

GAO

Report to the Chairman, Committee on  
Small Business, House of Representatives

January 1989

# PROCUREMENT

## Public Utilities' Compliance With Subcontracting Plan Requirements



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United States  
General Accounting Office  
Washington, D.C. 20548

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General Government Division

B-229245

January 26, 1989

The Honorable John J. LaFalce  
Chairman, Committee on Small Business  
House of Representatives

Dear Mr. Chairman:

Your June 2, 1987, letter asked for information and legal opinions concerning the compliance of public utility companies with federal laws and regulations requiring subcontracting plans for the maximum practicable use of small and small disadvantaged businesses. You also requested us to compare the efforts of the General Services Administration (GSA), the Department of Energy, and the Department of Defense (DOD) in ensuring that contracts with public utilities meet the subcontracting plan requirements.

On July 6, 1988, we testified on this before the Committee and also on earlier work we had done for the Committee examining compliance by GSA and the Departments of the Navy and Energy with subcontracting plan requirements in general.<sup>1</sup> As requested by the Committee after the hearing, we have prepared this report to provide the information on public utilities you asked for in your June 1987 request. The report summarizes the Comptroller General's legal opinions on three specific questions raised by the Committee. These opinions were provided to the Committee on July 5, 1988, (B-229245) and were also discussed and entered into the record at the July 6, 1988, hearing.

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## Results in Brief

A number of public utilities providing services to the federal government have declined to enter into formal written contracts because they object in whole or in part to the statutory requirements for subcontracting plans. Others have declined for less specific reasons. In our opinion, these utility companies nonetheless are subject to the federal statutory requirements for subcontracting plans and are legally required to satisfy those requirements.

We found that the rates paid by the government for utility services are generally not affected by whether or not the services are acquired under formal contract.

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<sup>1</sup>Compliance with Subcontracting Plan Requirements (GAO/T-GGD-88-45, July 1988). Also, see our report Procurement: Compliance With Subcontracting Requirements at GSA, Energy, and Navy (GAO/GGD-88-83, May 1988).

All of GSA's current formal written contracts with utility companies are in compliance with subcontracting plan requirements. At Energy, we found several instances where contracts for utility services did not contain subcontracting plans as required because the utility companies involved objected to the requirement. Although we did not do detailed audit work at DOD, it appears that few if any of the Department's contracts for utility services contain subcontracting plans since DOD procurement personnel told us they were unaware of the requirement.

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## Background

GSA has statutory authority to enter into long-term contracts for utility services for periods not to exceed 10 years. These contracts may be in the form of an areawide contract furnishing service to several federal agencies located within the supplier's area of service or a single point contract providing service to a single user. GSA also delegates authority to other agencies to negotiate and award their own utility contracts.

Section 211 of Public Law 95-507, enacted on October 24, 1978, requires that federal contracts and contract modifications exceeding \$500,000, or \$1 million in the case of construction contracts, contain a subcontracting plan providing for the maximum practicable utilization of small and small disadvantaged businesses.

Subcontracting plans, which are prepared by contractors subject to the review and approval of the agency awarding the contract or modification, must include

- separate goals for using small and small disadvantaged businesses as subcontractors;
- the name of an individual employed by the contractor who will administer the contractor's subcontracting program and a description of the individual's duties;
- a description of the efforts the contractor will make to ensure that small and small disadvantaged business concerns will have an equitable opportunity to compete for subcontracts;
- assurances that the contractor will require all subcontractors (except small businesses) that receive awards in excess of \$500,000 (\$1 million for construction subcontracts) to also prepare and implement a subcontracting plan;
- assurances that the contractor will submit periodic reports and cooperate in any studies as may be required by federal agencies in order to determine the extent of compliance with the subcontracting plan requirements; and

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- a description of the types of records the contractor will maintain to demonstrate compliance with the requirements and goals in the plan as well as efforts to identify and award subcontracts to small businesses.

Subcontracting plans are not required for contracts

- with small business concerns,
- for personal services,
- to be performed entirely outside the United States, and
- where the contracting officer certifies that no subcontracting opportunities exist.

Failure to comply in good faith with the requirements of the subcontracting plan can be considered a material breach of contract.

