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REPORT BY THE

Comptroller General

OF THE UNITED STATES

Federal Regulations Need To Be Revised To Fully Realize The Purposes Of The Competition In Contracting Act Of 1984

This report addresses several issues relating to executive agencies' implementation of the Competition in Contracting Act of 1984 in federal acquisition regulations. The purposes of the act were to enhance competition and better limit unnecessary sole-source contracting.

GAO found that some provisions in two government-wide regulations--the Federal Acquisition Regulation and the Federal Information Resources Management Regulation--need to be revised to be consistent with the requirements of the act or with congressional intent, as expressed in the House and Senate Conference Committee report on the act. Other provisions need to be revised to better implement the act's objectives. GAO also found that some agencies and subagencies had not properly revised their acquisition regulations to conform to the act.

GAO makes recommendations to revise the Federal Acquisition Regulation, the Federal Information Resources Management Regulation, and various agencies' and subagencies' acquisition regulations.

GAO/OGC-85-14
AUGUST 21, 1985

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-208159.5

The Honorable Jack Brooks, Chairman
The Honorable Frank Horton, Ranking Minority Member
Committee on Government Operations
House of Representatives

The Honorable William S. Cohen, Chairman
The Honorable Carl Levin, Ranking Minority Member
Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
United States Senate

This report is in response to your joint request of August 1, 1984, and subsequent discussions with your Offices. The report addresses several issues relating to executive agencies' implementation of the Competition in Contracting Act of 1984.

We are also sending copies of this report to the heads of the agencies to whom we are making recommendations.

Charles A. Bowsher

Comptroller General
of the United States

Federal agencies' purchases totaled over $182 billion in fiscal year 1984, almost one-fifth of the federal budget. The government's procurement data system reported that about 40 percent of this total was awarded competitively. Historically, the Congress has required agencies' purchases to be based on competition, whenever practicable. However, federal agencies have frequently awarded contracts on a noncompetitive (or sole-source) basis unnecessarily. As a result, the Congress enacted the Competition in Contracting Act of 1984 (the competition act) to enhance competition and better limit unnecessary sole-source contracting. The act took effect on solicitations issued after March 31, 1985.

In a joint letter dated August 1, 1984, the four congressional addressees of this report requested GAO to establish a task force to report on federal agencies' implementation of, and subsequent compliance with, the competition act. This report summarizes the work of the GAO task force to date, which has focused on implementation of the act in federal regulations. In response to the Committees' requests, GAO

--reviewed whether the changes made to various federal regulations conformed to the act;

--contacted 64 federal agencies to obtain information on how many had issued their own acquisition regulations, how many had revised them based on the act, and related matters; and

--performed other work described in the report.

BACKGROUND

Among its most important changes, the competition act strengthened or added government-wide requirements relating to (1) the use of competitive procedures, which allows all sources capable of satisfying the government's needs to compete, except in seven specified circumstances, (2) written justification and approval for the use of other than competitive procedures, (3) contractors' submissions of certified cost or pricing data (data used to price certain contracts, such as those not based on price competition), (4) publication of proposed contract awards, (5) procurement planning, and (6) bid protests by actual or prospective offerors. (See ch. 1).

Procurement within the federal government is regulated primarily by the Federal Acquisition Regulation (FAR), maintained by the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the General Services Administration (GSA). With certain exceptions, the procurement of automatic data processing equipment and related resources is regulated by the Federal Information Resources Management Regulation (FIRMR), which is maintained by GSA. In addition, some federal agencies have issued their own acquisition regulations implementing or supplementing FAR and/or FIRMR.

FAR and FIRMR were revised effective April 1, 1985, to implement the competition act. These FAR and FIRMR changes were issued as temporary regulations to be issued in final form after receipt and consideration of public comments. On July 1, GSA issued its final version of the FIRMR changes, which takes effect August 30, 1985, but may be observed earlier. The final FAR changes have not yet been issued.

RESULTS IN BRIEF

FAR needs a number of revisions for it to be consistent with the requirements of the competition act and related statutory provisions and with congressional intent, as expressed in the House and Senate Conference Committee report on the competition act. Additional FAR changes are needed to better implement the objectives of the competition act. Overall, GAO found that except for the problem areas discussed in this report, the many FAR revisions adopted to date generally reflect the statute.

GAO believes that the source of some inconsistencies was that those responsible for revising FAR did not adequately consider the conference report. Because the conference report represents the final statement of terms agreed to by both Houses of the Congress, next to the statute itself, it is the most persuasive evidence of congressional intent.

The FIRMR revisions for the most part complied with the competition act. However, some areas need improvement to satisfy the intent of the Congress, as stated in the conference report, or to better meet the act's objectives.

As of mid-May 1985, some agencies and subagencies had not properly revised their acquisition regulations to conform to the competition act. Since the act has already taken effect, these regulations need to be revised promptly.

PRINCIPAL FINDINGS

Revise FAR

Some FAR provisions are inconsistent with congressional intent. For example, use of the competition act's first exception to competitive procedures is not limited in FAR as specified in the conference report with respect to (1) contracts based on government acceptance of unsolicited proposals and (2) "follow-on" contracts (new acquisitions placed with particular contractors to continue specific programs where placement was necessitated by prior decisions). FAR also permits justifications under the first six (of the seven) exceptions to competitive procedures to be made on a class (rather than case-by-case) basis, contrary to the conference report. In addition, FAR is inconsistent with statutory requirements relating to publicizing proposed contract actions, reporting contract awards to the government data base, and notifying unsuccessful offerors. (See ch. 2.)

Some FAR provisions could better meet the objectives of the competition act if they (1) gave agency heads discretion and contracting officers more discretion in requiring contractors to submit certified cost or pricing data on awards under $100,000 and (2) sufficiently strengthened the requirements relating to procurement planning. (See ch. 3.)

Revise FIRMR

GAO found that some FIRMR references to FAR provisions were inconsistent with the intent of the competition act. In addition, FIRMR has not been revised to reflect congressional intent regarding the award of follow-on contracts under the act's first exception to competitive procedures. That is, the conferees did not intend for this provision to be used to perpetuate any contract involving obsolete or outmoded facilities, systems, or processes, including computer systems and software. (See ch. 4.)

Revise Agency Regulations	Although the Committees requested information on how effectively the act was being implemented as of April 1, 1985, GAO was able to determine that as of mid-May 1985, 13 of the 21 agencies that had acquisition regulations implementing or supplementing FAR had not revised them to conform to the competition act and Federal Acquisition Circular 84-5, which amended FAR. Also, one other agency had revised its regulations, but they included provisions which appeared to be inconsistent with the act. These 14 agencies accounted for $11.5 billion (or about 6.3 percent) of federal contract awards in fiscal year 1984. (DOD alone accounted for 79.6 percent of all federal awards during that period.) In addition, three subagencies had acquisition regulations that had not been revised to conform to the act. (See ch. 5.)
RECOMMENDATIONS	GAO recommends that the responsible agency heads make numerous specific changes to FAR and FIRMR to correct the problems identified. (See pp. 28, 38, and 43). GAO also recommends that the 14 agencies and 3 subagencies with nonconforming acquisition regulations take certain actions to resolve these problems. (See p. 52.)
AGENCY COMMENTS	The views of directly responsible officials were sought during the course of GAO's work and were considered in preparing the report. GAO did not request the agencies to review and comment officially on a draft of this report.

Contents

ABBREVIATIONS

AIDAR	Agency for International Development Acquisition Regulation
ADP	automatic data processing
DOD	Department of Defense
FAR	Federal Acquisition Regulation
FIRMR	Federal Information Resources Management Regulation
GAO	General Accounting Office
GSA	General Services Administration
NASA	National Aeronautics and Space Administration

CHAPTER 1

INTRODUCTION

The federal government spent over $182 billion in fiscal year 1984, almost one-fifth of the federal budget, for the purchase of products and services from the private sector. Historically, the Congress has required that purchases by federal agencies be based on competition in the marketplace whenever practicable.[1] For example, Public Law 96-83 (41 U.S.C. 401 et seq. (Supp. III 1979)) states that it is the policy of the Congress to promote economy, efficiency, and effectiveness in the procurement of property and services by and for the federal executive branch by promoting the use of full and open competition.[2]

BENEFITS OF COMPETITION

Competition is a prominent factor in government procurement law and policy for good reasons. All potential contractors should have the opportunity to do business with the government and the right to compete with others equally. Contracts should not be awarded on the basis of favoritism, but should go to those submitting the most advantageous offers to the government. Offering all contractors the opportunity to compete also helps to minimize collusion. In addition, competition is intended to insure that the government pays reasonable prices.

The benefits of competition go beyond short-term price advantage. The competitive process provides a means for finding out what is available to meet a particular government need and choosing the best solution. The most important benefits of competition can often be the improved ideas, designs, technology, delivery, or quality of products and services that potential contractors are motivated to produce or develop to obtain

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[1]However, federal agencies have frequently missed opportunities to award contracts competitively in accordance with legal requirements. Appendix IX lists our selected reports addressing federal agencies' sole-source contract awards. In addition, according to the Federal Procurement Data System (see app. X), about 40 percent of the value of federal agencies' fiscal year 1984 contract awards were competitive.

[2]The Competition in Contracting Act of 1984 defines "full and open competition" as permitting all responsible sources to submit sealed bids or competitive proposals on a procurement. (See the glossary, app. X, for explanations of "sealed bidding," "competitive proposals," and "responsible source.")

government contracts. The chance of winning a government contract or the threat of losing it provides a key incentive for greater efficiency and effectiveness. When competition is restricted, the government loses opportunities not only to obtain lower prices, but also to increase the productivity and the effectiveness of its programs.

FEDERAL PROCUREMENT STATUTES

The two primary federal procurement statutes were enacted over 35 years ago: (1) the Armed Services Procurement Act of 1947, 10 U.S.C. 2301 et seq., used by the Department of Defense (DOD), the Coast Guard, and the National Aeronautics and Space Administration (NASA) and (2) the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 251 et seq., used by most federal civilian agencies.

Various laws have amended these basic statutes. For example, Public Law 89-306 (the Brooks Act) amended the Federal Property and Administrative Services Act of 1949 to establish in the General Services Administration (GSA), authority for the central management and procurement of automatic data processing (ADP) equipment for the government. The Administrator of General Services may delegate ADP procurement authority to federal agencies when determined necessary for the economy and efficiency of operations or when it is essential to national defense or national security. The Administrator often gives agencies a blanket delegation when a procurement falls within a predetermined dollar range for a particular type of ADP resources. The regulations that GSA has developed to implement the Brooks Act are contained in the Federal Information Resources Management Regulation (FIRMR) (41 C.F.R. ch. 201).

THE COMPETITION ACT HAS SUBSTANTIALLY CHANGED STATUTES

Enactment of the Competition in Contracting Act of 1984 (the competition act) (title VII of division B of Public Law 98-369), on July 18, 1984, significantly changed previously existing procurement statutes. The competition act made a number of changes, most of them in essentially identical language, to both of the federal government's primary procurement statutes. The competition act also amended the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) and added provisions relating to bid protests to title 31 of the U. S. Code.

Changes to previously existing legislation are highlighted below. For a more detailed explanation of those changes, see appendix II. The legislative proposals and the problems which resulted in enactment of the competition act are discussed in appendix III.

Changes to both primary procurement statutes

The most significant provisions of the competition act relating to both primary procurement statutes are those which (1) require the use of competitive procedures to obtain full and open competition, (2) limit the use of other than competitive procedures to seven specified circumstances, (3) require written justification and approval for the use of other than competitive procedures, (4) require the use of advance procurement planning and market research, (5) permit the use of competitive procedures that allow only small businesses to compete, (6) eliminate the prior strict preference for formally advertised procurement (sealed bidding) and place the primary emphasis on trying to obtain full and open competition, whether achieved through sealed bidding or competitive proposals (negotiation), and (7) expand statutory requirements for contractors to submit certified cost or pricing data.

Changes to the Office of Federal Procurement Policy Act

The Office of Federal Procurement Policy Act established the Office of Federal Procurement Policy within the Office of Management and Budget. The Administrator for Federal Procurement Policy is responsible for providing overall direction of government procurement policy; also, "with due regard for applicable laws and the program activities of the executive agencies," the Administrator may prescribe government-wide procurement policies which are required to be implemented in the Federal Acquisition Regulation (FAR). Among the Administrator's principal functions are

- --providing leadership and ensuring action by the executive agencies in establishing, developing, and maintaining a single system of simplified government-wide procurement regulations and

- --providing for a computer-based Federal Procurement Data System for collecting, developing, and disseminating procurement data.

Among the competition act's amendments to the procurement policy act are requirements for federal agencies to (1) furnish and publicize information so that more potential contractors may be aware of opportunities to compete for federal contracts and subcontracts, (2) collect and transmit to the Federal Procurement Data System certain information on contract awards, including which awards use and which ones do not use competitive procedures, (3) designate for the agency and for each of its procuring activities, an advocate for competition, who is

responsible for challenging barriers to full and open competition, and (4) prepare and submit to the Congress annual reports on competition.

Changes to bid protest procedures

The Budget and Accounting Act of 1921 is the basic legislation establishing our Office. This act grants us the authority to determine the legality of public expenditures. Based on this authority, we have for years decided protests filed by interested parties concerning solicitations, proposed awards, or contracts for property or services.

The competition act establishes for the first time, an express statutory basis for such decisions. It establishes strict time limits for the issuance of bid protest decisions and requires agencies in many cases to suspend or "stay" a protested procurement action until the Comptroller General issues the decision. In addition, the act authorizes our Office to award successful protestors their costs of pursuing a protest as well as their costs of preparing bids and proposals.

When the President signed the competition act into law on July 18, 1984, he declared his belief that certain provisions of the act were unconstitutional. On October 17, 1984, about 3 months before the January 15, 1985, implementation date for the act's bid protest provisions, the Attorney General issued an opinion stating that these two provisions violated the separation of powers doctrine. Based on the Attorney General's opinion, the Director, Office of Management and Budget, on December 17, 1984, directed federal agencies not to comply with the "invalid provisions."

On May 28, 1985, the U.S. District Court for the District of New Jersey held that the competition act's stay provisions are constitutional. It ordered the Department of Justice to comply with the act. As a result (1) on June 3 the Attorney General announced that he would tell the agencies to comply, pending appeal of the court's decision, (2) on June 4 the Director, Office of Management and Budget, issued a memorandum withdrawing the December 17, 1984, directive, and (3) on June 5 the Department of Justice advised executive branch agencies to comply with the act's bid protest stay and cost provisions. DOD, GSA, and NASA published as an interim rule and requested comment on Federal Acquisition Circular 84-9 on June 20, 1985, effective that same day. The circular amended FAR to implement our Office's bid protest stay and cost provisions in accordance with the competition act and the revised Department of Justice advice.

In addition, the competition act amended the Federal Property and Administrative Services Act to authorize a 3-year program for the GSA Board of Contract Appeals to decide bid protests involving procurement of Brooks Act ADP resources.

FEDERAL REGULATIONS HAVE BEEN CHANGED TO IMPLEMENT THE COMPETITION ACT

Procurement within the federal government is regulated primarily by the FAR system, which consists of FAR and agency regulations which implement and supplement FAR.

FAR, a single government-wide procurement regulation, developed in accordance with the Office of Federal Procurement Policy Act of 1974, as amended, originally took effect on April 1, 1984. It was essentially a consolidation of the two previously existing primary procurement regulations: the Defense Acquisition Regulation, covering defense agencies, and the Federal Procurement Regulations, covering most other agencies.

DOD, GSA, and NASA issue and maintain FAR. Two councils, the Defense Acquisition Regulatory Council representing DOD and NASA, and the Civilian Agency Acquisition Council representing other agencies, coordinate the development of FAR changes.

FAR changes implementing the requirements of the competition act were issued as Federal Acquisition Circular 84-5, and are to be used on all solicitations issued after March 31, 1985. These FAR changes were issued as interim regulations, and are expected to be issued in final form after receipt and consideration of public comments.[3]

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[3]The Small Business and Federal Procurement Competition Enhancement Act of 1984 requires, effective November 29, 1984, that procurement policies, regulations, procedures, and forms relating to the expenditure of appropriated funds be published for public comment if they have (1) a significant effect beyond the internal operating procedures of the agency or (2) a significant cost or administrative impact on contractors or offerors. Based on the legislative requirement, FAR 1.301 (b), as amended by Federal Acquisition Circular 84-6 on January 10, 1985, states essentially the same publication requirements for agency acquisition regulations that implement or supplement FAR. However, publication is not required for issuances that merely implement or supplement higher level issuances that have previously undergone the public comment process, unless such implementation or supplementation results in additional significant cost or administrative impact on contractors or offerors or effect beyond the internal operating procedures of the issuing organization.

FIRMR, which is issued and maintained by GSA, provides regulations unique to the management and procurement of information resources. FIRMR provides that it is to be used by federal agencies with two primary exceptions. First, the Central Intelligence Agency is excluded from FIRMR coverage under Public Law 97-269. Second, under Public Law 97-86, certain DOD functions, operations, and uses are excluded.

FIRMR changes implementing the requirements of the competition act were issued by GSA as Temporary Regulation 11, which was effective April 1, 1985. After receipt and consideration of public comments, GSA issued the final version of these FIRMR changes on July 1. This final version, which also codified other existing FIRMR temporary regulations, takes effect on August 30, 1985, but may be observed earlier.

THE COMMITTEES' REQUESTS AND OUR RESPONSES

Our Office was requested in a joint letter dated August 1, 1984 (see app. I), by Representatives Jack Brooks and Frank Horton, the Chairman and Ranking Minority Member, respectively, of the House Committee on Government Operations, and Senators William S. Cohen and Carl Levin, the Chairman and Ranking Minority Member, respectively, of the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, to establish an interdivisional task force to report to the Committees on

--federal agencies' implementation of, and subsequent compliance with, the competition act and

--our plans to implement the bid protest provisions of the act.

As explained below, this report summarizes our task force's work to date, which focuses on regulatory implementation of the act. Specifically regarding implementation of the act's bid protest provisions, we (1) reviewed every aspect of our bid protest function in response to the Committees' request for information on our plans and (2) made a number of significant changes. We told the Committees of our plans to implement the bid protest provisions in a letter dated January 16, 1985 (B-208159.5). (See app. IV.)

In addition, on February 4, 1985, the Chairman, House Committee on Government Operations, requested that the Comptroller General testify before the Committee's Legislation and National Security Subcommittee on the two procurement protest provisions of the act which the President and Department of Justice believed to be unconstitutional. The Comptroller General testified on those issues before the Subcommittee on February 28, 1985. He strongly disagreed with the opinion of the Attorney

General and expressed the view that the President had violated the separation of powers doctrine by defying a duly passed act of the Congress through the actions of the Attorney General. (The testimony statement is shown in app. V.)

On March 19, 1985, the Committees requested that our Office perform a limited survey of the level of readiness of selected federal organizations to begin implementing the competition act on solicitations issued after March 31, 1985, as required. The objectives of our survey were (1) to learn whether and to what extent selected procuring organizations, mostly within DOD, might be experiencing or expecting problems in meeting the act's implementation date and (2) to help determine whether extending the legislative implementation date was warranted.

