, we find the theory of QRWO master contracting to be reasonable and not, in and of itself, unduly restrictive of competition. However, our preliminary audit work, as of February 8, 1980, indicates that DOE has solicited only one master contractor in over 80 per cent of the work orders examined. Since all master contractors, by definition, are qualified in the broad general areas of work for which they hold contracts, and all have agreed to submit bona fide work order proposals when solicited, we believe sole-source awards of work orders should rarely occur. If in practice DOE's use of QRWOs does not reduce the number of sole-source awards, this method of procurement may not be consistent with procurement statutes and regulations.

In addition, we are concerned that once master contracts have been awarded, no additional solicitations will be issued by DOE and no additional contracts will be awarded for three years. In those cases upholding prequalification of offerors, we have emphasized that:

"no manufacturer or producer is necessarily precluded from competing for a procurement for which he is able to provide a satisfactory product, and any such manufacturer or producer may become eligible to compete at any time that it demonstrates under applicable procedures that it is able to furnish an acceptable item meeting the Government's needs." Agriculture I. (Emphasis added.)

DOE states that annual solicitation, evaluation, and award would place an impossible burden on its program offices, would discourage use of QRWOs, and would result in contractors diverting their attention from performance to competition and negotiation. DOE further states that it must hold master contracts to a manageable number to be consistent with an expedited procurement.

We are not persuaded. Deliberate and complete exclusion of potentially qualified offerors for up to three years, merely or primarily to reduce administrative burdens, in our view is an undue restriction upon competition. For example, newly organized firms would be precluded from competition for a lengthy period. In August 1979 we also found a number of firms which had not competed for master contracts because they lacked capacity or capability at the time a solicitation was issued, but in less than three years wished to compete. We therefore believe that DOE should modify its QRWO procedures in this regard.

In addition, during competition for work orders, we see no reason for limiting the number of master contractors solicited to three. Since evaluation of work order proposals is quick and informal, and award generally is made on the basis of price, we believe that DOE should broaden competition at this stage by soliciting the maximum practicable number of master contractors for each work order.

Increasing the number of master contractors solicited should also insure that those who have not previously been awarded work orders will have an opportunity to compete. Contracting officers now are authorized to add

to source lists prepared by program personnel at the time a work order is to be issued, using either a rotation system or lists which indicate which master contractors have not previously been solicited. so long as any master contractor has not been awarded a work order, contracting officers have been orally advised that at least one such master contractor should be solicited for each work order, DOE states. We believe DOE should increase this number and develop precise written guidelines for contracting officers.

Organizational Conflicts of Interest

The Department of Energy Procurement Regulations provide that it is DOE's policy to "identify and avoid or mitigate organizational conflicts of interest before entering into contracts, agreements, and other arrangements." See 41 C.F.R. § 9-1.5402 (1979). According to the regulations, an organizational conflict of interest exists when an offeror or contractor has "past, present or currently planned interests that either directly or indirectly, through a client relationship, relate to work to be performed under a Department contract and which (1) may diminish its capacity to give impartial, technically sound, objective assistance and advice, or (2) may result in it being given an unfair competitive advantage." Id. § 9-1.5403(a)

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In order to "identify and avoid or mitigate" such conflicts of interest, DOE requires that offerors disclose relevant information bearing on the possible existence of any organizational conflicts of interest or warrant that no such conflicts exist. Id. §§ 9-1.5405 and 9-1.5407 The regulations further provide that if DOE determines a conflict exists, the contracting officer shall disqualify the offeror, avoid the conflict by including appropriate conditions in the resultant contract, or if the best interests of the Government so require, award the contract to the contractor without regard to the conflict. Id. § 9-1.5409

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DOE's ORHO master contract solicitations advise offerors of its policy of avoiding organizational conflicts of interest and require offerors to submit disclosure statements reflecting potential conflicts.

However, DOE does not determine whether a conflict exists before award of the QRWO master contract, but rather makes such determinations as part of the work order solicitation and award process.

We believe this procedure represents the only feasible means of avoiding organizational conflicts of interest, since the areas of work described in master contracts are so broad that almost every offeror would have a potential conflict. We note with approval that DOE has spelled out, in QRWO master contract solicitations, the consequences of failure to disclose or misrepresentation of any revelant interest. An offeror may, because of possible conflicts of interest, propose to exclude specific kinds of work contained in a QRWO solicitation.

Small Business Preference

Congress has declared that a fair proportion of the total Federal purchases and contracts should be placed with small business concerns. 41 U.S.C. 252(b)(1976); FPR § 1-1.702(1964 ed. amend. 192). In discussing this obligation, DOE states that in QRWO contracting, small business competition is enhanced by enabling such firms to compete for individual projects from which they would otherwise be precluded due to the size of the contracts. In addition, DOE believes that prequalification will reduce the cost of responding to successive solicitations, thus encouraging small business to compete.

We note that in the August 1979 solicitation, DOE defined and totally set aside an area of work which it believed appropriate for small businesses; in addition, 25 percent of the master contracts in other areas of work under that solicitation were set aside. DOE states that special recognition of the needs of small business will be a policy in QRWO solicitations, and that it generally will set aside a minimum percentage of awards for such firms. Under the August 1979 solicitation, the agency's Director of Small and Disadvantaged Business Utilization was to screen work orders, and small businesses were to be added to lists of firms solicited whenever the director recommended.

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Assuming that these declared policies are followed and that small businesses actually do receive a [illegible] portion of ORWO master contracts and work orders [illegible] we believe DOE will have met its statutory obligation to small business.

LEVEL-OF-EFFORT TASK ORDER CONTRACTING

Level-of-effort task order contracts are awarded on a competitive basis, and we find nothing inherently illegal in their use. However, the broad statements of work contained in the initial solicitation can make meaningful competition difficult and may not insure that DOE ultimately obtains acceptable products at the lowest possible price under a given individual task order. Furthermore, since under level-of-effort contracts a contractor is usually reimbursed for time expended, rather than results achieved, these contracts have the potential for maximizing rather than minimizing cost to the Government. In this regard, DOE has conceded that "[l]evel-of-effort contracting is recognized as a form of contracting which imposes few [illegible] and little incentive on the contractor * * *" and that "[t]he level-of-effort contractor can easily become complacent since he does not even have to 'sell' his proposals to receive award of a task."

For these reasons, we believe DOE should take steps to more clearly state and define the work to be [illegible] over the course of the contract period in future [illegible] solicitations. Additionally, we believe that DOE should, whenever possible, avoid the use of these contracts. We believe DOE's ORWO contracting system is preferable to task order contracting.

I trust this information will be helpful to you.

Sincerely yours,

R. F. KELLER

Deputy Comptroller General
of the United States

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