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## Objective, Scope, and Methodology

Our objective was to provide the information and legal opinions requested in your June 2, 1987, letter. Specifically, we were asked to provide

- the names and location of all utilities whose services are purchased through GSA that have not submitted a subcontracting plan as required by law;
- a legal opinion on whether a public utility that sells services to the federal government but refuses to enter into a formal written contract is still required to satisfy the subcontracting plan requirements of Public Law 95-507;
- the legal remedies available to the government to require compliance with the subcontracting plan provisions;
- a determination of whether it costs the government more if utility services are not purchased under contract;
- a legal opinion on whether a required clause had been improperly altered in certain subcontracting plans and the remedies available to the government where the clause had been improperly altered; and
- a comparison of GSA's efforts to comply with the subcontracting plan requirements when dealing with public utilities with those of the Departments of Energy and Defense.

To meet our objective, we reviewed agency policies and procedures for procuring public utility services and discussed these procedures with appropriate officials at GSA and the Departments of Energy and Defense.

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In formulating our legal opinions, we reviewed the applicable statutes and relevant court decisions, as well as a previous advisory opinion issued by the Department of Justice.

At GSA we reviewed individual contract files and subcontracting plans at the headquarters office responsible for procuring utility services throughout the country. To identify those utility companies that had declined to enter into contracts with GSA, we reviewed the agency's files and interviewed appropriate procurement staff.

Utilities acquisition at Energy is dispersed among 15 contracting offices nationwide. We visited the Albuquerque, New Mexico, office, which had awarded the largest number of utility contracts and reviewed the contract files located there. At the remaining offices, we interviewed appropriate staff by telephone and, in some cases, supplemented this information with correspondence.

At DOD, we interviewed procurement officials of major commands of the Army, Navy, and Air Force, and at the Defense Energy Programs Office within the Office of the Secretary of Defense. We did not review any contract files because they are widely dispersed across the country and because our initial audit work showed that it was unlikely that any of the Department's contracts for utility services would contain subcontracting plans.

We did our work from October 1987 through May 1988 and in accordance with generally accepted government auditing standards. The Departments of Energy and Defense and GSA provided written comments on a draft of this report. These comments are evaluated on page 10 and are included in appendixes II, III, and IV, respectively.

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## GSA Does Not Acquire All Utility Services Under Formal Contract

The Public Utilities Services Division of GSA's Public Buildings Service is responsible for negotiating with public utility suppliers<sup>2</sup> to ensure the government's needs are met in the most cost-effective manner. In meeting this responsibility, GSA's policy is to use formal contracts whenever appropriate. Although federal procurement regulations require agencies to obtain a formal written contract for all purchases exceeding \$25,000, a number of utility companies have declined to enter into formal contracts with the federal government because of objections to one or more

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<sup>2</sup>As used in this report, utility services include electricity, water, natural gas, steam and sewerage service but does not include telecommunications.

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of the clauses required to be contained in government contracts or because of less specific objections. In most instances, federal agencies have no choice but to accept and pay for these utility services without a contract since alternative sources are not available.

GSA has made progress in increasing the number of public utilities providing services to the government under contract. In 1976 there were 41 areawide contracts in effect with utility companies. By June of 1988 this number had increased to 67. In addition, 12 single point contracts were also in effect.

Nonetheless, some public utilities continue to decline to enter into formal contracts with GSA. We identified 23 such utilities and, as requested, have listed their names and locations in appendix I.

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## Utilities Not Providing Services Under Formal Written Contract Are Still Subject to Subcontracting Plan Requirements

Based upon our review of federal law, it is our opinion that a public utility that sells services to the federal government but that declines to enter into a formal contract with the government is nonetheless subject to the statutory subcontracting plan requirements of section 211 of Public Law 95-507 and is required to satisfy those requirements. This and other legal opinions you requested are discussed in our analysis which was provided to you under separate cover at the July 6, 1988, hearing.

In our opinion, the most appropriate remedy available to the government in cases where there is no formal contract would be to seek judicial enforcement of the subcontracting plan requirements by obtaining an injunctive order enjoining the utility from failing or refusing to comply with the statutory requirements.

The practicality of pursuing this remedy is a matter the agencies should consider in light of the individual circumstances. While judicial enforcement of the subcontracting plan requirements is generally available to the government, our examination of case law suggests that the probability of success in obtaining an injunction to effect this remedy is uncertain.