In summary, officials at 9 of the 15 organizations we contacted indicated that extending the act's implementation date was not warranted based on problems experienced or expected in their organizations. Those at the other six said it was warranted. However, officials at 8 of the 10 organizations we were specifically asked to contact said it was not warranted.

In briefing the Committees' offices on March 20, 1985, we were asked whether a legislative extension was warranted. We stated that even if legislation could have been developed and enacted quickly, providing an "across-the-board" extension so close to the implementation date might have created more disruption and confusion for the organizations that were ready for implementation than it would have prevented for those organizations that were not ready.

After the briefing, we were requested to provide the results of our survey in writing. We responded to that request in a report dated April 8, 1985 (GAO/OGC-85-5). (The report is shown in app. VI.)

On April 26, 1985, the Committees requested that we provide them with a report summarizing our work on federal agencies' regulatory implementation of the competition act as of April 1, 1985. This report responds to that request. We were also requested to initiate efforts to analyze agencies' compliance with the competition act after completing this report.

OBJECTIVES, SCOPE, AND METHODOLOGY

Our overall objective in reviewing executive branch organizations' regulatory implementation of the competition act was to give the Committees information on how effectively the act was being implemented in federal regulations up to its April 1, 1985, implementation date. Specifically, we agreed with the Committees that this report would:

--Discuss the inconsistencies we had identified between the competition act, including its congressional intent as expressed in congressional committee reports on the act, and regulatory revisions to implement the act. The federal regulations include (1) FAR (see chs. 2 and 3), (2) FIRMR (see ch. 4), and (3) federal agencies' implementing and supplementing regulations. (See ch. 5.)

--Provide our opinion on whether the use of specific make and model specifications[4] can be considered full and open competition. (See ch. 4.)

--Provide certain other information on federal agencies' issuances of regulations that implement or supplement FAR or FIRMR, including which agencies have issued such regulations and whether they conform to the competition act. (See ch. 5.)

--Provide information on (1) the reports we issued on January 16, 1985, and April 8, 1985, in response to the Committees' requests relating to implementing the competition act and (2) our testimony of February 28, 1985, on the constitutionality of the act's bid protest provisions, to summarize the overall results of this phase of our work. (See the previous section and apps. IV, V, and VI.)

To fulfill this request, we analyzed the changes to implement the competition act which were made to FAR, FIRMR, and the agencies' regulations implementing or supplementing those higher level regulations.

We analyzed the FAR changes in comparison to (1) the requirements of the competition act and related statutory provisions and (2) the House and Senate Conference Committee report[5] and other congressional committee reports on the competition act. We compared both (1) the proposed FAR revisions, issued on October 1, 1984, by the Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council and (2) the interim regulation, which took effect on solicitations issued after March 31, 1985, issued on December 20, 1984, as Federal Acquisition Circular 84-5, under the authority of the Secretary of Defense and the Administrators of GSA and NASA. (Both issuances requested public comment.)

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[4]See the glossary, app. X, for an explanation of this term.

[5]Report No. 98-861.

We performed similar comparative analyses on (1) the draft revisions to FIRMR made during February and March 1985, (2) the FIRMR revisions, which became effective on April 1, 1985, issued on March 14, 1985, for public comment, and (3) the revisions to the agency and subagency implementing or supplementing acquisition regulations issued between December 5, 1984, and May 8, 1985, to implement competition act changes and higher level regulation issuances.

Our review of the implementing or supplementing regulations included an analysis of the results of the Office of Federal Procurement Policy's review of agency acquisition regulations implementing the competition act. Executive order 12291, issued February 17, 1981, provided for executive oversight of the regulatory process and authorized the Office of Management and Budget to review certain agency regulations. Office of Management and Budget Bulletin 85-7, dated December 14, 1984, required agencies to submit copies of those regulations which implement or supplement the FAR implementation of the competition act to the Office of Federal Procurement Policy for review.

Based on these preliminary analyses, we identified possible conflicts between those regulations and the competition act or its congressional intent, especially as reflected in the conference report on the act. We also identified other issues relating to possible revisions needed in the regulations to better implement the objectives of the competition act. We (1) presented the offices of the congressional committees with lists of these issues and (2) met with federal officials, including representatives of those agencies responsible for the regulations, to discuss many of the issues. Except where otherwise stated, this report addresses only the problems identified that are currently reflected in the various regulations.

To help identify any additional significant problem areas we obtained and analyzed copies of comments submitted to federal officials as of June 1, 1985, in response to requests for comments on these regulations. Comments were submitted by organizations and individuals in the private sector and other federal agencies. In addition, we reviewed the Federal Register[6] on a continuing basis to identify agencies' and subagencies' issuances of implementing or supplementing regulations relating to the requirements of the competition act.

We also developed a data collection form, sent it to 64 federal agencies, and used it to collect information relating to agencies' implementing and supplementing regulations through a follow-up telephone survey. Use of the data collection form ensured that comparable information was collected from each

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[6]See the glossary, app. X, for an explanation of the Federal Register.

agency. We mailed the forms to the senior procurement executives of the 64 agencies surveyed to allow them and/or their designees to review the questions before answering them by telephone. We contacted all of them between May 14-22, 1985, to obtain their answers.

We selected the 64 agencies (app. VII identifies these agencies) from two sources, (1) the Federal Procurement Data Center Standard Report for fiscal year 1984[7] and (2) the Office of Federal Procurement Policy's list of senior procurement executives which included five agencies that were not included in the Data Center's report.[8]

The views of directly responsible officials were sought during the course of our work and were considered in the preparation of this report. In accordance with the requesters' wishes, we did not request the agencies to review and comment officially on a draft of this report.

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[7]The report lists 61 agencies as required to report all procurement actions using appropriated funds to the Center. However, two of the agencies, the Civil Aeronautics Board and the Water Resources Council, no longer exist. The Board is included in the report because it had spent money for procurement during fiscal year 1984 before it was dissolved. The Water Resources Council ceased to exist several years ago. Thus, our survey included 59 of the 61 agencies listed in the report.

[8]The Office of Federal Procurement Policy Act requires the heads of executive agencies covered by the act to designate senior procurement executives. The Policy Office's list included 50 agencies as having designated senior procurement executives.

CHAPTER 2

FAR NEEDS TO BE REVISED TO BE CONSISTENT WITH STATUTORY REQUIREMENTS AND CONGRESSIONAL INTENT

FAR needs to be revised to be consistent with (1) the requirements of the Competition in Contracting Act of 1984 and related statutory provisions and (2) congressional intent, as expressed in the House and Senate Conference Committee report on the competition act. Overall, we found that except for the problem areas discussed in this report, the many FAR revisions adopted thus far generally reflect the statute.

The majority of the suggested FAR revisions discussed in this chapter are needed because of inconsistencies between FAR and statutory requirements. However, some of the revisions are needed because of discrepancies between FAR implementation and congressional intent, as reflected in the conference report.

We believe that in revising FAR, the Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council did not give appropriate consideration to the conference report, which provides direction to those responsible for issuing the regulations. Because the conference report represents the final statement of terms agreed to by both Houses of the Congress, next to the statute itself, it is the most persuasive evidence of congressional intent.

We brought each problem area we identified to the attention of the congressional committees as well as representatives of the two FAR councils. Also, in a letter dated December 12, 1984, the Committee Chairmen and Ranking Minority Members told appropriate officials in DOD, GSA, and NASA about many of these problems as well as the need for FAR to be revised to resolve them. In response to the letter, the three agencies told the Congressmen that the two FAR councils would consider their comments "at the time all of the comments on the temporary regulation are being considered . . . ."

The final regulation has not yet been issued and the great majority of these problems have not been resolved. We believe that unless FAR is revised as suggested in this report, the purposes of the competition act, to enhance competition and better limit unnecessary sole-source contracting, will not be fully realized.

FAR REVISIONS ARE NEEDED

To be consistent with statutory requirements and with congressional intent as reflected in the conference report on

the competition act, FAR needs to be revised. Some of these revisions relate to FAR part 6, "Competition Requirements", and include:

--limiting use of provisions of the competition act's first exception to the requirement for full and open competition regarding follow-on contracts; unsolicited proposals; and limited rights in data, patent rights, copyrights, and other circumstances;

--providing guidance on the requirement to "consider" responses to published notices of proposed contract actions;

--precluding justifications under the first six exceptions to full and open competition (see app. II) from being made on a class basis; and

--requiring agencies acquiring goods and services from another agency's sole-source contract (intragovernmental procurement) to justify the sole-source procurements themselves.

The revisions needed in other parts of FAR include:

--conforming provisions which deal with publicizing contract actions to statutory requirements;

--conforming provisions relating to uniform reporting requirements for the Federal Procurement Data System to the requirements of the competition act;

--stating in FAR that whenever practical, agencies should tell contractors what the government needs in functional terms; and

--requiring that notice be given to unsuccessful offerors in all situations where contracts are awarded based on competitive proposals.

Follow-on contracts and unsolicited proposals

Sole-source awards based on follow-on contracts[1] and on contracts resulting from unsolicited proposals[2] are both significant procurement issues. Reliable data is not available either government-wide or in DOD on the number or value of (1) all follow-on awards or (2) awards resulting from unsolicited proposals. However, DOD reported that over $42 billion (or 32 percent) of the DOD prime contract awards over $25,000 in fiscal year 1984 were for "follow-on awards after competition," which excludes follow-ons awarded after an original sole-source contract.

Regarding unsolicited proposals, our prior reviews of contracts above the small purchase[3] threshold awarded by DOD and major federal civil agencies have shown that numerous sole-source contracts based on unsolicited proposals should have been awarded competitively. For example:

--Our review of a statistical sample of six civil agencies' sole-source contracts awarded between July 1, 1979, and June 30, 1980, for all types of goods and services showed that for an estimated 507 (or 66 percent) of the 767 contract awards in our universe resulting from unsolicited proposals, the contractors did not possess unique capabilities for meeting the government's minimum requirements and competition was feasible (GAO/PLRD-82-40).

--We found that the Defense Nuclear Agency awarded 781 of its 795 new contracts noncompetitively in fiscal year 1979. The vast majority of these were based on

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[1]According to the Federal Procurement Data System's uniform reporting requirements, a "follow-on contract" is a new noncompetitive acquisition (whether by separate new contract or modification outside the scope of the original contract) placed with a particular contractor to continue a specific program, where placement was necessitated by prior decisions.

[2]FAR defines "unsolicited proposal" as a written proposal that is submitted to an agency on the initiative of the submitter for the purpose of obtaining a contract with the government and which is not in response to a formal or informal request (other than an agency request constituting a publicized general statement of needs).

[3]See the glossary, app. X, for an explanation of this term.

unsolicited proposals and the Defense Nuclear Agency's handling of these contracts violated the intent of DOD's guidance on the use of competition (GAO/PLRD-81-45).

--Our review of DOD's management support service contracts awarded in fiscal year 1979 showed that 40 percent of the 256 randomly selected contracts reviewed were based on unsolicited proposals. We stated that although unsolicited proposals should not be discouraged, all too often they have been used to

--subvert the competitive process,

--encourage work that may not be important relative to DOD's mission needs and priorities,

--abrogate DOD's responsibilities over the scope and direction of work related to defense management, and

--perform work that is not truly unique or innovative (GAO/MASAD-81-19).

FAR 6.302-1, which states the "first exception" to the requirement for full and open competition, provides that:

> "When the supplies or services required by the agency are available from only one responsible source and no other type of supplies or services will satisfy agency requirements, full and open competition need not be provided for."

This provision also describes several examples of conditions under which the first exception may be used. However, the provision, including the second and third examples (FAR 6.302-1(b)(2) and (3)), relating to follow-on contracts and unsolicited proposals, does not limit sole-source awards in accordance with the conference report's statements of congressional intent. That is, FAR 6.302-1(b) states that the list of examples is "not intended to be all inclusive." In contrast, the conference report states that the first exception may be used for follow-on contracts and unsolicited proposals only under certain specified conditions.

The competition act[4] states that for purposes of applying the act's first exception to full and open competition:

> "(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the Unites States and does not resemble the substance of a pending competitive procurement and
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> "(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures."

We believe that the conference report on the competition act clearly indicates congressional intent that use of the first exception for follow-ons and unsolicited proposals be limited to a greater extent than they are limited by FAR. The report (which refers to the competition act as "the conference substitute") states that:

> "The conference agreement also clarifies that sole-source awards resulting from certain unsolicited proposals or 'follow-on' contracts fall under the first exception. . . In neither case, however, is this exception to be used as a 'carte blanche' justification for going sole-source.
>
> "The use of the first exception for unsolicited proposals and follow-on contracts is limited in both cases to certain specific conditions. In the case

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[4]See both section 2711(a)(1) of the competition act, amending section 303(d)(1)(A) and (B) of the Federal Property and Administrative Services Act, and section 2723(a)(1) of the competition act, amending 10 U.S.C. 2304(d)(1)(A) and (B) (the Armed Services Procurement Act).

of unsolicited proposals, the conference substitute authorizes sole-source awards based on unsolicited research proposals when the agency can determine that the substance of the proposal is not otherwise available to the government, and the proposal does not resemble the substance of a pending competitive procurement.

"The conferees do not intend, however, that this provision be used as a loophole by which agencies and contractors can circumvent the competition requirements contained in the substitute. This authorization is strictly limited to state-of-the-art proposals which represent advanced scientific knowledge. Even under these conditions, agencies should seek proposals wherever possible from competing researchers to ensure that the best proposal available is selected. . . .

"In the case of follow-on contracts, a sole-source award under the first exception may be made for the continued development or production of a major system or highly specialized equipment if award to other than the original source would result in substantial duplication of cost that could not be recovered through the use of competition, or unacceptable delays in fulfilling the agency's needs."

The conference report also states congressional intent to limit noncompetitive follow-on contracts to those awarded (1) after an original competitive award and (2) in certain situations, after a cost/benefit analysis, but neither of these points are reflected in FAR.

"The conferees intend that follow-on contracts be awarded only to incumbent vendors who receive the original contracts following some form of price or technical competition. The conference substitute recognizes that in major systems and highly specialized equipment acquisitions, there are situations where the initial capital investment could cause substantial duplication of cost if the contract were awarded to other than the original source. However, the substitute requires the agency to determine and document that such cost cannot be offset by savings that would result from openly competing the requirement. The conferees believe that a cost/benefit analysis is necessary to make a precise determination."

In summary, contracts based on acceptance of unsolicited proposals should be considered to be "available from only one source," only if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept, the substance of which (1) is not otherwise available to the United States and (2) does not resemble the substance of a pending competitive procurement. This authority should also be strictly limited to state-of-the-art proposals which represent advanced scientific knowledge. Even under these conditions, agencies should seek proposals wherever possible from competing researchers to ensure that the best proposal available is selected.

Regarding follow-on contracts, we believe they should be deemed to be available from only the original source and be procured through procedures other than competitive procedures under the competition act's first exception only under certain conditions. These conditions are when the follow-on contract is for the continued development or production of a major system or highly specialized equipment and it is likely that award to a source other than the original source would result in (1) substantial duplication of cost to the government which is not expected to be recovered through competition or (2) unacceptable delays in fulfilling the executive agency's needs. In addition, this authority should be limited to follow-on contracts awarded (1) after an original competitive award and (2) if the basis for the decision is "substantial duplication of cost to the government which is not expected to be recovered through competition," after a cost/benefit analysis has been performed which determines and documents the decision.

Limited rights in data, patent rights, copyrights, and other circumstances

As noted above, FAR 6.302-1 describes several examples of conditions under which the first exception to the requirement for full and open competition may be used. However, one of these examples could be interpreted as being less restrictive than the first exception.

FAR 6.302-1 includes the following two criteria that must be met under the first exception: (1) the supplies or services required by the agency are available from only one responsible source and (2) no other type of supplies or services will satisfy agency requirements. The competition act also contains similar language.

To help avoid misinterpretation, one of the examples which FAR describes as permitting the first exception to be used should be clarified to include the second part of this exception. The example is FAR 6.302-1(b)(4):

"The existence of limited rights in data, patent rights, copyrights, or secret processes; the control of basic raw material; or similar circumstances, make the supplies and services available from only one source (however, the mere existence of such rights or circumstances does not in and of itself justify the use of these authorities). . . ."

In summary, this example needs to be revised to also require that "no other type of supplies or services will satisfy agency requirements."

Considering responses to published notices of proposed contract actions

FAR 6.302-1 (c)(2) provides that for contracts awarded under the first exception to full and open competition, the Commerce Business Daily notices of proposed contract actions[5] required by FAR 5.201 shall have been published and any bids or proposals must have been "considered." This requirement is based directly on the provisions of the competition act.

FAR 5.201 (c) states that the primary purposes of the Commerce Business Daily notices of proposed contract actions are to improve small business access to acquisition information and enhance competition by identifying contracting and subcontracting opportunities. FAR 5.207 describes the contents of these notices. Based on the provisions of the competition act, FAR 5.207 (b)(5) requires contracting officers to insert a statement in each notice "that all responsible sources may submit a bid, proposal, or quotation which shall be considered by the agency."

FAR does not provide guidance regarding what constitutes "consideration" in these situations. However, the conference report states:

". . . the conferees emphasize that agencies should, at a minimum, give each bid or proposal received in response to the Commerce Business Daily notice sufficient consideration so as to be able to make an

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[5]The Commerce Business Daily is published every day except weekends and holidays by the Department of Commerce. It provides industry with notice concerning current government contracting and subcontracting opportunities, including information on the identity and location of contracting offices and prime contractors having current or potential need for certain requirements. This publication is especially effective for reaching potential suppliers outside the local area in which the need arises.

informed judgement about the responsibility of the bidder and the responsiveness of the bid."

Therefore, FAR should provide guidance regarding what constitutes such consideration.

Class justifications for sole-source contracts

FAR 6.303-1 forbids contracting officers from commencing negotiations for a sole-source contract or a contract resulting from an unsolicited proposal or awarding any other contract without providing for full and open competition, unless they (1) justify the use of such actions in writing, if required by FAR 6.302, "Circumstances permitting other than full and open competition," (2) certify the accuracy and completeness of the justification, and (3) obtain the required approval in accordance with FAR 6.304.

FAR 6.303-1(c) permits justifications relating to the first six exceptions from the requirement for full and open competition (FAR 6.302-1 through 6) to be made on a class basis. (Also, see FAR 6.304(c).) However, we believe that such class justifications are inconsistent with congressional intent. Although the competition act does not state whether justifications and approvals for the first six exceptions must be on a case-by-case basis or may be on a class basis, the act's conference report states:

"All determinations and decisions required for use of the exceptions to competitive procedures provided in this substitute are to be made on a case-by-case basis. Broad categories or classes of products and services cannot be exempt from competitive procedures."

Intragovernmental procurements

Reliable government-wide data is not available on the number or value of intragovernmental procurements.[6] However, for fiscal year 1983, the latest year for which data is available, DOD reported $3.5 billion in such purchases, excluding foreign military sales contracts, which totaled another $6.4 billion.

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[6]DOD defines intragovernmental procurements as orders written by a military department or defense agency purchasing office requesting a nondefense federal agency to furnish supplies or services from its stocks, in-house manufacturing facilities, or contracts to be executed by the other agency.

