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STATEMENT OF

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BEFORE THE

SUBCOMMITTEE ON
GENERAL OVERSIGHT AND MINORITY ENTERPRISE

COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

[Comments on Public Law 95-507]

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Mr. Chairman and Members of the Subcommittee:

Section 211 of Public Law 95-507 approved October 24, 1978, amended the Small Business Act to provide for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to have the maximum practicable opportunity to participate in the performance of contracts let by Federal agencies. The 1978 amendments required that certain implementing clauses be included in all contracts exceeding $10,000 except those for services personal in nature and those to be performed outside of the United States, its territories and possessions. They required also that construction contracts in excess of $1 million with large business concerns and other large business contracts in excess of $500,000 contain provision for subcontracting plans designed to achieve the statutory aims.

Implementation of section 211 was delayed. The Office of Federal Procurement Policy did not publish implementing regulations until April 20, 1979, followed by publication of the Federal Procurement Regulations on July 2 by the General Services Administration and publication of the Defense Acquisition Regulation by the Department of Defense on July 27, 1979.

Shortly before publication of the Department of Defense implementing regulations Congressman Joseph P. Addabbo

wrote to the Comptroller General posing three issues stemming from the delay in implementing section 211:

1. "Were all federal agencies legally required to implement section 211 of P.L. 95-507 as of October 24, 1978?

2. "Does the failure to promulgate implementing regulations in a timely fashion legally excuse any agency from requiring its contractors to comply with section 211, as of October 24, 1978? and

3. "What is the legal status of all federal contracts awarded since October 24, 1978, that fall within the scope of section 211 but which do not contain the mandated subcontracting plans? If /it is determined/ that all or any particular group of subcontracts suffer from a legal deficiency because they do not contain plans, can that deficiency be remedied by executing modifications to such contracts which contain plans? What other remedies, if any, are available?"

We concluded in an opinion to Congressman Addabbo, dated October 19, 1979, as to the first two issues that there existed only the requirement for agencies to begin the process of developing implementing regulations upon enactment of the act, that we were not in position to conclude that the responsible agencies took longer than a

reasonable time to issue their regulations, and that agencies were not required to have contractors comply with section 211 until implementing regulations were issued.

We based our conclusions upon the fact that the provisions of section 211, for the most part, were not self-executing and largely upon the relative complexity of the procedures and understandings which needed to be developed and communicated throughout the federal procurement community.

As to the third issue, it followed that the legality of contracts awarded after October 24, 1978, but before the issuance of implementing regulations are not impaired by the absence of the required subcontracting plans. We do not believe that Congress intended the Government procurement process to virtually come to a halt pending issuance of the necessary regulatory implementation of section 211. Contracts awarded after issuance of the regulations, however, should contain subcontractor plans. Contracts which failed to contain plans required under section 211 and the implementing regulations are indeed legally deficient. It is our view though that the remedy for this legal deficiency must depend on particular circumstances. Contract modifications might be appropriate under certain conditions. On the other hand, contract termination and procurement resolicitations might be the preferable solution in other cases. Also, situations might well exist

under which no feasible remedy is possible.

In this connection I would refer to a memorandum to the heads of departments and establishments issued on November 21, 1979, by the Acting Administrator of the Office of Federal Procurement Policy addressing the issue of corrective actions necessary. In that memorandum the Acting Administrator recognizes that in some cases the time for implementation of section 211 has exceeded reasonable bounds in that a substantial number of contracts and contract solicitations that should have contained required subcontracting provisions are deficient.

The Acting Administrator requests each agency to include required provisions in all outstanding solicitations and, where feasible, to modify all contracts awarded that should but do not contain the subcontract provisions where modification would lead to a greater utilization of small, disadvantaged subcontractors. In addition, in order to evaluate the extent of noncompliance and to avoid similar problems in the future, each agency is to provide the Office of Federal Procurement Policy a report of the number and dollar amount of contracts and solicitations requiring subcontracting provisions that were issued without the provision and the number and dollar amount of those subsequently modified to include the provision.

That concludes my statement, Mr. Chairman, and I'll be glad to respond to any questions that you or the Subcommittee members may have.