FAR 6.303, which covers the justification requirements for using procedures other than competitive procedures, does not specifically address intragovernmental procurements.

The competition act[7] states that:

"In no case may an executive agency . . .

> ". . .procure property or services from another executive agency unless such other executive agency complies fully with the requirements of this title in its procurement of such property or services."

In addition, the conference report states that the competition act (referred to as "the substitute"):

> ". . .prohibits an agency from procuring its goods and services from another agency unless that agency has complied with the requirements of the substitute. The substitute includes this prohibition to prevent one agency from acquiring its goods and services from another agency's sole-source contract without having to justify a noncompetitive procurement itself. This restriction is in addition to, not in lieu of, any other restriction provided by law, including the Economy Act of 1932 (31 U.S.C. §686(a))."

To be consistent with congressional intent, FAR 6.303 needs to be revised to require agencies acquiring goods and services from another agency's sole-source contract to justify the sole-source procurements themselves.

Publicizing contract actions

FAR part 5 prescribes policies and procedures for publicizing contract opportunities and award information. Publicizing is intended to (1) increase competition, (2) broaden industry participation in meeting government requirements, and (3) assist small businesses and certain others in obtaining contracts and subcontracts.

However, some of the provisions in FAR part 5 are not consistent with the competition act or with other statutory provisions subsequently enacted, which have revised provisions of the competition act. Regarding these other statutory provisions, the competition act amended the Office of Federal

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[7]See sections 2711 and 2723 of the competition act, amending the Federal Property and Administrative Services Act and the Armed Services Procurement Act, respectively.

Procurement Policy Act with respect to publicizing procurement notices. However, because there were some discrepancies between these requirements and the requirements of the Small Business Act (15 U.S.C. 637(e)), as amended by Public Law 98-72, the Small Business and Federal Procurement Competition Enhancement Act of 1984 amended both the Office of Federal Procurement Policy and the Small Business Acts to eliminate the discrepancies.

FAR subpart 5.2 states requirements for publicizing proposed contract actions. Agencies are required to furnish for publication in the Commerce Business Daily notices of proposed contract actions of $10,000 and above. However, FAR exempts certain situations from this requirement.

The first inconsistency between FAR and statutory provisions relates to FAR 5.202 (a)(1), which states that the contracting officer need not submit the required notice when it is determined that:

> "The contract action is of a classified nature, and the synopsis cannot be worded to preclude the disclosure of classified information; or disclosure of the agency's needs would compromise the national security. . . ."

In contrast, neither the competition act nor the Small Business and Federal Procurement Competition Enhancement Act of 1984, which amended its procurement notice provisions, permit this broad an exception. Both statutes state that a notice is not required if "the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security." The FAR provision appears to reflect, at least partly, the statutory language in effect prior to enactment of the competition act. That is, the Small Business Act did not require publication of notices relating to procurements which for security reasons were of a classified nature.

Thus, FAR exempts from the notice requirements those contract actions for which the notice would disclose classified information, while the current statutory exemption only applies to information which would compromise national security. The disclosure of information which has been classified would not in every instance necessarily compromise the national security (for example, information which should never have been classified or information which was properly classified initially but which no longer deserves to be classified). Therefore, whenever a notice cannot be worded to preclude the disclosure of classified information, agencies need to determine whether such disclosure would in fact compromise the national security. If it would not, agencies also need to take the necessary steps to have the information properly declassified before its disclosure.

In summary, FAR should reflect the statutory language by stating that the exception applies only if the disclosure of information would compromise the national security. In addition, each contracting agency should be required to establish procedures so that the appropriate official can (1) determine whether the disclosure of particular classified information would in fact compromise the national security and (2) if it would not, take the steps necessary to have the information properly declassified before its disclosure.

A second inconsistency is in FAR 5.202 (a)(5), which states that the contracting officer need not submit the required notice when it is determined that the "contract action is for utility services and only one source is available. . . ." However, this differs from the Small Business and Federal Procurement Competition Enhancement Act which states that a notice is not required if "the procurement is for utility services, other than telecommunication services, and only one source is available." Therefore, procurements for such telecommunications services should not be exempted from the notice requirement.

A third inconsistency is in FAR 5.202 (a)(7), which states that the contracting officer need not submit the required notice when it is determined that:

> "the contract action results from . . . an unsolicited research proposal that demonstrates a unique and innovative research concept and publication of any notice would improperly disclose the originality of thought or innovativeness of the proposed research. . . ."

In contrast, the Small Business and Federal Procurement Competition Enhancement Act provides that a notice is not required if the proposed procurement would result from acceptance of:

> "any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal. . . ."

Therefore, the FAR provision should be amended to include the words "or would disclose proprietary information associated with the proposal."

A fourth inconsistency relates to FAR 5.201(b) and 5.205 (c)(2). FAR 5.201(b) describes which contract actions are required to be publicized in the Commerce Business Daily. This FAR provision (1) generally exempts proposed contract actions that are to be made outside "the U.S., its possessions, or Puerto Rico" and (2) refers to FAR 5.205, which specifically exempts architect-engineer services made outside the United States, its possessions, or Puerto Rico. However, we could find

no statutory basis under current law for these exemptions. In addition, we contacted representatives of the Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council, but they were also unable to cite any basis in current law for these exemptions.[8] Therefore, FAR 5.201(b) and 5.205(c)(2) need to be revised to delete the current exemptions from publicizing proposed contract actions to be made outside the United States, its possessions, or Puerto Rico.

A fifth inconsistency relates to FAR 5.207. This provision, which describes the contents of notices of proposed contract actions requires, among other things, the following to be included: "Specification, including notation 'QPL' if the specification requires a qualified product."[9] In contrast, the Small Business and Federal Procurement Competition Enhancement Act requires such notices to include provisions that:

> ". . . state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award. . . ."

Although the FAR provision covers the required products and, by implication, services as well, it does not cover "offeror" qualification requirements. Therefore, FAR 5.207 needs to be revised to require notices of proposed contract actions to also state whether an offeror must meet a qualification requirement to be eligible for award.

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[8]The Small Business and Federal Procurement Competition Enhancement Act provides that proposed contract awards are not required to be publicized in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation. Just before this report was submitted for final approval, a spokesperson for the Defense Acquisition Regulatory Council told us that the Council is seeking to exempt all foreign procurements from the notice requirements on this basis.

[9]"QPL" refers to a qualified products list. According to FAR 9.201 (1) "qualified product" means an item that has been examined and tested for compliance with specification requirements and qualified for inclusion in a qualified products list and (2) "qualified products list" means a list that identifies the qualified item by specification, government designation, part or model number or trade name, test or qualification reference, manufacturer's name and address, and place of manufacture.

Procurement reporting requirements

The competition act[10] requires each executive agency to collect and maintain in a computer file, certain information, for a period of 5 years by fiscal year. The information specifically required, which relates to procurements other than small purchases (that is, procurements of more than $25,000), is also required to be entered into the Federal Procurement Data System, the official federal procurement data base. This includes, for example, information on which of the competition act's seven exceptions permitted the use of "other than competitive procedures," if such procedures were used. These requirements were intended to facilitate congressional oversight of contracting activities and provide ready access to such information by other agencies and the public.

In addition, section 2752 of the competition act states that:

> "Not later than March 31, 1985, the single Government-wide procurement regulation referred to in section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) shall be modified to conform to the requirements of this title and the amendments made by this title."

However, FAR does not include the act's reporting or "record requirements." FAR subpart 4.6, which prescribes uniform reporting requirements for the Federal Procurement Data System, has not been modified based on the competition act. Instead, according to Office of Federal Procurement Policy officials, the reference to the Federal Procurement Data System reporting manual in FAR 4.6 is intended to include the manual's requirements "by reference."

We agree that this could be an acceptable way of communicating the act's record requirements, except that, as of June 7, 1985, the Federal Procurement Data System instruction implementing the competition act did not revise the reporting manual. Therefore, the act's record requirements have not been included in FAR either directly or by reference. Federal Procurement Data Center officials agreed that they need to update the manual, but said they do not expect to update it until after FAR has been finalized.

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[10]See section 2732 (a) of the competition act, which added section 19 to the Office of Federal Procurement Policy Act.

In addition, regarding the competition act's previously mentioned requirement for a 5-year retention period, we found that neither FAR, the Federal Procurement Data System instruction implementing the competition act, nor the reporting manual mentions this requirement.

Furthermore, we identified a problem relating to section 19(c) of the Office of Federal Procurement Policy Act, which was added by the competition act. This provision requires the information that must be collected with respect to each procurement carried out using competitive procedures to be categorized separately from other procurements using competitive procedures if the procurement results in the submission of a bid or proposal by "only one responsible source."[11] Although both the Federal Procurement Data System instruction and the related standard form 279 implementing the competition act call for reporting the receipt of (1) one offer and (2) more than one offer, neither mentions the term "responsible source." As a result, for procurements on which two or more offers are received and all but one are found to be nonresponsible, the agencies are being instructed to categorize the procurements as "more than one offer," contrary to the act's requirements.

In summary, either FAR 4.6 or the Federal Procurement Data System reporting manual to which it refers needs to be revised to (1) specify the information that the competition act requires executive agencies to collect and transmit to the Federal Procurement Data System and (2) provide for a 5-year retention period. Revisions are also needed to either FAR 4.6 or the reporting manual and to standard form 279, used to collect information on contract actions, to require the information that must be collected with respect to each procurement carried out using competitive procedures to be categorized separately from other procurements using competitive procedures if the procurement results in the submission of a bid or proposal by "only one responsible source."

Preference for functional specifications

Based on the competition act, FAR 10.002(b) states that:

> "Acquisition policies and procedures of defense agencies shall require descriptions of agency requirements, whenever practicable, to be stated in terms of functions to be performed or performance required."

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[11]A "responsible source" is one that is capable of satisfying the government's requirement. For a more detailed definition, see the glossary, app. X.

However, the conference report on the competition act indicates congressional intent that there be a government-wide rather than just a defense agency preference for the use of functional descriptions:

> "Wherever practical, the conferees strongly believe that contractors should be told what the Government needs in functional terms. This approach allows the Government to take advantage of the innovative ideas of the private sector."

While the competition act only specified the policy to be followed by defense agencies, stating a government-wide preference in FAR would promote uniformity of procurement policies across agencies, which is consistent with Office of Federal Procurement Policy Act objectives. Therefore, FAR 10.002 (d) needs to be revised to state that, whenever practical, agencies should tell contractors what the government needs in functional terms.

Notifications to unsuccessful offerors

FAR 15.1001 (a) states that:

> "The contracting officer shall notify each offeror whose proposal is determined to be unacceptable or whose offer is not selected for award, unless disclosure might prejudice the Government's interest. However, notice is not required if the contract is for
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> (1) Subsistence,
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> (2) Personal or professional services,
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> (3) Services of educational institutions,
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> (4) Supplies or services purchased and used outside the United States, or
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> (5) Supplies or services for which only foreign firms have been solicited."

The exemptions provided in FAR 15.1001(a) conflict with the requirements of the competition act. The competition act[12]

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[12]See section 2711 of the competition act, amending section 303B(d)(4) of the Federal Property and Administrative Services Act, and section 2723 of the competition act, amending 10 U.S.C. 2305(b)(4)(D) (the Armed Services Procurement Act).

states that executive agencies in awarding contracts based on competitive proposals:

> ". . . shall award the contract by transmitting written notice of the award to such source and shall promptly notify all other offerors of the rejection of their proposals."

We believe that notice to unsuccessful offerors is required in all situations where contracts are awarded based on competitive proposals. The competition act's bid protest provisions, and the fact that notice to unsuccessful offerors often provides a basis for protests, increase the importance of such notice.

CONCLUSIONS

FAR needs to be revised to be consistent with (1) the requirements of the competition act and related statutory provisions and (2) statements of congressional intent set forth in the House and Senate Conference Committee report on the competition act.

Some of the needed FAR revisions relate to use of the competition act's first exception to the requirement for full and open competition (FAR 6.302-1). These needed FAR revisions deal with sole-source contract awards resulting from unsolicited proposals; follow-on contract awards; and awards based on one of the FAR examples of a first exception condition, provided in FAR 6.302-1(b)(4), which relates to limited rights in data, patent rights, copyrights, and other circumstances. Also, guidance is needed on what constitutes "considering" responses to published notices of proposed contract actions (see FAR 6.302-1(c)(2)).

Other needed FAR revisions relating to FAR part 6 are: (1) precluding justifications under the first six exceptions to full and open competition from being made on a class basis (see FAR 6.303-1(c) and 6.304(c)) and (2) requiring in FAR 6.303 that agencies acquiring goods and services from another agency's sole-source contract justify the sole-source procurements themselves.

Needed FAR revisions relating to other parts of FAR include (1) conforming provisions in FAR part 5, which deal with publicizing contract actions, to statutory requirements, (2) conforming requirements relating to FAR subpart 4.6, which prescribes uniform reporting requirements for the Federal Procurement Data System, to the requirements of the competition act, (3) stating in FAR 10.002(b) that whenever practical, agencies should tell contractors what the government needs in functional terms, and

(4) requiring in FAR 15.1001(a) that notice be given to unsuccessful offerors in all situations where contracts are awarded based on competitive proposals.

RECOMMENDATIONS

We recommend that the Secretary of Defense and the Administrators of General Services, NASA, and the Office of Federal Procurement Policy take the following actions to amend FAR.

--FAR 6.302-1 should be revised to provide that contracts based on acceptance of unsolicited proposals may be considered to be "available from only one source" only if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which (1) is not otherwise available to the United States and (2) does not resemble the substance of a pending competitive procurement. FAR 6.302-1 should also provide that this authority is strictly limited to state-of-the-art proposals which represent advanced scientific knowledge and, even under the conditions cited above, agencies should seek proposals wherever possible from competing researchers to ensure that the best proposal available is selected.

--FAR 6.302-1 should also be revised to provide that follow-on contracts may be deemed to be available from only the original source and may be procured through procedures other than competitive procedures only when the follow-on contract is for the continued development or production of a major system or highly specialized equipment and it is likely that award to a source other than the original source would result in (1) substantial duplication of cost to the government which is not expected to be recovered through competition or (2) unacceptable delays in fulfilling the executive agency's needs. In addition, FAR 6.302-1 should provide that this authority is limited to follow-on contracts awarded (1) after an original competitive award and (2) if the basis for the decision is "substantial duplication of cost to the government which is not expected to be recovered through competition," after a cost/benefit analysis has been performed which determines and documents the decision.

--FAR 6.302-1(b)(4), which relates to limited rights in data, patent rights, copyrights, and other circumstances, should be revised to also require that "no other type of supplies or services will satisfy agency requirements."

--FAR 6.302-1(c)(2) should be revised to provide guidance regarding what constitutes "considering" responses to the

required Commerce Business Daily notices of proposed contract actions. The guidance should indicate that each response should be given sufficient consideration to make an informed judgment on whether the offeror might be capable of satisfying the government's need.

--FAR 6.303-1(c) should be revised to preclude justifications under the first six exceptions to full and open competition from being made on a class basis. Also, FAR 6.304(c), which states requirements relating to class justifications, should be deleted.

--FAR 6.303 should be revised to require agencies acquiring goods and services from another agency's sole-source contract to justify the sole-source procurements themselves.

--FAR 5.202(a)(1) should be revised so that the exception to the requirement to publicize proposed contract actions in the Commerce Business Daily is narrower and conforms to statutory requirements. That is, a notice should not be required if the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security. FAR should also be revised to require each contracting agency to establish procedures for (1) determining whether the disclosure of particular classified information in such notices would compromise the national security and (2) if it would not, taking the steps necessary to have the information properly declassified before its disclosure.

--FAR 5.202(a)(5) should be revised to provide that a notice is not required if the procurement is for utility services, other than telecommunication services, and only one source is available.

--FAR 5.202(a)(7) should be revised to provide that a notice is not required if the proposed procurement would result from acceptance of any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal.

--FAR 5.201(b) and 5.205(c)(2) should be revised to delete the current exemptions from publicizing proposed contract actions that are to be made outside the United States, its possessions, and Puerto Rico.

--FAR 5.207 should be revised to require notices of proposed contract actions to also state whether an offeror must meet a qualification requirement to be eligible for award.

--FAR 4.6, or the Federal Procurement Data System reporting manual to which it refers, should be revised to incorporate the requirements of section 19 of the Office of Federal Procurement Policy Act which were added by section 2732(a) of the competition act. These requirements (1) specify the information that executive agencies are required to collect and transmit to the Federal Procurement Data System and (2) provide for a 5-year retention period. In addition, FAR subpart 4.6, or the Federal Procurement Data System reporting manual, should be revised and standard form 279, used to collect information on contract actions, should also be revised to require the information that must be collected with respect to each procurement carried out using competitive procedures to be categorized separately from other procurements using competitive procedures if the procurement results in the submission of a bid or proposal by "only one responsible source."

--FAR 10.002(b) should be revised to provide that, whenever practical, agencies should tell contractors what the government needs in functional terms.

--FAR 15.1001(a) should be revised to require notice to unsuccessful offerors in all situations where contracts are awarded based on competitive proposals.

CHAPTER 3

OTHER FAR REVISIONS ARE NEEDED TO BETTER IMPLEMENT THE OBJECTIVES OF THE COMPETITION ACT

In addition to the changes relating to inconsistencies suggested in chapter 2, FAR needs to be revised to better implement the objectives of the Competition in Contracting Act of 1984. FAR revisions are needed in these additional areas:

--Providing discretion to agency heads to prescribe dollar thresholds of less than $100,000 relating to requirements for certified cost or pricing data on contract and subcontract modifications.

--Giving more discretion to contracting officers to obtain certified cost or pricing data when deemed necessary to ensure that prices are fair and reasonable on awards under $100,000.

--Strengthening the requirements relating to procurement planning.

FAR REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA ON AWARDS UNDER $100,000 NEED TO BE REVISED

Agency heads should be given discretion and contracting officers should be given more discretion in requiring contractors to submit certified cost or pricing data on awards under $100,000.

Before the enactment of the competition act, contractors were required by the Armed Services Procurement Act to submit cost or pricing data and certify that the data was accurate, complete, and current before the award of certain specified categories of defense contracts and subcontracts over $500,000, such as those not based on "adequate price competition." Contractors were also required by regulation to meet these same requirements on civil agency contracts and subcontracts over $100,000. These provisions were intended to (1) give the government greater assurance of fair and reasonable prices and (2) provide the basis for retroactive price adjustments.

The competition act extended the statutory requirement previously in the Armed Services Procurement Act to cover civil agency procurements by amending the Federal Property and Administrative Services Act. The competition act also established in both of these statutes a uniform threshold of $100,000.

Although reliable government-wide data is not available, DOD reported for fiscal year 1984 that it had obtained certificates of current cost or pricing data on 39,103 contract actions, accounting for $68.5 billion, or about 45 percent of the total value of its awards.

We question the appropriateness of FAR 15.804-2(a)(1) (ii) and (iv), as currently written. These FAR provisions require certified cost or pricing data before modification of any contract and of certain subcontracts, when the modification involves a price adjustment expected to exceed $100,000. However, the competition act amended the Federal Property and Administrative Services Act to require the certified data with respect to modifications of such contracts and subcontracts, if the price adjustment is expected to exceed $100,000, "or such lesser amount as may be prescribed by the agency head." Also, the Armed Services Procurement Act already contained these words. We believe FAR should specifically provide that agency heads have the discretion to require certified cost or pricing data under the circumstances described in FAR 15.804-2 (a)(i)(ii) and (iv) when the price adjustment is not expected to exceed $100,000.

We also identified problems relating to FAR 15.804-2 (a)(2). This provision states that there should be "relatively few instances" where certified cost or pricing data and inclusion of defective pricing clauses would be justified in awards between $25,000 and $100,000. It also states that when awarding a contract of $25,000 or less, the contracting officer shall not require certified cost or pricing data.

We question the appropriateness of these FAR provisions, although it may be appropriate to advise contracting officials not to require certified data on awards under $100,000 unless necessary to adequately ensure fair and reasonable prices. The conference report states that the act:

> ". . .authorizes contracting officers to request cost or pricing data for defense and civilian procurements under $100,000. Obtaining such data for small dollar contracts has proven to be a problem in purchasing spare parts where excessive overcharges have become legendary."

In addition, various studies have questioned the pricing of significant numbers of spare parts procurements under $100,000. For example, the DOD Inspector General stated on May 25, 1984, that based on the DOD-wide audit of 2,300 spare parts procurements, 36 percent, representing 6 percent of the $291 million sampled, were unreasonably priced. We note that these unreasonably priced "spare parts procurements" averaged under

$25,000. (An additional 17 percent were "potentially unreasonably priced" and another 5 percent were "not determinable as to reasonableness.")

Also, our work on spare parts showed that DOD often did not obtain adequate justification for price increases of 25 percent or more annually during the 42-month period ended June 30, 1983. That is, based on our statistical sample, we estimate that of the 48,803 contracts in our universe which experienced annual price growth of 25 percent or more in comparison to previous procurements, between 18,627 to 24,839 (or 38 to 51 percent) were awarded without obtaining satisfactory explanations of the price increases.

To identify our universe of contracts, we made 368,921 price comparisons and found that 50,163, or 13.6 percent, experienced an annual price growth of 25 percent or more.[1] We noted that 94.5 percent of the 368,921 comparisons involved procurements of $25,000, or less, and an additional 4.3 percent were for procurements between $25,000 and $100,000.

FAR REQUIREMENTS FOR ACQUISITION PLANNING NEED TO BE STRENGTHENED

FAR part 7, Acquisition Planning, places predominant emphasis on relatively complex or high-dollar procurements. Although we do not have any concerns with the FAR revisions based on the competition act which specifically relate to such procurements, we believe that FAR part 7 requirements applicable to all procurements need to be strengthened.

Competition act objectives

The competition act's emphasis on procurement planning and market research applies broadly across procurements of various sizes and kinds. Most importantly, the competition act[2]

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[1]Our universe of 50,163 contracts was reduced by 1,360 because the prices of these contracts were established by activities we did not visit. Thus, it would be inappropriate to project the results of our work over these 1,360 contracts.

[2]See sections 2711 and 2723 of the competition act, amending the Federal Property and Administrative Services Act and title 10 of the U.S. Code.

requires executive agencies to use advance procurement planning and market research in preparing for the procurement of property and services.[3]

The Senate Committee on Governmental Affairs issued two reports on the "Competition in Contracting Act" legislative proposals that were the forerunners in the Senate of the legislation finally enacted.[4] The initial Senate report states:

> ". . . Evidence and testimony presented to the Committee provided a range of explanations for the government's over-reliance on sole-source contracting. The following findings were identified as problems in the present procurement system. . . .
>
> --"The rush to spend appropriated funds at the end of the fiscal year, often due to ineffective procurement planning, curtails competition;
>
> --"Advance procurement planning and market research, used to determine the availability of competition in the marketplace, are often not being done;
>
> --"Overly-detailed specifications unnecessarily restrict the procuring agency from considering acceptable alternatives, and often result in only one contractor capable of meeting the agency's needs . . . ."

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[3]These same sections of the competition act also specifically (1) require justifications for contracts to be awarded using procedures other than competitive procedures to include a description of the market survey done or a statement of the reasons a market survey was not done and (2) forbid executive agencies from entering into a contract for property or services using procedures other than competitive procedures based on the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions.

[4]The report identifiers are 97-665, ordered to be printed on November 15, 1982, and 98-50, ordered to be printed on March 31, 1983.

. . . . .

"The Oversight of Government Management Subcommittee. . . found that an agency's need to award a contract by the end of the fiscal year often became the motivation behind unnecessarily restrictive specifications that subsequently made competition 'impracticable'."

. . . . .

"Competition in contracting is predicated on the procuring agency's understanding of the marketplace. Advance procurement planning and market research are essential in developing this understanding. Ineffective planning, conversely, can contribute to excessive year-end spending, shortcutting the procurement process, restrictive specifications, and ultimately sole-source contracting."

. . . . .

"The Oversight Subcommittee also found that agencies which failed to adequately plan ahead often resorted to sole-source contracting at year-end. These agencies were frequently inundated with procurement requests during the fourth quarter, severely constricting the contracting officers' ability to obtain competition."

The subsequent Senate report expresses many of these same thoughts, especially with regard to year-end spending.

The conference report on the competition act states:

"The Senate amendment requires agencies, as part of the affirmative effort to obtain competition, to use advance procurement planning, conduct market research, and develop nonrestrictive specifications."

"The conference substitute retains these requirements contained in the Senate amendment, but applies them as planning requirements for all procurements--competitive and noncompetitive. . . ."

FAR requirements

FAR 7.102 states that:

"Agencies shall perform acquisition planning and conduct market surveys to promote and provide for full and open competition (see part 6), or, when full and open competition is not required in accordance with Part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies and services to be acquired . . . This planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. The purpose of this planning is to ensure that the Government meets its needs in the most effective, economical, and timely manner."

FAR 7.103 also requires agency heads or their designees, among other things, to prescribe procedures for:

--Ensuring that in no case is a contract entered into without full and open competition on the basis of a lack of acquisition planning or concerns related to the amount of funds available to the agency for acquisitions.

--Ensuring that acquisition planners address the requirement to specify needs, develop specifications, and to solicit offers in such a manner to promote and provide for full and open competition with due regard to the nature of the supplies and services to be acquired.

--Establishing criteria and thresholds at which increasingly greater detail and formality in the planning process is required as the acquisition becomes more complex and costly, specifying those cases in which a written plan shall be prepared.

--Writing plans either on a system basis or on an individual contract basis, depending on the acquisition.

--Ensuring that the principles of this subpart are used, as appropriate, for those acquisitions that do not require a written plan as well as for those that do.

--Reviewing and approving acquisition plans and revisions to these plans.

Our position

Although FAR part 7 fulfills the minimum requirements of the competition act, we believe it needs to be strengthened.

Our reviews of defense and civil agencies' sole-source contracts[5] showed that (1) many contracts were awarded sole-source unnecessarily and (2) ineffective procurement planning, including the failure of contracting officers to perform adequate market research, was a major factor in the unnecessary sole-source awards.

For example, based on our review of a statistical sample of civil agencies' sole-source contracts awarded between July 1, 1979, and June 30, 1980, we found that (1) competition was feasible on an estimated 1,686 new contract awards (or 32 percent of our universe of contracts), which initially obligated $123.1 million and (2) ineffective procurement planning was a possible cause of the lack of competition on all of these awards. In response to our recommendations, GSA amended the Federal Procurement Regulations governing most civil agencies' procurement, effective May 9, 1983, as follows:

> "FPR 1-1.342 Advance procurement planning systems and procedures.
>
> > "(a) The head of each executive agency shall establish advance procurement planning systems and procedures that include:
> >
> > > "(1) Procurement procedures providing lead time and cut-off dates for preparing solicitations, obtaining and evaluating bids or proposals, making preaward surveys, performing contract audits, negotiating, and making contract awards in an orderly manner.
> > >
> > > "(2) Procedures for developing, monitoring, and updating advance procurement plans; and
> > >
> > > "(3) Review procedures for last-quarter spending.
> >
> > "(b) A prime objective of these procedures shall be to ensure that the efforts of all personnel responsible for the procurement of property and services are coordinated as early as practicable to obtain required items of requisite quality, on time, and at the lowest price. Consistent with that

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[5]See DOD Loses Many Competitive Procurement Opportunities (GAO/PLRD-81-45 July 29, 1981) and Less Sole-Source, More Competition Needed on Federal Civil Agencies Contracting (GAO/PLRD-82-40 Apr. 7, 1982).

objective is the responsibility to eliminate inefficiencies normally associated with hurried or unnecessary end-of-year procurements and to award contracts on a competitive basis as required by applicable laws and regulations."

According to GSA and Civilian Agency Acquisition Council officials, by the time these provisions were issued on April 15, 1983, the proposed FAR part 7 had already been drafted and sent out for public comment and the amendments adopted in the Federal Procurement Regulations were never formally considered for inclusion in FAR. We believe, in view of the pervasive nature of problems relating to ineffective procurement planning, that provisions similar to those that were adopted in the Federal Procurement Regulations should be included in FAR.

CONCLUSIONS

FAR needs to be revised to better implement the objectives of the competition act as expressed in the act itself and its legislative history. These changes include (1) providing discretion to agency heads in FAR 15.804-2(a)(1)(ii) and (iv), to prescribe dollar thresholds of less than $100,000 relating to requirements for certified cost or pricing data on contract and subcontract modifications, (2) providing more discretion to contracting officers in FAR 15.804-2(a)(2), to obtain certified cost or pricing data when necessary to ensure that prices are fair and reasonable on awards under $100,000, and (3) strengthening the requirements in FAR part 7 relating to procurement planning.

RECOMMENDATIONS

We recommend that the Secretary of Defense and the Administrators of General Services, NASA, and the Office of Federal Procurement Policy take action to amend FAR.

--FAR 15.804-2(a)(1)(ii) and (iv) should be revised to require certified cost or pricing data before modification of any contract and the subcontracts identified in that provision, when the modification involves a price adjustment expected to exceed $100,000, "or such lesser amount as may be prescribed by the agency head."

--FAR 15.804-2(a)(2) should be revised to provide more discretion to contracting officers to obtain certified cost or pricing data on awards under $100,000 when they decide it is necessary to ensure that prices are fair and

reasonable. This includes permitting contracting officers to require certified cost or pricing data on awards of $25,000, or less.

--FAR part 7 should be revised to require agency heads to establish procurement planning systems and procedures that include

  --procurement procedures providing lead time and cutoff dates for preparing solicitations, obtaining and evaluating bids or proposals, making preaward surveys, performing contract audits, negotiating, and making contract awards in an orderly manner;

  --procedures for developing, monitoring, and updating procurement plans; and

  --review procedures for last-quarter spending.

--FAR part 7 should also be revised to state that a prime objective of these procedures should be to ensure that the efforts of all personnel responsible for the procurement of property and services are coordinated as early as practicable to obtain required items of requisite quality, on time, and at the lowest price. Consistent with that objective is the responsibility to eliminate inefficiencies normally associated with hurried or unnecessary end-of-year procurements and to award contracts on a competitive basis as required by applicable laws and regulations.

CHAPTER 4

FIRMR IMPLEMENTATION OF THE COMPETITION ACT HAS GENERALLY BEEN SUCCESSFUL BUT SOME IMPROVEMENTS ARE NEEDED

Implementation of the competition act in FIRMR for the most part complied with the act. However, some areas need improvement to satisfy the intent of the Congress, as stated in the conference report, or to better meet the objectives of the competition act.

As discussed in chapter 1, regulations unique to the management and procurement of information resources are contained in FIRMR. GSA initially implemented the provisions of the competition act in FIRMR Temporary Regulation 11, which took effect on April 1, 1985. GSA issued the final version of this FIRMR revision on July 1. It takes effect on August 30, 1985, but may be observed earlier.

FIRMR HAS RECENTLY BEEN REVISED REGARDING SPECIFIC MAKE AND MODEL SPECIFICATIONS

One concern we had with the FIRMR revisions that took effect on April 1, 1985, related to the use of specific make and model specifications. The competition act contains detailed certification, justification, and approval requirements for the use of "other than competitive procedures." (See app. II.) Based on Temporary Regulation 11, effective April 1, 1985, FIRMR provided that the use of a specific make and model specification restricted competition and had to be justified as a restrictive specification. However, FIRMR did not require a procurement which contained such a specification to be justified as using other than competitive procedures in accordance with the competition act, unless there was only one responsible source for the item sought. We discussed this concern with GSA officials.

In April 1985, the requesting Committees asked us for our opinion on whether the use of specific make and model specifications can be considered full and open competition. We considered whether, under the competition act, an agency's use of this type of specification constituted other than competitive procedures that must be certified, justified, and approved in accordance with the act's requirements. From our review of the act, we concluded that (1) the restriction of a procurement to a specific make and model does not fulfill the requirement for full and open competition and (2) FIRMR needed to be revised to

require written certification, justification, and approval in accordance with the act for the use of other than competitive procedures in such cases.

However, GSA's final version of its FIRMR amendment revised the provisions relating to use of specific make and model specifications. FIRMR now states that whenever a procurement includes this type of specification, it is "other than full and open competition" and must be certified, justified, and approved in accordance with the provisions of the competition act. Because of this recent FIRMR revision, we are not making a recommendation relating to this issue.

OTHER REVISIONS ARE NEEDED IN FIRMR

GSA's implementation of the competition act in FIRMR was successful, except for several problem areas that need to be addressed. These include (1) FIRMR references to FAR provisions that are inconsistent with the intent of the act, (2) the use of follow-on contracts to perpetuate any contract involving obsolete or outmoded facilities, systems, or processes, and (3) the lack of a requirement that agencies consider the possible effects on competition of using the more restrictive types of specifications.

FIRMR references to FAR

FIRMR refers to FAR for general contracting procedures applicable to the procurement of ADP resources. We are concerned about FIRMR references to FAR provisions that we believe are inconsistent with the intent of the competition act. (See ch. 2.) For example, FIRMR 201-11.002 refers to FAR 6.303 for coverage governing justifications for the use of other than competitive procedures. As noted in chapter 2, FAR states that some justifications may be made on an individual or class basis and this is inconsistent with the conference report's statement that all such justifications are to be made on a case-by-case basis.

We asked the Chief of GSA's Policy Branch how his organization proposed to resolve the problem of FIRMR references to FAR provisions that are inconsistent with the act, and he responded that his organization will wait for those responsible for FAR maintenance to recommend changes to FAR. Whenever FIRMR refers to the FAR provisions that are inconsistent with the intent of the act, we believe FIRMR is also inconsistent with the intent of the act. Therefore, we believe such problems need to be resolved promptly.

Follow-on contracts

The competition act permits the use of other than competitive procedures when the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the agency's

needs. In the case of follow-on contracts for some types of property, the act provides that property may be deemed to be available from only one source (the original source) if award to another source would result in either (1) substantial duplication of cost to the government that is not expected to be recovered through competition or (2) unacceptable delays in fulfilling the agency's needs.

As reflected in the conference report, the conferees did not intend for this follow-on provision to "be used to perpetuate any contract which involves obsolete or outmoded facilities, systems or processes, including computer systems and software." However, nothing has been added to FIRMR to set forth the conferees' intent. Language should be added to FIRMR to reflect congressional intent on this matter.

Restrictive specifications

We are also concerned about the possibility that restrictive types of specifications, such as brand name or equal and compatibility limited purchase descriptions,[1] could be used in some cases to restrict competition unnecessarily. Such use would violate the requirements of the competition act. FIRMR does not require the use of brand name or equal purchase descriptions to be justified as restrictive specifications, although it does contain such a requirement for compatibility limited purchase descriptions. In addition, in the past we have found overly restrictive specifications to be a serious procurement problem. However, FIRMR does not require agencies to have management controls to help ensure that specifications are not overly restrictive.

In light of the conferees' preference for functional specifications noted in chapter 2, we believe regulations should require agencies to consider the possible effects on competition of using these more restrictive types of specifications. Therefore, to better meet the objectives of the competition act, FIRMR should require agencies to justify any use of a brand name or equal purchase description as a restrictive specification. To accomplish this same purpose, FIRMR should also require agencies to install effective management controls, such as review and approval of written justifications for the more restrictive types of specifications, including compatibility limited and brand name or equal. This should help ensure that use of the more restrictive types of specifications does not unnecessarily restrict competition.

CONCLUSIONS

Implementation of the competition act in FIRMR was successful, except for several areas that need improvement. The problem of FIRMR references to FAR provisions that are inconsistent

[1]See the glossary, app. X, for an explanation of these terms.

with the intent of the act, as reflected in the conference report, needs to be promptly resolved. In addition, FIRMR needs to be revised to

--state that follow-on contracts should not be used to perpetuate any contract that involves obsolete or outmoded facilities, systems, or processes; and

--require agencies to consider the possible effects on competition of using the more restrictive types of specifications.

RECOMMENDATIONS

We recommend that the Administrator of General Services:

--Take action to promptly resolve the problem of FIRMR references to FAR provisions that are inconsistent with the act, as discussed in chapter 2 of this report.

--Revise FIRMR to state that follow-on contracts should not be used to perpetuate any contract that involves obsolete or outmoded facilities, systems, or processes.

--Revise FIRMR to require (1) the use of brand name or equal purchase descriptions to be justified as restrictive specifications and (2) agencies to install effective management procedures or controls to ensure that use of the more restrictive types of specifications, such as compatibility limited and brand name or equal, does not unnecessarily restrict competition.

CHAPTER 5

SOME AGENCIES' ACQUISITION REGULATIONS NEED TO BE REVISED TO CONFORM TO THE COMPETITION ACT

As of mid-May 1985, 14 executive branch agencies with acquisition regulations in effect implementing or supplementing FAR had not properly revised them to conform to the competition act and Federal Acquisition Circular 84-5. These agencies accounted for $11.5 billion (or about 6.3 percent) of federal contract awards reported to the Federal Procurement Data System for fiscal year 1984. Thirteen of these agencies told us they had not yet revised their regulations to conform to the act. Although the other agency had revised its regulations, the regulations included provisions which appeared to be inconsistent with the act. In addition, three subagencies had acquisition regulations that did not conform to the act or the revised FAR. Since the competition act took effect on solicitations issued after March 31, 1985, these agencies and subagencies need to promptly revise their regulations.

SOME ACQUISITION REGULATIONS HAD NOT BEEN REVISED TO CONFORM TO THE ACT

Thirteen agencies, accounting for $11.2 billion in fiscal year 1984 contract awards, told us between May 14 and May 22, 1985, that they had regulations in effect implementing or supplementing FAR which did not conform to the competition act and FAR, as amended by Federal Acquisition Circular 84-5. These agencies said that although they had not yet revised their regulations to conform to the competition act, they planned to do so.

Eight other agencies that awarded over 92 percent of federal procurement dollars in fiscal year 1984 told us they had issued regulations conforming to the revised FAR. Seven of these agencies published their regulations for public comment. The other agency cited exemptions from the requirement to obtain public comment.

Twenty-one agencies that award the vast proportion of federal procurement funds have issued acquisition regulations that took effect on or after April 1, 1984, implementing or supplementing FAR or both FAR and FIRMR. According to these agencies, most of their regulations implement or supplement only FAR and not FIRMR. However, the majority of the 64 agencies contacted did not believe they needed to issue acquisition regulations of their own to implement or supplement FAR or FIRMR.

According to the agencies surveyed, five subagencies had issued acquisition regulations implementing or supplementing FAR and one of these five did not conform to the act or the revised FAR; in addition to these five subagencies, two others were still using pre-FAR regulations that did not conform to the act or FAR.

Most agency respondents to our survey rated the training and general awareness level of their personnel responsible for implementing the competition act as satisfactory or better for complying with the act.

Based on the Office of Federal Procurement Policy Act, FAR defines the FAR system as consisting of FAR, which is the primary document, and agency acquisition regulations that implement and supplement FAR. FAR limits agency acquisition regulations to those necessary to implement FAR policies and procedures within an agency and those additional policies, procedures, provisions, and clauses that supplement FAR to satisfy the specific needs of the agency. FIRMR contains similar limitations on implementing and supplementing regulations.

As noted in chapter 1, we contacted 64 agencies to obtain information on acquisition regulations and related matters. (The agencies are identified in app. VII. Additional information is also provided in apps. VII and VIII.)

Specifically, we sought to obtain information on

--how many agencies and subagencies had issued acquisition regulations implementing or supplementing FAR, FIRMR, or both;[1]

--how many of these agency regulations conformed to the competition act and FAR, as amended by Federal Acquisition Circular 84-5,[2] and how many of the subagency regulations conformed to the revised FAR;

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[1]Our data collection form, which was sent to each of the agencies, defined "issued" as (1) signed or authorized by the agency head or another high-level official for the agency head, (2) intended to take effect, at least initially, in that form, and (3) made available to agency personnel, as well as others outside the agency, as appropriate. In contrast, the term "proposed regulation" as defined in our data collection form (1) does not meet the definition of issued and (2) means regulations which are published or disseminated in a preliminary or draft state and are not intended to take effect in that form.

[2]See chapters 2 and 3 regarding our analysis of the FAR revisions in comparison to the competition act.

--how many agencies and subagencies without their own acquisition regulations planned to issue regulations implementing or supplementing FAR, FIRMR, or both;

--what regulations were being used by those agencies that had not issued acquisition regulations implementing or supplementing FAR or FIRMR;

--whether agencies and subagencies had published their regulations or proposed regulations in the Federal Register for public comment, and if not, why not; and

--what level of awareness agencies believed their personnel responsible for implementing the competition act had to comply with the act.

Of the 64 agencies contacted, 63 responded to our questions.[3] Sixty-one of these 63 agencies stated that they used FAR as the primary regulation to guide their procurement activities.[4] Regarding FIRMR, two agencies, DOD and NASA, said their acquisition regulations implemented or supplemented FIRMR and 19 said their regulations did not. Of the remaining 42 agencies without regulations, 35 said they used both FAR and FIRMR, 6 said they used only FAR, and the other agency, the Tennessee Valley Authority, said it used only FIRMR.

Agencies with implementing or supplementing regulations awarded most procurement funds

Although the majority of the agencies contacted indicated that they had not issued and did not expect to issue any acquisition regulations implementing or supplementing FAR or FIRMR,

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[3]The only agency we contacted that did not respond to our questions is the Central Intelligence Agency. That agency declined to respond, explaining that it is not agency policy to divulge details about its procedures and methods. The agency also stated that (1) it operates under a variety of exceptions to procurement statutes and (2) it plans to comply with the competition act to the maximum extent practicable.

[4]The Tennessee Valley Authority and the Overseas Private Investment Corporation both stated they are exempt from the requirement to conform to FAR. The Tennessee Valley Authority stated that it does not use FAR because it is exempted by its authorizing legislation. (See 16 U.S.C. 831 h(b).) The Overseas Private Investment Corporation stated that it abides by FAR in all respects that it can, but it is exempt from FAR because it does not use appropriated funds. (FAR provides that it applies to acquisitions using "appropriated funds.")

they accounted for less than 1 percent of the value of fiscal year 1984 contract awards.[5] In contrast, the agencies that said they had issued such regulations that took effect on or after April 1, 1984, accounted for over 98.8 percent of the total value of federal contract awards in fiscal year 1984. According to the Federal Procurement Data System, the 59 responding agencies we surveyed that report to the system procured goods and services valued at about $182.9 billion during fiscal year 1984. DOD accounts for 79.6 percent of this amount.

According to the respondents:

--Twenty-one agencies, accounting for $180.6 billion (or 98.8 percent) of federal contract awards in fiscal year 1984, had issued regulations which took effect on or after April 1, 1984, implementing or supplementing FAR, FIRMR, or both. Of these, the regulations of two, NASA and DOD (accounting for $152.4 billion, or 83.3 percent of the awards), implement or supplement both FAR and FIRMR and 19 deal only with FAR.

--Seven other agencies, accounting for $638.5 million[6] (or about 0.35 percent) of federal contract awards in fiscal year 1984, had not, but intended sometime in the future, to issue acquisition regulations implementing or supplementing FAR, FIRMR, or both. Two of the seven said their regulations will implement or supplement both FAR and FIRMR; the remaining five said their regulations will deal only with FAR. Of the seven, six said that they were using both FAR and FIRMR to conduct procurement and the other (the Office of Personnel Management) said it was using only FAR.

--Thirty-five agencies, accounting for $1.6 billion[7] (or 0.9 percent) of fiscal year 1984 federal contract awards had not issued and did not expect to issue implementing

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[5]All the dollar amounts shown in this chapter are based on information reported to the Federal Procurement Data System. (See app. VII.) Since four of the responding agencies did not report data into the system, the dollar amounts shown do not include these agencies' contract awards.

[6]One of the seven, the Panama Canal Commission, did not report to the data system. Therefore, the amount shown is the total for the other six agencies.

[7]Since 3 of the 35 did not report to the data system, the amount shown is the total of the other 32 agencies.

or supplementing regulations. Of those, 29 said they used both FAR and FIRMR to guide procurement within their organizations, 5 said tney used only FAR, and 1 said it used only FIRMR.

Most agency acquisition regulations not in conformance with the competition act

Of the 21 agencies that had acquisition regulations in effect implementing or supplementing FAR or FIRMR, 13, accounting for about $11.2 billion (or about 6.1 percent) of federal contract awards in fiscal year 1984, stated that their regulations did not conform to (1) the competition act and (2) FAR, as amended by Federal Acquisition Circular 84-5.[8]

According to the agency respondents:

--Eight agencies, accounting for $169.5 billion (or 92.7 percent) of federal contract awards in fiscal year 1984, had issued revised regulations in conformance with Federal Acquisition Circular 84-5. Two of these eight agencies, accounting for $13.5 billion (7.4 percent), told us that their regulations did not conform to the competition act because they dealt with our Office's bid protest procedures in a manner that did not conform to the act (see p. 4).[9] The other six agencies said their implementing or supplementing regulations conformed to the competition act.

--Thirteen agencies, accounting for $11.2 billion (or 6.1 percent) of fiscal year 1984 federal contract awards, had not yet revised their regulations to conform to the act and FAR, as amended by Federal Acquisition Circular 84-5. Of these 13 agencies, 12, accounting for $10.9 billion, planned to revise their current regulations to

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[8]All 21 of these agencies told us that they either (1) were not aware of the problems our task force and the 2 congressional committees have raised regarding Federal Acquisition Circular 84-5 (see chs. 2 and 3) or (2) if they were aware of them, had not taken a position on these matters.

[9]Officials of both these agencies told us in mid-July 1985 that they have taken steps to conform their regulations to the act's bid protest provisions.

bring them into conformance and the other, the Department of State, planned to issue new regulations to conform. The respondent for State, which procured about $249 million worth of goods and services in fiscal year 1984, noted that the agency (1) was still using its regulations issued under the Federal Procurement Regulations which preceded FAR and (2) sent a message to the department's field offices throughout the world on June 6, 1984, announcing changes required by FAR to the department's old regulations.[10]

Agency publication of acquisition regulations for public comment

As noted in chapter 1, the Small Business and Federal Procurement Competition Enhancement Act of 1984 includes requirements relating to publication of procurement regulations for public comment. We asked the officials of the 21 agencies which had issued regulations that took effect on or after April 1, 1984, implementing or supplementing FAR, whether the agency regulations had been published for public comment as required. According to the respondents:

--Of the eight agencies which stated that they had revised their acquisition regulations to conform to Federal Acquisition Circular 84-5, seven published them in the Federal Register and requested public comment. The Department of the Treasury did not request public comment, citing an exemption from the requirement. That is, the Treasury respondent stated that the agency's revised regulations have no significant effect beyond the internal operating procedures of the agency.

--Of the 13 agencies with regulations in effect implementing or supplementing FAR that did not conform to FAR, as amended by Federal Acquisition Circular 84-5, all but 2, the Department of State and the International Trade Commission, published their latest issuances for public comment. The International Trade Commission respondent cited an exemption from the requirement, stating that the agency's regulations have no significant cost or administrative impact on contractors or offerors. The State Department, as discussed earlier, still had regulations issued under the old Federal Procurement Regulations which preceded FAR.

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[10]None of these 13 agencies had included implementation or supplementation of FIRMR in its regulations.

Information on subagency regulations

According to agency respondents, five subagencies had regulations that implemented or supplemented FAR and their parent agencies' acquisition regulations and none did for FIRMR. Also, two additional subagencies had pre-FAR regulations still in effect.

Four subagencies with acquisition regulations implementing or supplementing FAR are within DOD and are significant procuring agencies in themselves. The DOD respondent said that all four of these subagencies had revised their regulations so that they were in conformance with Federal Acquisition Circular 84-5. The four subagencies are the Defense Logistics Agency and the Departments of the Army, Navy, and Air Force.

The acquisition regulations of the other three subagencies reported as having them did not conform to Federal Acquisition Circular 84-5, according to the agency respondents. The Department of Health and Human Services' respondent said the regulations of its subagency, the Public Health Service (1) implemented or supplemented FAR, (2) were issued before the competition act took effect, (3) did not fully conform to FAR, as amended by Federal Acquisition Circular 84-5, and (4) would not be revised until Health and Human Services had issued revisions to its own regulations. The respondents for the Departments of the Treasury and the Interior said that their subagencies, the Bureau of Engraving and Printing and the Bureau of Indian Affairs, respectively, still had pre-FAR regulations in effect.

According to the agency respondents, only one subagency which did not have acquisition regulations, the U.S. Marshals Service within the Department of Justice, planned to issue regulations.

According to agency respondents, of the five subagencies which had acquisition regulations implementing or supplementing FAR, only one published its regulations for public comment: the Public Health Service, on September 9, 1984. The respondent for DOD stated that the four DOD subagencies did not publish their regulations for public comment because of exemptions from the requirement: they either have no significant effect beyond the internal operating procedures of those agencies, or have no significant cost or administrative impact on contractors or offerors.

Agencies' opinions of the ability of their personnel to comply with the competition act

Most agencies, according to the respondents we spoke with, rated their procurement and other personnel that are responsible for implementing the competition act as satisfactory or highly

satisfactory in their training and general awareness levels for complying with the act. Respondents for 21 agencies gave a rating of highly satisfactory and respondents for 34 agencies gave a rating of satisfactory. The respondents for the remaining eight agencies stated that training and general awareness levels for the personnel responsible for implementing the act within their agencies were neither satisfactory nor unsatisfactory, the midpoint position of our five point rating scale. None responded "unsatisfactory" or "highly unsatisfactory."

ONE OF THE 12 SETS OF REGULATORY REVISIONS DOES NOT CONFORM TO THE ACT

We reviewed the revisions to the eight sets of agency and four sets of subagency acquisition regulations which had been issued to implement the competition act as of May 22, 1985.[11] Aside from those issues previously discussed in this report, we identified one problem with one agency's regulations. That is, the Agency for International Development Acquisition Regulation (AIDAR) contain provisions which seem to be inconsistent with the competition act. This agency accounted for $332.9 million in fiscal year 1984 contract awards.

AIDAR sections 715.613-70 and 71 authorize the use of special source selection procedures when the agency determines that a particular project requires the services of an educational institution, an international research center, or a cooperative development organization. These procedures appear to restrict the procurement for the required services to these entities and do not appear to involve consideration of price until after a source is initially selected. To this extent, the procedures are inconsistent with the requirements of the competition act that an agency (1) allow all responsible offerors to compete (full and open competition) and (2) establish procedures to assure that the government will obtain its goods and services at the lowest reasonable cost. Not allowing all responsible offers to compete also conflicts with the requirements of FAR, as amended by Federal Acquisition Circular 84-5.

We discussed this issue with the agency's designated contact point for receipt of public comments on the revisions to AIDAR. He told us that changes have been proposed to the agency's senior procurement executive to revise these procedures.

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[11]As previously noted, seven of the agencies' acquisition regulations were published for public comment. We asked these agencies to provide the comments to us and, as part of our review of the revisions to agencies' acquisition regulations, we examined all the comments they gave us.

CONCLUSIONS

As of mid-May 1985, 14 agencies, accounting for $11.5 billion (or about 6.3 percent) of the fiscal year 1984 federal contract awards reported to the Federal Procurement Data System, had acquisition regulations in effect implementing and supplementing FAR which had not been properly revised to conform to the competition act and Federal Acquisition Circular 84-5. Thirteen of these 14 agencies had not yet revised their regulations based on the competition act. The other, the Agency for International Development had revised its regulations but provisions in AIDAR 715.613-70 and 71 appeared to be inconsistent with the competition act.

Because the competition act took effect on solicitations issued after March 31, 1985, these agencies need to promptly revise their regulations to conform with the act and reduce the chances of actions being taken or procedures being followed which do not comply with legal requirements.

For the same reason, the three agencies with subagencies that have acquisition regulations in effect not conforming to the competition act also need to take prompt action to either revise these regulations to conform to the act or rescind them.

RECOMMENDATIONS

We recommend that the Secretaries of the Departments of Agriculture, Health and Human Services, Housing and Urban Development, Labor, State, Transportation, and the Interior; and the heads of the Department of Justice, Federal Emergency Management Agency, International Trade Commission, National Science Foundation, U.S. Information Agency, and the Veterans Administration take prompt action to revise their acquisition regulations to conform to the competition act.

We also recommend that the Administrator of the Agency for International Development revise AIDAR 715.613-70 and 71 to remove the restrictions to full and open competition for all acquisitions other than those specifically authorized by statute and bring the regulations into conformity with the competition act.

In addition, we recommend that the Secretaries of the Departments of the Interior, Health and Human Services, and the Treasury direct appropriate officials in the Bureau of Indian Affairs, the Public Health Service, and the Bureau of Engraving and Printing, respectively, to take prompt action to either revise the subagency acquisition regulations to conform to the competition act or rescind them.

APPENDIX I

Congress of the United States

Washington, D.C. 20515

August 1, 1984

The Honorable Charles A. Bowsher
Comptroller General of the United States
Washington, D.C. 20548

Dear Mr. Bowsher:

As you know, the Competition in Contracting Act was recently enacted into law as part of the Deficit Reduction Act of 1984. We want to thank you and your staff for the strong support and assistance provided during the consideration of this important government-wide procurement reform legislation.

Our work is not done, however, as we must ensure that (1) the amendments to the Federal Acquisition Regulation required to implement this Act accurately reflect congressional intent; (2) implementation is carried out in a timely fashion, allowing for a public comment period, in order to meet the April 1, 1985 deadline; and (3) the procuring agencies comply with the statutory and regulatory requirements of the Act.

Accordingly, we request that you establish an interdivisional task force to review the implementation of, and subsequent compliance with, the Competition in Contracting Act. We request that GAO report its findings, conclusions, and recommendations by March 1, 1985, to the Senate Governmental Affairs Subcommittee on Oversight of Government Management and the House Government Operations Committee. (GAO note 1.)

We also request that you report by December 15, 1984, on GAO's plans to implement the bid protest provisions contained in section 2713 and subtitle D of the Act, which take effect on January 15, 1985. (GAO note 2.)

Again, thank you and your staff for your hard work and diligence toward increasing competition in Federal contracting. We greatly appreciate your efforts.

Sincerely,

WILLIAM S. COHEN, Chairman
Subcommittee on Oversight
of Government Management
Senate Committee on
Governmental Affairs

JACK BROOKS, Chairman
House Committee on
Government Operations

APPENDIX I

The Honorable Charles A. Bowsher
August 1, 1984
Page Two

CARL LEVIN
Ranking Minority Member

FRANK HORTON
Ranking Minority Member

GAO Note 1: As discussed in chapter 1, this request was subsequently amended.

GAO Note 2: Based on our subsequent discussions with the Committees' offices, the date of this report was revised. As noted in chapter 1, our January 16, 1985, report responded to this request.

APPENDIX II

COMPETITION IN CONTRACTING ACT CHANGES TO THE ARMED SERVICES PROCUREMENT ACT, FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT, THE OFFICE OF FEDERAL PROCUREMENT POLICY ACT, AND THE BUDGET AND ACCOUNTING ACT

The Competition in Contracting Act of 1984 amended both the Armed Services Procurement Act and the Federal Property and Administrative Services Act to:

--Require the use of competitive procedures in order to obtain full and open competition.

--Limit the use of other than competitive procedures to seven specified circumstances.

--Require contracting officers to justify and to obtain approval from other specified agency officials for the use of other than competitive procedures.

--Define competitive procedures to include procurements of architectural or engineer services conducted in accordance with 40 U.S.C. 541 et seq., competitive selection of basic research proposals, and GSA's multiple award schedule programs.

--Replace the previous strong statutory preference for formal advertising[1] with provisions that put competitive proposals[2] (negotiation) almost on a par with sealed bids.[3]

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[1]"Formal advertising," which was replaced under the acts with the term sealed bidding, was a method of contracting that employed competitive bids, public opening of bids, and awards.

[2]"Competitive proposal" is an offer submitted to the government when it is necessary to conduct discussions with responding offerors. This method of contracting permits bargaining and usually affords offerors an opportunity to revise their offers before award of a contract.

[3]"Sealed bidding" is a method of contracting that employs competitive bids, public opening of bids, and awards.

--Eliminate the statutory exceptions justifying negotiation.[4]

The competition act requires agencies to:

--Specify agency needs and solicit bids or proposals in a manner designed to achieve full and open competition.

--Use advance procurement planning and market research.

--Develop specifications so as to obtain full and open competition.

--Require the use of sealed bids if (1) time permits solicitation, submission, and evaluation of sealed bids, (2) award will be made on the basis of price and other price-related factors, (3) it is not necessary to conduct discussions, and (4) there is a reasonable expectation of receiving more than one sealed bid.

--Allow the head of an agency to exclude a particular source in order to establish or maintain an alternative source or sources of supply if he/she determines that it would: (1) increase or maintain competition and likely result in reduced overall costs, (2) be in the interest of national defense to have the facility available in case of national emergency or industrial mobilization, or (3) be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

--Allow the use of other than competitive procedures only if: (1) property or services are available from only one source and no other type of property or services will satisfy the needs of the agency (includes certain follow-ons and unsolicited research proposals), (2) the agency's need is of such unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources (must still obtain maximum competition practicable), (3) it is necessary to award to a particular source/sources in order to maintain a facility in case of national emergency or to achieve industrial mobilization or to establish or maintain an essential engineering, research, or development capability provided by an educational or

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[4]"Negotiation" means contracting through the use of either competitive or noncompetitive proposals and discussions. Any contract awarded without using sealed bidding procedures is a negotiated contract.

other nonprofit institution or a federally funded research and development center, (4) it is required by the terms of an international agreement or treaty or by written direction of a foreign government that is reimbursing the agency for the cost of the procurement, (5) a statute expressly authorizes or requires procurement through another agency or from a specified source or the agency's need is for a brand-name commercial item for authorized resale, (6) disclosure of the agency's needs would compromise national security unless the number of sources is limited (must still obtain maximum practicable competition), or (7) the head of an agency determines it is necessary in the public interest to use other than competitive procedures and gives the Congress 30-days' written notice before award (non-delegable).

--Justify in writing the use of other than competitive procedures and certify the accuracy and completeness of the justification. The justification must include (1) a description of the agency's needs, (2) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration of the reasons for using that exception, (3) a determination that the anticipated cost will be fair and reasonable, (4) a description of the market survey conducted or a statement of the reasons a market survey was not conducted, (5) a listing of the sources, if any, that expressed in writing an interest in the procurement, and (6) a statement of the actions, if any, the agency may take to remove or overcome a barrier to competition before a subsequent procurement for such needs. In addition, justifications for contracts over $100,000 must be approved either by the competition advocate for the procuring activity or by certain specified agency officials at a level higher than the contracting officer, depending on the dollar value of the procurement.

--Provide a uniform threshold of $100,000 for requiring contractors to submit certified cost and pricing data.

--Allow contracting officers to require cost or pricing data for procurement actions below the threshold.

The Office of Federal Procurement Policy Act was amended by adding sections requiring that each executive agency:

--Publish a notice of solicitation in the Commerce Business Daily for each procurement action exceeding $10,000; and publish a notice of award in the Commerce Business Daily for procurement actions exceeding $25,000, if subcontracting opportunities are likely to occur from that award.

APPENDIX II

--Allow at least 15 days from the time the notice of solicitation is published in the Commerce Business Daily to the time the solicitation is issued and at least 30 days from the time the solicitation is issued to the time proposals must be submitted.

--Have each procuring activity within the agency establish an "Advocate for Competition" who is responsible for challenging barriers to and promoting full and open competition in the agency's procurements.

--Make an annual report to the Congress, for 5 years, starting in January 1986, specifying the agency's plans to increase competition and to reduce noncompetitive contracts and summarizing the advocate for competition's accomplishments during the previous fiscal year.

--Establish and maintain a record, by fiscal year, of competitive and noncompetitive procurement actions (other than small purchases) and enter that data in the Federal Procurement Data System.

The Budget and Accounting Act was amended to:

--Codify and strengthen our Office's bid protest procedures.

--Allow actual or prospective bidders or offerors whose direct economic interest would be affected by the award or failure to award a contract to challenge the agency's solicitation, award, or proposed award by filing a protest with the Comptroller General.

--Require the Comptroller General to notify the agency within 1 day of receipt of the protest. The agency has 25 working days to respond (10 days under the "express" option) and the Comptroller General has 90 working days (45 under the "express" option) to issue his opinion.

--Require that if the protest is filed before award, an award may not be made unless the head of the procuring activity finds and reports to the Comptroller General that urgent and compelling circumstances, which significantly affect the United States' interests, will not permit awaiting a decision. This finding may be made only if award is likely to occur within 30 days.

--Require that if the protest is filed within 10 days after award, performance must be suspended unless the head of the procuring activity makes a determination of urgent and compelling circumstances or determines that performance is in the best interest of the United States and reports this determination to the Comptroller General.

--Require, in the event that the protest is sustained, that the Comptroller General recommend corrective action and the head of the procuring activity notify the Comptroller General if the recommendations are not implemented within 60 calendar days.

Possible corrective actions include refraining from exercising any options under the contract, immediate recompetition of the contract, issuance of a new solicitation, contract termination, reaward, or any combination of these actions or any other recommendations that the Comptroller General determines necessary. The Comptroller General also may grant reimbursement of bid or proposal preparation costs and costs incurred in making the protest. These costs must be paid from the agency's procurement funds.

The Federal Property and Administrative Services Act was amended to:

--Set up a 3-year program to allow the GSA Board of Contract Appeals (the Board) to resolve protests involving procurement of ADP resources under Public Law 89-306 (the Brooks Act).

--Require the Board to hold an initial hearing within 10 days of the filing of a protest and issue a final decision within 45 days, unless the Chairman determines that specific and unique circumstances require a longer period of consideration.

--Require that if the protest is made before contract award, the Board must suspend the GSA Administrator's ADP procurement authority or delegation of authority for the procurement at issue. No award can be made unless the agency establishes that urgent and compelling circumstances which significantly affect the United States' interests require award and that award is likely to occur within 30 days.

--Require that if the Board receives notice of a protest within 10 days after contract award, the Board must suspend the authority or delegation of authority and contract performance will be suspended, unless the agency finds that compelling circumstances exist.

--Require that if the Board sustains the protest, the Board may suspend, revoke, or revise the GSA Administrator's ADP procurement authority or delegation of that authority for the procurement at issue. The Board also may grant reimbursement of the costs of filing and pursuing the protest (including reasonable attorney's fees) and bid or proposal preparation costs.

THE COMPETITION IN CONTRACTING ACT OF 1984 ADDRESSES THE NEED FOR FEDERAL AGENCIES TO INCREASE THE USE OF COMPETITION

The Competition in Contracting Act represents a compromise among provisions in three legislative proposals introduced during the 98th Congress--S.338, the proposed "Competition in Contracting Act of 1983;" H.R. 2545, the proposed "Defense Procurement Reform Act of 1983;" and H.R. 5184, the proposed "Competition in Contracting Act of 1984." Each of these bills, as well as numerous similar proposals being simultaneously considered by the Congress, was intended to stem the growing use of sole-source or noncompetitive procurement procedures, and ultimately, to substantially reduce federal expenditures.

S.338, 98th Cong., 1st Sess. (1983), which was the major source of the language of the Competition in Contracting Act, had previously passed the Senate as an independent measure on December 11, 1983. The history of its consideration is one of frustration over the growing use of noncompetitive procurement procedures at the same time that procurement budgets, particularly the DOD budget, were increasing dramatically. Congressional concern focused on estimated savings of between 15 to 50 percent from the use of competitive procedures, particularly regarding over $19 billion spent annually by DOD for spare parts, mostly on a noncompetitive basis. To overcome the "institutional bias" against competition, S.338 contained sole-source justification and reporting requirements as well as provisions establishing "advocates for competition" within each agency.

The second of the three bills combined in the act, H.R. 2545, 98th Cong., 1st Sess. (1983), was identical in many respects to S.338, although directed specifically to increasing effective competition in DOD procurements. Excessive prices paid by DOD for spare parts was the subject of five hearings by the Investigations Subcommittee of the House Committee on Armed Services, to which H.R. 2545 was referred. Both the Senate and House Committees on Armed Services were deeply concerned about the spare parts pricing "scandal" in DOD. For example, the Conference Report on the Department of Defense Authorization Bill, 1984, H.R. 5167, noted the following with respect to procurement reform:

> "The conferees discussed at length the impact that the recent examples of excessive payments for common items have had on every aspect of the congressional consideration of the defense budget, the process for acquisition of supplies by the Department of Defense, and the management of the Department of Defense in general. The recurrence of

APPENDIX III

> seemingly inexplicable occurrences such as these mandate legislative attention. While acknowledging the recent initiatives undertaken by the Department of Defense, only legislation will ensure that the recent initiatives will result in systemic changes."

H.R. 5184, 98th Cong., 2d. Sess. (1984), the proposed Competition in Contracting Act of 1984 was also intended to overcome the reluctance of federal agencies to use competitive procedures. Section 2741 of the act, establishing the procurement protest system, was adopted from this bill. In introducing this legislation, the Chairman, House Committee on Government Operations, stated:

> "While Federal procurement regulations require agencies to award contracts on a competitive basis, inventive procurement officials within the agencies have found numerous ways to circumvent or get around these requirements altogether. As a result, this problem is getting worse. . . . As a result of not using full and open competition, the Government is spending billions of dollars each year in excessive prices for its goods and services. The horror stories that we have all heard concerning DOD's acquisition of spare parts are a vivid example of the waste and abuse that is rampant within DOD. In this regard, the Government Operations Committee found that costs for spare parts decreased drastically when competition is used--by as much as 80 percent."

Drawing on the provisions of S.338, H.R. 2545, and H.R. 5184, the act established "full and open competition" as the standard for federal procurements. Procedures designed to safeguard against unnecessary sole-source contracts were established. These involve requirements for written justifications, approvals, and public notices when noncompetitive procurements are believed necessary; the establishment of advocates for competition in each agency responsible for challenging barriers to full and open competition; annual reports to the Congress describing each agency's plans for increasing competition and the accomplishments of the advocates for competition during the preceding year; and the procurement protest system.

The protest mechanism proposed in H.R. 5184 and later adopted in the Competition in Contracting Act is a codification and strengthening of the bid protest system previously established by the Comptroller General. For over 60 years the Comptroller General has entertained protests from prospective contractors contending that executive agencies violated the procurement or appropriation laws. The Congress included the bid protest system in the Competition in Contracting Act for the same reasons that it included the advocates for competition program and other "safeguards"--to insure that reluctant agencies apply the legal standards for award of contracts.

Concern about the institutional bias against competition was as great during congressional consideration of the Competition in Contracting Act as it had been during consideration of the bills which were combined in the act. The drafters of the act used S.338 to provide a framework and major provisions, but they believed that it did not go far enough in checking the predisposition of agencies to avoid competition. Therefore, they strengthened the justification, approval, and notice requirements and the advocate for competition program in S.338. Knowing that the institutional bias against competition could overcome internal checks, the Congress also included the bid protest provisions in the act so that an organization independent of the procuring agencies would have responsibility for investigating and voicing its concern if all the other procedures mandated by the Congress did not work.

APPENDIX IV

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-208159.5 January 16, 1985

The Honorable Jack Brooks, Chairman
The Honorable Frank Horton, Ranking Minority Member
Committee on Government Operations
House of Representatives

The Honorable William S. Cohen, Chairman
The Honorable Carl Levin, Ranking Minority Member
Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
United States Senate

In a letter dated August 1, 1984, you jointly requested, among other things, that this Office report to you on our plans for implementing the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), Pub. L. 98-369. This responds to your request. This letter also transmits to you our final Bid Protest Regulations as published in the Federal Register on December 20, 1984. See Enclosure 1.

Section 2741 of CICA authorizes the Comptroller General to decide protests filed by interested parties concerning solicitations, proposed awards or contracts for property or services procured by federal agencies. Although this Office has been issuing decisions on protests for many years under its authority to determine the legality of public expenditures, 31 U.S.C. § 3526 (1982), CICA establishes for the first time an express statutory basis for such decisions. In addition, CICA contains a number of features not a part of our current protest procedures and establishes strict time limits for the issuance of our decisions. The object is to create an efficient and effective process for ensuring that government contracts are awarded in a manner consistent with the requirements of law.

The passage of CICA caused us to review closely every aspect of our bid protest function and to make a number of significant changes. This letter will summarize our efforts. We have included attachments that provide additional details.

Personnel

CICA requires that we issue our decisions on bid protests within 90 working days of when a protest is filed. Cases handled under express option procedures must be decided within 45 calendar days. In order to meet these deadlines in every case, we will need to reduce considerably the average time it currently takes to issue our decisions.

When this Office receives a bid protest, the case is assigned to a writing attorney, who is responsible for drafting a proposed decision. In some cases, such as when a protest is untimely, beyond our jurisdiction, or clearly without merit, the attorney begins drafting the decision immediately. In most cases, however, we request the contracting agency to prepare a report on the merits of the protest and invite the protester to comment on the report. In a few cases, we hold an informal conference to discuss the issues raised. Once the case is fully developed, the attorney drafts a decision. In all cases, the writing attorney submits the proposed decision to a reviewing attorney who reviews both the style and content of the draft. The reviewer then submits the draft to an Assistant General Counsel.

We analyzed the various reasons why issuing decisions on protests currently takes as long as it does. One reason is the size of our professional and support staff. Although management and other changes will help in processing the cases more quickly, we concluded that in order to meet the statutory deadlines--even with no increase in caseload--we would have to increase our staff.

We have increased our procurement law professional staff. We accomplished the increase by hiring attorneys and by reassignment from other sections of the Office to our Procurement Law section. Also, we are in the process of hiring additional support staff.

Management

We have just completed a reorganization of the Procurement Law section of the Office of the General Counsel. The new structure is designed to provide more day-to-day supervision of the cases and to allow for greater flexibility should our caseload rise substantially once the CICA bid protest provisions become effective.

We are also changing the signature level for some of our decisions. Currently, proposed decisions are signed by either the General Counsel or the Comptroller General. In the future, cases that on their face do not state a valid basis of protest or that raise issues beyond our jurisdiction, as well as the more routine cases that we decide on the merits, will be signed below the General Counsel level.

Training

We developed a comprehensive program to familiarize all our procurement law staff with CICA and the implementing regulations. The program is designed to serve the needs of all our attorneys, regardless of level of experience.

In November, we held a course for all new attorneys to instruct them on the basic principles of procurement law and to acquaint them with such matters as case management, law library resources and computerized research. All of our attorneys, regardless of experience, as well as the staff of our Procurement Law Control Group, will be required to attend training sessions on CICA and on our new regulations. These sessions are scheduled for the second week of January. In addition, those attorneys who have not attended a legal writing course within the past 4 years will be required to do so. We will also offer computer research and word processing training to all interested staff members.

Finally, our recent reorganization means that a number of our more senior attorneys for the first time will have management responsibilities. We have requested our Office of Organization and Human Development to conduct training sessions for these attorneys to assist them in developing the kinds of interpersonal and other skills they will require.

Equipment

We are currently in the process of replacing our various paper-based record keeping systems with an automated case tracking and management information system. The new system, designed under an interagency agreement with the Department of Labor as supplemented by GAO contracts, will provide us with an efficient and accurate means of tracking each case as it proceeds through the Office, for preparing various management reports, and for generating the statistics needed to comply with the reporting requirements of CICA. Parts of this system are already in place and training of personnel has begun.

We plan to obtain a dedicated microprocessor that will be used to generate various forms and letters. This computer will be particularly useful for the summary disposition of protests raising issues that are frivolous, untimely or beyond our jurisdiction. In addition, we plan to acquire a second microprocessor that will better enable procurement law attorneys to analyze pricing or cost data, simulate agencies' computerized evaluation models, and process some of our more complex cases.

Finally, we plan to obtain more word processors, to continue to develop our computerized research capabilities, and to experiment with facsimile transmission of protest documents. We have, in fact, entered into an agreement with the Army Materiel Command (AMC) under which they will install a facsimile machine in our Office to transmit protest documents between our Office and AMC.

Bid Protest Regulations

The Act requires this Office to prescribe procedures for the expeditious resolution of bid protests. This process, described below, was completed on December 20 with the publication in final form of our Bid Protest Regulations. 49 Fed. Reg. 49417 (1984) (Enclosure 1).

Work began on our new regulations immediately after Congress passed CICA. Recognizing that successful implementation of the Act will require a high degree of cooperation between this Office and the contracting agencies, we consulted representatives from the major procuring agencies to discuss the protest requirements of CICA and how best they might be implemented. A team of GAO senior attorneys, under the direction of the Associate General Counsel for Procurement Law, drafted proposed regulations (Enclosure 2). Basically, we retained the format and substance of our current procedures (Enclosure 3), modified, of course, to reflect the requirements of CICA. We published the proposed regulations in the Federal Register on September 17 and invited interested parties to submit their comments by October 17. On October 10, we hosted a meeting of representatives from more than a dozen contracting agencies to discuss the proposed regulations. Members of my staff appeared before various professional groups for the same purpose.

We received 23 comments on our proposed regulations. We fully considered all of these comments and, where appropriate, revised our final regulations to accommodate the views expressed. For example, many of the comments we received concerned the requirements for filing protests and serving protest

copies. Some commenters objected to the proposed service requirement as being unduly complex, while the contracting agencies were concerned primarily that the requirement would not ensure that an agency would receive a copy of the protest soon enough. Our final regulations delete the service requirement and substitute instead a requirement that a protester provide the contracting agency with a copy of the protest within 1 day of filing at GAO. In addition, our regulations require a protester to provide us with an additional copy of its protest which we will make available to the agencies in Washington, D.C. We also clarified our responsibility to notify the agency by telephone within 1 day of the filing of a protest.

Further examples of changes made in our final regulations concern the classes of protests that GAO will not consider, such as protests regarding matters within the purview of the Small Business Administration, challenges to affirmative responsibility determinations, and issues in litigation. Further in this connection, we revised the proposed section 21.1(a) to provide that after a particular procurement has been protested to the General Services Administration Board of Contract Appeals, no protests by any party regarding that procurement will be considered by our Office while that initial protest is before the Board.

We also revised the proposed language with regard to when we would recommend that a successful protester recover bid or proposal preparation costs and the costs of pursuing the protest, including reasonable attorneys fees. The final regulations state at section 21.6(e) that we will allow recovery of the costs of pursuing a sustained protest except where we recommend that the protested contract be awarded to the protester and the protester receives the award. Also, the section has been revised to include the standard, adopted from language in the Conference Report on the Competition In Contracting Act, that recovery of the costs of pursuing a protest and of bid and proposal preparation will be available only where the contracting agency unreasonably excluded the protester from the procurement. See Conference Report on the Competition In Contracting Act of 1984, H. Rep. No. 98-861, at 1437 (June 23, 1984).

Periodically, as we gain experience under CICA, we will review our operations. We may have them reviewed also by knowledgeable persons outside this Office. We will adjust our operations as needed to ensure that the purposes of CICA are achieved.

B-208159.5

We trust the above summary of our efforts to implement the bid protest provisions of the Competition in Contracting Act of 1984 is responsive to your request.

Charles A. Bowsher

Comptroller General
of the United States

Enclosures

APPENDIX V

UNITED STATES GENERAL ACCOUNTING OFFICE

FOR RELEASE ON DELIVERY
EXPECTED AT 10:00 A.M. EST
THURSDAY, FEBRUARY 28, 1985

STATEMENT OF

CHARLES A. BOWSHER

COMPTROLLER GENERAL OF THE UNITED STATES

BEFORE THE

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Subcommittee:

We are pleased to appear here today to discuss the position of the President and the Department of Justice that two provisions of the Competition in Contracting Act, Pub. L. No. 98-369, are unconstitutional, and the action of the Executive Branch in not executing the two provisions.

The challenged provisions are included within the "procurement protest system" established by section 2741 of the Act. Both represent additions to the bid protest procedures formerly conducted by the General Accounting Office, and are designed to make bid protests a more effective mechanism for enhancing competition. The first requires agencies in many cases to suspend or "stay" a

protested procurement action until the Comptroller General issues a decision on the protest. The second authorizes us to award attorneys fees, as well as bid and proposal preparation costs.

We strongly disagree with the opinion of the Attorney General that these provisions of the Act are unconstitutional. The Attorney General's view is that the Act violates the separation of powers doctrine by authorizing the Comptroller General both to lift the suspension of procurement action by issuing a protest decision, and also to award costs. According to the Attorney General, the Comptroller General is solely an agent of the Congress and can, therefore, only perform those functions that the Congress may delegate to its committees. The Attorney General's opinion is premised upon an erroneous understanding of the nature of the Office of the Comptroller General and the authority which he may exercise. The Attorney General's opinion is also based upon a misunderstanding of the operation of the protest system established by the Act, and its effect upon Executive Branch operations.

We also believe that, in this case, it is the President who has violated the separation of powers doctrine by defying a duly passed Act of the Congress through the actions of the Attorney General and the Director of OMB.

I. Background

Before addressing the Attorney General's view in more detail, I think it would be useful to indicate briefly why the disputed provisions were passed. An interested party may protest a violation of a procurement statute or regulation to the Comptroller General. Section 2741 of the Competition in Contracting Act codifies and strengthens the bid protest system which has been operated by the General Accounting Office for over 60 years, ever since GAO was established.

In order to insure prompt resolution of protests, the Act provides deadlines designed to achieve a decision within 90 working days.

Also, the Act requires agencies to suspend protested procurement actions pending the Comptroller General's decision, except when an agency determines that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting.

Finally, in order to provide some meaningful relief to protesters in cases where remedial procurement action is not practical, GAO has awarded bid and proposal preparation costs in appropriate cases. The Act expands this relief by providing that the Comptroller General may award to successful protesters their costs of pursuing a protest as well as the traditionally-awarded bid and proposal costs.

The Act carefully balances competing public interests. Prospective contractors have an inexpensive and expeditious forum in which their claims of illegal exclusion from the government's business may be heard. The existence of a forum for such claims, made much more effective by the stay of contract performance in many cases, will, as the Congress intended, help insure that agencies comply with the mandate of full and open competition. At the same time, provision is made to eliminate interruptions in meeting the federal government's pressing needs for goods and services in appropriate cases.

II. Opinion of the Attorney General

Let me now turn to the objections of the Attorney General.

On November 21 the Attorney General informed the Congress of his decision that federal agencies should not execute two provisions of the new protest system. The Attorney General argues that the Comptroller General is solely an agent of the Congress, and, that as such, he may only perform the functions which the Congress may delegate to a committee. In support of his contention, the Attorney General points to two Reorganization Acts which describe the Comptroller General as being "a part of the legislative branch," and to the Accounting and Auditing Act of 1950 which describes the Comptroller General as "an agent of the Congress." The Attorney General also points to statutory limitations on the President's power to remove the Comptroller General as being significant.

In the Attorney General's view, the Comptroller General may not take any action which binds individuals and institutions outside of the Legislative Branch. To do so would be to perform an "executive" function. This includes the Comptroller General's statutory authority to lift the "stay" of procurement actions by issuing a protest decision, which the Attorney General characterizes as "the power to dictate when a procurement may proceed." It also includes the award of the costs of pursuing a protest and bid and proposal preparation costs.

III. Nature of the Office

I am firmly of the view that the Comptroller General of the United States is not solely an agent of the Congress, but rather serves as an officer of the United States. As such, the Comptroller General may exercise the authority given him under the Competition in Contracting Act wholly consistently with the Constitution.

Since creation of the Office of the Comptroller General in 1921, Comptrollers General have performed a variety of duties to serve the needs of the Congress. Such activities include our traditional audit reports, staff papers and studies, our responses to requests for views on proposed legislation, and legal opinions on matters which do not involve our account settlement responsibilities.

APPENDIX V

Other responsibilities affect directly the Executive Branch agencies and provide assurance that funds are fully and accurately accounted for and expended in a manner authorized by law. One example is the Comptroller General's responsibility to audit and settle accounts. Another is the settlement and adjustment of claims by and against the United States. And still another is promulgation of government-wide accounting and internal control standards.

However these various functions may be classified, one aspect of the Office of the Comptroller General is clear. The Comptroller General by statute is, in fact, appointed in the manner provided in the Constitution for appointment of "Officers of the United States." It is true that once appointed by the President after Senate confirmation he does not serve at the pleasure of the President but, rather, serves for a fixed term of 15 years.

The Attorney General argues that the security of the Comptroller General from removal by the President necessarily renders him a part of the legislature. Yet there are other officers of the United States for whom Presidential removal is significantly circumscribed without affecting their status. And the fact is that the Comptroller General cannot be removed at the whim of the Congress either. The Congress can remove the Comptroller General by joint resolution (which requires a majority vote of both chambers and the signature of the President), but

only after notice and hearing, and only for one or more of five specified reasons: permanent disability, inefficiency, neglect of duty, malfeasance, or conduct which is felonious or involves moral turpitude. Congress can also remove the Comptroller General by impeachment, as it can remove any officer, but again only through lengthy procedures designed to ensure due process and fairness and only for certain limited reasons: treason, bribery or "High Crimes and Misdemeanors."

In short, the provisions governing removal of the Comptroller General support, rather than contradict, his status as an officer of the United States. This status of the Comptroller General is in no way affected by references in the 1945 and 1949 Reorganization Acts to the General Accounting Office as "a part of the legislative branch of the Government." By characterizing the Comptroller General, the head of the GAO, as part of the Legislative Branch, the Congress did nothing more than restrict the ability of the President to place him in a subservient status through the device of a reorganization plan. In 1932, President Hoover had proposed a transfer of GAO to the Bureau of the Budget. Thereafter, GAO was excluded from Presidential reorganization authority, including the 1945 and 1949 Reorganization Acts. The Attorney General errs in attributing constitutional significance to statutory classifications of the Comptroller General.

IV. The Comptroller General and the Separation of Powers

The Comptroller General's entire duty under the Competition in Contracting Act is limited to three basic actions: the promulgation of procedural rules, the issuance of recommendations pursuant to specific findings, and the award of costs based upon specified legal determinations. There is no doubt that these are precisely the type of duties that the Comptroller General has exercised since 1921. Under the Act, the Comptroller General is required to give advisory opinions regarding the legality of procurement actions, which will presumably bind him in the audit and settlement of accounts, just as he has always done under his account settlement authority. He is empowered to award bid and proposal preparation costs and the costs of pursuing protests, just as he traditionally granted bid and proposal costs under his claims settlement authority.

The Attorney General argues that the authority to award costs and the "stay" provisions of the Act involve the exercise of executive powers which can only be exercised by an officer under direct control of the President. Certainly, there are officials whose purely executive jobs are so related to the President's constitutional duties that operation of our form of government requires the official to be directly responsible to the President. However, the award of costs to protesters

cannot reasonably be viewed as requiring the President to have direct control over the official who performs the function. The authority to award costs based upon a determination that a procurement action violated a statute is not assigned by the Constitution to the President, and exercise of that authority by an officer of the United States cannot reasonably be said to interfere with the President's performance of his constitutional duties.

Similarly, the "stay" provisions do not place purely executive powers in the hands of the Comptroller General. The Act merely requires the procuring agency, if it can do so consistently with the national interest, to "wait and see" what the Comptroller General recommends before proceeding. The agency is not required to wait at all if it determines that performance would be in the best interest of the United States or that delay would "significantly affect interests of the United States." The "stay" provisions can hardly be said to involve one branch assuming the power to control another branch. Moreover, the "stay" provision cannot "disrupt the proper balance between coordinate branches" or "coerce" the constitutional office of the President by delaying previously authorized executive action, since the "stay" is only implemented if the Executive Branch itself finds delay consistent with the interests of the United States.

V. Constitutionality of Executive Branch Actions

Finally, we believe that the President, not the Congress, has violated the separation of powers doctrine. Upon signing the Act, the President stated that he was instructing the Attorney General to inform executive agencies how to comply with the Act consistently with the Constitution. As I have discussed, pursuant to this instruction the Attorney General directed agencies not to comply with two provisions of the Act. The Director of OMB, in turn, issued a bulletin specifically providing the same direction to all executive agencies.

Disobediance of a law is itself a matter of serious constitutional significance. The President's constitutional duty is to "take care that the laws be faithfully executed." We cannot find any justification for the action taken to deliberately avoid the law in this case.

The Competition in Contracting Act imposes few limitations upon executive action in a field long-recognized to be a proper concern of the Congress, contracting by the federal government. The disputed "stay" provision can be avoided by executive agencies when required by the pressing needs of the United States, and the payment of compensation or damages to private claimants cannot reasonably be claimed to have major constitutional significance.

The Comptroller General has exercised statutory duties similar to those provided in the Act since 1921, and the Attorney General cannot point to one judicial decision holding that those duties violate the separation of powers doctrine. In fact, the absence of decided case law supporting the Attorney General's constitutional opinion is a strong argument that, in this case, the Constitution requires the President to uphold the law.

It is significant that the actions of the Attorney General and the Director of OMB, which constitute lawmaking by the Executive Branch, were unwarranted based upon the Attorney General's legal opinion. The Attorney General recognized in his opinion the power of the Congress to enact a law providing for suspension of a procurement for 90 days following a protest. He was only concerned about the Comptroller General's authority to release a suspended procurement by issuing a decision, and the authority to delay a procurement for more than 90 days following a protest. In order for agencies to comply with the law in a manner consistent with the Attorney's General's opinion, they need only have been directed not to proceed with a protested procurement action for 90 days even if the Comptroller General issues an earlier decision,and to end a stay after 90 days if a decision or satisfactory justification for delay has not been issued by the

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Comptroller General. Instead, OMB eliminated a provision of the Competition in Contracting Act that is central to enhancing the ability of the bid protest system to increase full and open competition for contracts. We do not believe that the Constitution empowers the President and his subordinate officers to undertake this revision of the Competition in Contracting Act.

APPENDIX VI

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-208159.5

April 8, 1985

The Honorable Jack Brooks, Chairman
The Honorable Frank Horton, Ranking Minority Member
Committee on Government Operations
House of Representatives

The Honorable William S. Cohen, Chairman
The Honorable Carl Levin, Ranking Minority Member
Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
United States Senate

Subject: Limited Survey of the Need to Delay Implementation of the Competition in Contracting Act of 1984 (GAO/OGC-85-5)

In a letter dated August 1, 1984, you jointly requested that our Office establish an interdivisional task force to review the implementation of, and subsequent compliance with, the Competition in Contracting Act of 1984 (the act). As you know, the act is intended to increase the use of competition in contracting. As agreed with the two Committees, we plan to provide you with a report covering the period at least up to and a little beyond the act's April 1, 1985, implementation date. The report will summarize the task force's work on federal agencies' efforts to implement the act.

As part of the task force effort, the Committees, on March 19, 1985, also requested that we

--perform a limited survey, by telephone, of the level of readiness of selected federal organizations to begin implementing the act on April 1, 1985, as required and

--provide the results in a briefing to your Offices the following day.

After performing the survey and summarizing the results at the March 20, 1985, briefing, the two Committees asked us to provide the survey results in writing. We were requested to perform the survey because of continuing rumors of (1) anticipated problems at some federal agency locations in meeting the act's implementation date and (2) a need for the implementation date to be delayed or extended.

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In summary, we received mixed responses. Officials at 9 of the 15 organizations we contacted indicated that extending the act's implementation date was not warranted based on problems experienced or expected in their organizations. Those at the other six said it was warranted. However, officials at 8 of the 10 organizations we were specifically asked to contact said an extension was not warranted.

Officials at 12 of the 15 organizations we contacted cited some implementation problems. The basic problem identified was the need to revise paperwork in process, such as solicitations and justifications, to comply with the act. Officials at the highest level organizations we contacted generally did not see a need for an extension, while those at lower level organizations in the Navy and the Air Force generally supported an extension.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of our survey were (1) to learn whether and to what extent selected procuring organizations, mostly within the Department of Defense (DOD), might be experiencing or expecting problems in meeting the act's implementation date and (2) to help determine whether a legislative extension of the implementation date was warranted.

We were requested to contact procurement officials at 10 organizations, which are identified in the enclosure to this letter, as well as any other DOD organizations we thought appropriate and feasible in the short time available. We contacted these 10 and 5 additional organizations (also listed in the enclosure). We selected these additional organizations judgmentally from the three military services to provide more complete information concerning whether and to what extent problems might exist, especially within lower level organizations in the services. We defined "lower level" organizations as those that report to the highest level organizations we contacted. The enclosure indicates which organizations are lower level by showing the organizations we contacted to which they report.

In performing the survey we used a short data collection form we developed to gather comparable information from each organization. We also attempted to speak with a high ranking procurement official at each location knowledgeable about the act. However, because of the short response time available for the survey, it was not always possible to speak with the official we initially attempted to contact. In such cases, we spoke with the individuals to whom we were referred. In every case these individuals appeared to have the knowledge needed to answer our questions. The enclosure lists the names and positions of the officials we contacted and those we attempted to

contact, in accordance with the Committees' request. Our survey was performed in accordance with generally accepted government auditing standards.

We told those officials we contacted that we were seeking to obtain information for the congressional committees regarding both the level of readiness in various organizations to implement the act on solicitations issued after March 31, 1985, and whether they believed the implementation date needed to be extended. We asked procurement officials to (1) characterize the general training/awareness level of contracting and/or requirements personnel in their organizations that would be responsible for complying with the act on April 1, (2) identify any problems they anticipated in implementing the act, and (3) categorize the problems as either:

--"very serious" which we defined as: the current date of implementation will mean substantial numbers of solicitations will either be issued that do not comply with the act or will be delayed;

--"moderately serious," defined as: the current date of implementation will cause enough disruptions in the solicitation process so that extension of the act's implementation date is warranted;

--"manageable," defined as: there will be some problems but they can be handled and an extension is not critical; or

--"no problems."

RESULTS

The survey results showed mixed support for and against an extension of the act's implementation date. Officials at 9 of the 15 organizations we contacted said that an extension was not warranted at their locations. All three Army organizations we contacted, as well as the Defense Logistics Agency and the General Service Administration's Federal Supply Service, declared they were ready to implement the act. Four of the 10 Navy and Air Force organizations we contacted also indicated that extension of the implementation date was not warranted at their locations but the remaining 6 said it was. In addition, four of these six officials stated that time extensions ranging from 45 days to 180 days should be granted. The remaining two officials said that a 30-day extension should be granted, but only for those procurement offices that wanted to exercise that option.

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Of the six highest level organizations we contacted, only one saw a need for an extension. However, five of the seven lower level organizations in the Navy and the Air Force supported an extension, while neither of the two in the Army did. The basic problem identified was the need to revise paperwork, such as solicitations and justifications, which was in the pipeline but needed revision to comply with the act.

Of the 10 organizations we were specifically asked to contact, only 2, the Air Logistics Center, Tinker Air Force Base, and the Navy Ships Parts Control Center, said they needed an extension. However, since (1) some of the DOD organizations we contacted indicated that significant problems might exist at other locations and (2) we had been requested to contact any other organizations we thought appropriate and feasible in the short time available, we contacted five additional organizations--one Army, two Navy, and two Air Force organizations. Officials at three of the additional four lower level organizations and the one additional highest level organization contacted stated that an extension was needed.

Based on our survey, of the 15 procurement officials we questioned:

--Three categorized their problems in meeting the act's implementation date as "very serious," three as "moderately serious," six as "manageable," and three as "no problems," as defined in the previous section.

--Eleven officials believed the training/awareness level of the personnel responsible for complying with the act in their organizations was satisfactory, but the remaining four believed that it was not satisfactory.

--Four officials said they did not expect any problems in response to our questions about the following possible problem areas: (1) new requirements relating to notices of proposed contract awards in the Commerce Business Daily, solicitations, justifications and reporting of contract awards, (2) timely updating of computer software, and (3) any other problems they expected to experience in meeting the act's implementation date. Of the other 11 officials, 10 said that they expected problems in the first area described above, 3 expected problems in the second, and 5 expected problems in the third.

--Seven officials explained that a number of contract awards made after April 1, 1985 (ranging from "a few" to "thousands" at the various locations contacted), would be delayed because (1) solicitations intended for issuance

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before April 1, 1985, but not issued by that date, would have to be revised in accordance with the act's requirements or (2) procurement personnel were not yet familiar with all of the new competition requirements. Specifically, the estimated delays were: "several hundreds to thousands" of contracts/solicitations (Air Logistics Center, Warner-Robins Air Force Base); "2,400" (Air Logistics Center, Tinker Air Force Base); "750" (Naval Facilities Engineering Command); "a substantial number" (Naval Electronic Systems Command); "a large percentage" (Navy Ships Parts Control Center); "a few, maybe 3" (Air Logistics Center, Ogden, Utah); and "unknown" (Air Force Logistics Command). One of these officials also stated the view that some solicitations could be issued after March 31, 1985, that do not comply with the act.

OBSERVATION

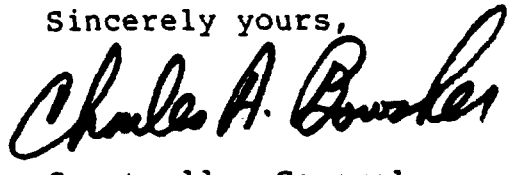
In briefing your Offices on March 20, 1985, we were asked our opinion about whether a legislative extension was warranted. We stated, and continue to believe, that even if legislation could have been developed and enacted quickly, providing an "across-the-board" extension so close to the implementation date might have created more disruption and confusion for the organizations that were ready for implementation than it would have prevented for those organizations that were not ready.

. . . . .

As agreed with the Committees, unless one of the recipients publicly announces its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time we will send copies to interested parties and make copies available to others upon request.

We hope that this information is responsive to your concerns. Please advise us if further information is needed.

Sincerely yours,



Comptroller General
of the United States

Enclosure

APPENDIX VI

FEDERAL ORGANIZATIONS AND OFFICIALS CONTACTED

Shown below are the 10 federal organizations we were specifically requested to contact and their locations. Also shown are the names and positions of the officials we interviewed, as well as those we attempted to interview, but were unable to because of the short time available.

Department of Defense

Defense Logistics Agency (DLA), Alexandria, Virginia

We interviewed:

--Mr. M. J. Popik
Chief, Policy Branch, Contracts Division

Army

Army Materiel Command (AMC), Alexandria, Virginia

We attempted to contact:

--General Stallings, Deputy Chief of Staff for Procurement and Production

We interviewed:

--Mr. John R. Jury
Assistant to the Deputy Chief of Staff for Procurement Policy and Analysis

U. S. Army Tank and Automotive Command (TACOM), Warren, Michigan (which is under the command of AMC)

We attempted to contact:

--General Flynn, Deputy Commanding General for Procurement and Readiness

--Mr. Henry B. Jones, Director
Procurement and Production Division

--Colonel Allen Templeton, Deputy Director, Procurement and Production Division

We interviewed:

--Mr. Gil Knight, Chief
Procurement Analysis and Compliance Division, Procurement and Production

Navy

U. S. Naval Material Command (NMC), Arlington, Virginia

We interviewed:

--Mr. Richard A. Moye, Deputy Director
Contract and Business Policy Division

U. S. Navy Ships Parts Control Center (NSPCC), Arlington, Virginia, which is part of the Naval Supply Systems Command (both of which are under the command of NMC)

We interviewed:

--Mr. Jason Hirsh
Deputy Branch Head
Control Center Functional Management

Air Force

U. S. Air Force Systems Command (AFSC), Andrews Air Force Base, Maryland

We interviewed:

--Mr. Scott Thompson, Chief
Competition Management Office
Office of Command
Competition Advocate

U. S. Air Force Electronics Systems Division, Hanscom Air Force Base, Massachusetts (which is under the command of AFSC)

We interviewed:

--Mr. Robert Bowes, Chief
Contract Policy Office

Air Logistics Center (ALC), Ogden, Utah (which is under the command of the Air Force Logistics Command)

We interviewed:

--Mr. William Ernst
Deputy Director for Contracts

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ALC, Tinker Air Force Base, Oklahoma (which is under the command of the Air Force Logistics Command)

We interviewed:

--Mr. Robert Hancock
Director for Contracts

Civil Agencies

Office of Federal Supply and Services
General Services Administration
Washington, D.C.

We attempted to contact:

--Mr. Lew DeProspero, Director
Office of Procurement

--Mr. Walter Eckbreth, Director
Policy and Review Division

We interviewed:

--Mr. John Harms
Senior Procurement Analyst
Acting for Director, Office
of Procurement

. . . . .

Shown below are the five additional organizations we contacted that we were not specifically requested to contact and their locations. Also shown are the names and positions of the officials we interviewed, as well as those we attempted to interview but were unable to because of the short time available.

Army

U. S. Army Missile Command (MICOM), Redstone Arsenal, Alabama (which is under the command of AMC)

We attempted to contact:

--Mr. W. L. Clemons, Director
Procurement and Production Directorate

--Colonel William A. Moore
Deputy Director, Procurement and
Production Directorate

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We interviewed:

--Ms. Martha Rice
Procurement Analyst, Policy
and Resource Management Division

Navy

Naval Facilities Engineering Command (NFAC), Alexandria, Virginia (which is under the command of NMC)

We interviewed:

--Mr. J. M. Cowden
Assistant Commander for Contracts

--Mr. Paul Buonaccorsi, Director, Contracts Divison

Naval Electronic Systems Command (NELEX), Arlington, Virginia (which is under the command of NMC)

We interviewed:

--Mr. Steve Carberry
Executive Director for Contracts

Air Force

Headquarters, Air Force Logistics Command (AFLC), Wright Patterson Air Force Base, Ohio

We attempted to contact:

--General Richard D. Smith
Deputy Chief of Staff, Contracting
and Manufacturing

We interviewed:

--Mr. Ralph French
Chairman, Contracts Committee

ALC, Warner-Robins Air Force Base, Georgia (which is under the command of AFLC)

We interviewed:

--Lieutenant Colonel John Elliott
Director for Contracts

APPENDIX VII

FISCAL YEAR 1984 CONTRACT AWARDS BY AGENCIES

INCLUDED IN OUR SURVEY OF AGENCY ACQUISITION REGULATIONS

Agency	Dollars (000 omitted)	Percent
Total for all agencies reporting	182,897,737	100
ACTION	4,441	0.0024
Administrative Conference of the United States	254	0.0001
Agency for International Development	332,903	0.1820
Alaska Natural Gas Transportation System	145	0.0001
American Battle Monuments Commission	3,215	0.0018
Board for International Broadcasting	251	0.0001
Commission on Civil Rights	554	0.0003
Commodity Futures Trading Commission	5,522	0.0030
Consumer Product Safety Commission	4,963	0.0027
Department of Agriculture	1,892,141	1.0345
Department of Commerce	259,005	0.1416
DOD	145,673,741	79.6476
Department of Education	135,684	0.0742
Department of Energy	13,132,686	7.1803
Department of Health and Human Services	1,406,718	0.7691
Department of Housing and Urban Development	67,729	0.0370
Department of Justice	398,700	0.2180
Department of Labor	460,688	0.2519
Department of State	248,833	0.1361
Department of Transportation	1,631,291	0.8919
Department of the Interior	1,406,945	0.7693
Department of the Treasury	417,696	0.2284
Environmental Protection Agency	537,516	0.2939
Equal Employment Opportunity Commission	26,905	0.0147
Executive Office of the President	18,322	0.0100
Federal Communications Commission	3,356	0.0018
Federal Election Commission	1,547	0.0008
Federal Emergency Management Agency	317,433	0.1736
Federal Labor Relations Authority	923	0.0005
Federal Maritime Commission	264	0.0001
Federal Mediation and Conciliation Service	690	0.0004
Federal Mine Safety and Health Review Commission	85	.0000

Agency	Dollars (000 omitted)	Percent
Federal Trade Commission	6,455	0.0035
GSA	2,410,842	1.3181
International Trade Commission	3,639	0.0020
Interstate Commerce Commission	1,755	0.0010
Merit Systems Protection Board	0	0.0000
NASA	6,711,399	3.6695
National Capital Planning Commission	154	0.0001
National Foundation on the Arts and the Humanities	11,736	0.0064
National Gallery of Art	1,303	0.0007
National Labor Relations Board	4,210	0.0023
National Mediation Board	2,061	0.0011
National Science Foundation	197,530	0.1080
National Transportation Safety Board	728	0.0004
Nuclear Regulatory Commission	67,567	0.0369
Occupational Safety and Health Review Commission	162	0.0001
Office of Personnel Management	417,540	0.2283
Peace Corps	25,688	0.0140
Pennsylvania Avenue Development Corporation	3,845	0.0021
Railroad Retirement Board	11,231	0.0061
Securities Exchange Commission	6,959	0.0038
Selective Service System	2,467	0.0013
Small Business Administration	15,088	0.0082
Smithsonian Institution	41,816	0.0229
Tennessee Valley Authority	1,426,496	0.7799
United States Arms Control and Disarment Agency	1,768	0.0010
United States Information Agency	73,481	0.0402
Veterans Administration	3,060,671	1.6734

The information provided in this appendix is based on the Federal Procurement Data System. Five agencies that were included in our survey because they were on the Office of Federal Procurement Policy's list of agencies that had named senior procurement executives did not report their contract awards to the data system. They are:

Central Intelligence Agency
Federal Home Loan Bank Board
Farm Credit Administration
Overseas Private Investment Corporation
Panama Canal Commission

RESPONSES TO OUR SURVEY

OF AGENCY ACQUISITION REGULATIONS

We surveyed 64 agencies. One agency, the Central Intelligence Agency, did not answer our survey questions.

The following information is based on agencies' responses to our questions.

Twenty-one agencies had issued acquisition regulations which implement or supplement FAR. These agencies are listed in the following three categories:

Six agencies had issued acquisition regulations conforming to the competition act and FAR, as amended by Federal Acquisition Circular 84-5.

Department of Commerce
DOD
Department of the Treasury
Environmental Protection Agency
GSA
NASA

Two agencies had issued acquisition regulations conforming to FAR, as amended by Federal Acquisition Circular 84-5, but not to the competition act:

Agency for International Development
Department of Energy

Thirteen agencies had acquisition regulations in effect implementing or supplementing FAR that did not conform to the competition act and FAR, as amended by Federal Acquisition Circular 84-5:

Department of Agriculture
Department of Health and Human Services
Department of Housing and Urban Development
Department of Justice
Department of Labor
Department of State
Department of Transportation
Department of the Interior
Federal Emergency Management Agency
International Trade Commission
National Science Foundation
United States Information Agency
Veterans Administration

Two agencies had issued acquisition regulations implementing or supplementing FIRMR:

DOD
NASA

Forty-two agencies had not issued acquisition regulations implementing or supplementing FAR or FIRMR:

ACTION
Administrative Conference of the United States
Alaska Natural Gas Transportation System
American Battle Monuments Commission
Board for International Broadcasting
Commission on Civil Rights
Commodity Futures Trading Commission
Consumer Product Safety Commission
Department of Education
Equal Employment Opportunity Commission
Executive Office of the President
Farm Credit Administration
Federal Communications Commission
Federal Election Commission
Federal Home Loan Bank Board
Federal Labor Relations Authority
Federal Maritime Commission
Federal Mediation and Conciliation Service
Federal Mine Safety and Health Review Commission
Federal Trade Commission
Interstate Commerce Commission
Merit Systems Protection Board
National Capital Planning Commission
National Foundation on the Arts and the Humanities
National Gallery of Art
National Labor Relations Board
National Mediation Board
National Transportation Safety Board
Nuclear Regulatory Commission
Occupational Safety and Health Review Commission
Office of Personnel Management
Overseas Private Investment Corporation
Peace Corps
Panama Canal Commission
Pennsylvania Avenue Development Corporation
Railroad Retirement Board
Securities Exchange Commission
Selective Service System

Small Business Administration
Smithsonian Institution
Tennessee Valley Authority
United States Arms Control and Disarmament Agency

Seven agencies had not, but intended to issue acquisition regulations:

Department of Education
National Foundation on the Arts and the Humanities
National Labor Relations Board
Nuclear Regulatory Commission
Office of Personnel Management
Panama Canal Commission
United States Arms Control and Disarmament Agency

Eighteen agencies had published their latest acquisition regulations for public comment:

Agency	Date published
Agency for International Development	Apr. 24, 1985
Department of Agriculture	Mar. 28, 1984
Department of Commerce	May 8, 1985
DOD	Apr. 4, 1985
Department of Energy	Jan. 29, 1985
Department of Health and Human Services	Apr. 9, 1984
Department of Housing and Urban Development	Mar. 1, 1984
Department of Justice	Mar. 5, 1984
Department of Labor	Jun. 19, 1984
Department of Transportation	Jun. 1, 1984
Department of the Interior	Apr. 10, 1984
Environmental Protection Agency	Dec. 5, 1984
Federal Emergency Management Agency	Mar. 29, 1984
GSA	Dec. 5, 1984
NASA	Mar. 29, 1985
National Science Foundation	Nov. 28, 1984
U.S. Information Agency	Apr. 3, 1985
Veterans Administration	Mar. 29, 1984

Four subagencies had issued acquisition regulations conforming to FAR, as amended by Federal Acquisition Circular 84-5:

Defense Logistics Agency
Department of the Air Force
Department of the Army
Department of the Navy

Three subagencies had acquisition regulations in effect not conforming to FAR, as amended by Federal Acquisition Circular 84-5:

Bureau of Indian Affairs
Bureau of Engraving and Printing
Public Health Service

One subagency had not, but intended to issue acquisition regulations:

U.S. Marshals Service

One subagency had published its acquisition regulations for public comment:

Public Health Service

APPENDIX IX

OUR SELECTED REPORTS ADDRESSING FEDERAL AGENCIES' SOLE-SOURCE CONTRACT AWARDS

	Date
Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting (GAO/PLRD-82-40)	Apr. 7, 1982
Labor Needs to Better Select, Monitor, and Evaluate its Employment and Training Awardees (GAO/HRD-81-111)	Aug. 28, 1981
DOD Loses Many Competitive Procurement Opportunities (GAO/PLRD-81-45)	July 29, 1981
Controls Over DOD's Management Support Service Contracts Need Strengthening (GAO/MASAD-81-19)	Mar. 31, 1981
Government Earns Low Marks on Proper Use of Consultants (GAO/FPCD-80-48)	June 5, 1980
Controls Over Consulting Service Contracts at Federal Agencies Need Tightening (GAO/PSAD-80-35)	Mar. 20, 1980
The Department of Energy's Practices for Awarding and Administering Contracts Need to be Improved (GAO/EMD-80-2)	Nov. 2, 1979
Increased Competition Can Reduce Elevator Maintenance and Cleaning Service Contract Costs (GAO/PSAD-78-115)	June 14, 1978
Competition for Negotiated Government Procurement Can and Should be Improved (GAO/PSAD-77-152)	Sept. 15, 1977
More Competition in Emergency Defense Procurement Found Possible (B-171561)	Mar. 25, 1971

APPENDIX X

GLOSSARY OF TERMS

Acquisition	The acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the federal government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract. (FAR 2.1)
Acquisition planning	The process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition. (FAR 7.101)
Brand name or equal	A type of purchase description in which an agency specifies its requirement by reference to a particular brand name product followed by the words "or equal" and a listing of the essential characteristics of that product that an offered "equal" product must possess. According to FAR 10.004(b)(3), this technique should only be used when an adequate specification or more detailed description cannot feasibly be made available by means other than inspection and analysis in time for the acquisition under consideration.
Commerce Business Daily	Is published every day except weekends and holidays by the Department of Commerce. It provides industry with notice concerning current government contracting and subcontracting opportunities, including information on the identity and location of contracting offices and prime contractors having current or potential need for certain requirements.

Compatibility limited	A term referring to a statement of requirements for ADP equipment or services that limits a procurement to ADP equipment or services compatible with existing systems. These requirements tend to restrict competition and are not to be used solely for reasons of economy or efficiency. (FIRMR 201-24.207 (a) and (b))
Competitive procedures	Procedures under which an agency enters into a contract pursuant to full and open competition. (41 U.S.C. 403(6))
Competitive proposal	An offer submitted to the government when it is necessary to conduct discussions with responding offerors. This method of contracting permits bargaining and usually affords offerors an opportunity to revise their offers before award of a contract. (FAR 6.401 and 15.102)
Contract	A term describing various agreements or orders for procuring supplies or services. An agreement, enforceable by law, between two or more competent parties to do or not do something not prohibited by law, for a legal consideration. All contracts require the essential elements of offer and acceptance. These elements constitute the means by which a contract is consummated, and the absence of either element prevents the formation of a contract. In government procurements, the invitation for bids or request for proposals constitutes a request by the government for offers of a certain nature. The bid or proposal submitted in response to the solicitation is, in fact, the offer, and the subsequent contract award constitutes acceptance.
Contract modification	Any written change in the specifications, delivery point, rate of delivery, contract period, quantity, or other provisions of an existing contract.

Contracting officer	A person who, either by virtue of his/her position or by appointment in accordance with prescribed regulations, is vested with the authority to enter into and/or administer contracts and make related determinations and findings.
Contracting	Purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. (FAR 2.1)
Defense Acquisition Regulation	The basic document detailing the rules covering procurement by DOD. This regulation was replaced by FAR.
Executive agency	An executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned government corporation within the meaning of 31 U.S.C. 846. (FAR 2.1)
FAR	The single, government-wide procurement regulation issued and maintained jointly by GSA, DOD, and NASA. It replaced both the Defense Acquisition Regulation and Federal Procurement Regulations.
FAR system	Established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. FAR system consists of FAR, which is the primary document, and agency acquisition regulations that implement or supplement FAR. (FAR 1.1)
Federal agency	Any executive agency or any establishment in the legislative or judicial branch of the government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction).
FIRMR	A regulation which establishes integrated provisions for use by federal or executive agencies (as applicable) governing their information activities regarding the management, acquisition, and use of certain ADP and telecommunications resources. (41 CFR ch. 201)

Federal Procurement Data System	The official federal procurement data base which provides a comprehensive mechanism for assembling, organizing, and presenting contract placement data for the federal government.
Federal Procurement Regulations	The basic document governing federal civilian agency procurement which was replaced by FAR.
Federal Register	Published daily, Monday through Friday (except on official holidays), provides a uniform system for making available to the public regulations and legal notices issued by federal agencies. These include presidential proclamations and executive orders and federal agency documents having general applicability and legal effect, documents required to be published by an act of the Congress, and other federal agency documents of public interest.
Follow-on contract	Defined by the Federal Procurement Data Center as a new noncompetitive acquisition (whether by separate new contract or modification outside the scope of the original contract) placed with a particular contractor to continue a specific program, where placement was necessitated by prior decisions.
Formal advertising	A term replaced under the Competition in Contracting Act with the term sealed bidding. A method of contracting under which an agency issues an invitation for bids, potential contractors submit sealed bids which are publicly opened at a specified time and place, and the agency awards a contract to the lowest responsible bidder whose bid conforms in all material respects to the requirements of the invitation for bids.
Full and open competition	When used with respect to a contract action, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.(41 U.S.C. 403(7))

Market survey	Attempts to ascertain whether other qualified sources capable of satisfying the government's requirement exist. This testing of the marketplace may range from written or telephone contact with knowledgeable federal and nonfederal experts regarding similar or duplicate requirements, and the results of any market test recently undertaken, to the more formal sources sought announcements in pertinent publications (e.g., technical/scientific journals, or the Commerce Business Daily), or solicitations for information or planning purposes. (FAR 7.101)
Negotiation	Contracting through the use of either competitive or other than competitive proposals and discussions. Any contract awarded without using sealed bidding procedures is a negotiated contract. (FAR 15.101)
Office of Federal Procurement Policy	Established by 41 U.S.C. 401 to provide overall direction of federal procurement policy, prescribe procurement policies, regulations, procedures and forms for executive agencies, and coordinate programs to improve the quality and performance of procurement personnel.
Other than competitive procedures	Any method of conducting a procurement that does not meet the definition of competitive procedures.
Purchase description	A description of the essential physical characteristics and functions required to meet the government's minimum needs. (FAR 10.001)
Qualified product	An item that has been examined and tested for compliance with specification requirements and qualified for inclusion in a qualified products list. (FAR 9.201)
Qualified products list	A list that identifies the qualified item by specification, government designation, part or model number or trade name, test or qualification reference, manufacturer's name and address, and place of manufacture. (FAR 9.201)

Responsible source	A prospective contractor that (1) has adequate financial resources to perform the contract or the ability to obtain such resources, (2) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and government business commitments, (3) has a satisfactory performance record, (4) has a satisfactory record of integrity and business ethics, (5) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills, (6) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities, and (7) is otherwise qualified and eligible to receive an award under applicable laws and regulations. (41 U.S.C. 403 (8))
Responsive	A term describing a bid that meets, without any material deviation, the expressed requirements of the government's solicitation.
Sealed bidding	A method of contracting that employs competitive bids, public opening of bids, and awards (FAR 14.101). See "formal advertising."
Small purchase	An acquisition of supplies, nonpersonal services, or construction in the amount of $25,000 or less using the simplified procedures described in FAR part 13.
Sole-source acquisition	A contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source. (FAR 6.003)
Specific make and model specification	A description of a government requirement that is expressed in a form so that only the specified make and model will satisfy the government's needs, irrespective of the number of suppliers that may be able to furnish the specific make and model. (FIRMR 201-2.001)

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Specification	A description of the technical requirements for a material, product, or service that includes the criteria for determining whether these requirements are met. Specifications are required to state only the government's actual minimum needs and be designed to promote full and open competition, with due regard to the nature of the supplies or services to be acquired. (FAR 10.001)
Unsolicited proposal	A written proposal submitted to an agency on the initiative of the submitter for the purpose of obtaining a contract with the government and which is not in response to a formal or informal request (other than an agency request constituting a publicized general statement of needs). (FAR 15.501)

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