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## The Government's Utility Costs Are Generally Not Affected by the Lack of Formal Contracts

The prices charged by public utilities are generally determined by rate schedules that apply to all users and are based on factors such as whether the user is an industrial concern or private citizen, the normal volume used, and usage during peak hours. Contracts between utilities and the government generally specify only that the government will pay the rates and receive the discounts it is otherwise entitled to. Because the costs of utility services are set by public regulation, the government's costs for utility services are generally unaffected by whether or not a formal contract exists. However, federal procurement regulations require formal contracts for utility services or connections exceeding \$25,000.

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## Some Subcontracting Plans Have Had Unauthorized Changes

In January 1984 GSA requested Small Business Administration (SBA) approval to modify the clause required in subcontracting plans that specifies that all subcontractors other than small businesses that receive awards meeting the requisite dollar threshold must also prepare and implement a subcontracting plan. GSA proposed that plans contained in utility contracts require plans only from subcontractors receiving subcontracts of more than \$500,000 to construct or operate facilities directly pertinent to providing service to the government. Since the language of the regulatory clause covered "all subcontractors" meeting the requisite dollar threshold, the revised clause was clearly more limited in its coverage of subcontractors. GSA's position was that it hoped this modification would result in more utilities agreeing to subcontracting plans since some utilities had expressed a reluctance to implement plans that would apply to all subcontractors. SBA approved the modification the following month.

In October 1986, in response to an inquiry from the Committee, SBA reversed its position on allowing substitution of this modified clause in subcontracting plans. Although GSA has subsequently stopped using the modified clause in its negotiations with utility companies, 26 contracts had been awarded that contained the modified clause in their subcontracting plans.

In our opinion, neither GSA nor SBA had the authority to modify or approve modification of the original regulatory clause in a way that affects the implementation of the statutory subcontracting plan requirements. The legal remedies available to the government regarding contracts with regulatory subcontracting plan clauses that have been altered in an unauthorized manner are to modify the contract so that the plan contains the correct clause, terminate the contract and resolicit the



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procurement, or seek judicial enforcement of the required clause. As previously discussed, the practicality of pursuing any of these remedies should be considered in light of individual circumstances.

GSA officials said they have already corrected three of the subcontracting plans that were modified and will attempt to correct the others as time and resources permit. They also said that should GSA be unable to correct all of the remaining contracts, they will be corrected individually as each comes due for renewal.

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## Utility Contracts With Subcontracting Plans at GSA, Energy, and DOD

In addition to using GSA areawide contracts for utility services, the Departments of Energy and DOD also award their own contracts for utility services. We compared the efforts of GSA, Energy and DOD to ensure that contracts for utility services comply with subcontracting plan requirements. As is the case at GSA, some utility companies have refused to enter into contracts with Energy and DOD. Regarding utility services that are acquired under formal written contract, we found that all of GSA's contracts that should have had subcontracting plans contained them. At Energy, we found several contracts for utility services that should have had subcontracting plans but did not. Our discussions with various officials within DOD indicated that very few if any of the military's utilities contracts contained subcontracting plans.

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### GSA

All of GSA's 12 single point contracts with utility companies contained subcontracting plans. Of the 67 areawide contracts for utility services, 52 contained subcontracting plans and 15 had justified reasons for not containing plans.

Twelve of the 15 areawide contracts that do not contain subcontracting plans were entered into before the implementation of Public Law 95-507 and thus were not required to contain the subcontracting plan clause. These 12 contracts are scheduled to be renewed shortly and GSA officials said they will seek to have the subcontracting plan clause incorporated in the contracts in the renegotiations.

Two of the 15 areawide contracts without subcontracting plans were below the dollar threshold and thus were not required to contain the clause. The last of the contracts without a subcontracting plan was awarded to a small business and consequently did not require a subcontracting plan.

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## Department of Energy

The Department of Energy procures approximately \$1 billion of utility services annually. Energy officials and procurement staff said that most of the utility services procured by the Department are obtained under formal written contract. Some utility companies, however, have declined to enter into formal written contracts with Energy and consequently have not submitted subcontracting plans. In those cases where Energy is procuring utilities under formal written contract, we identified five contracts that contained subcontracting plans but several that should have had plans but did not.

The files for Energy's procurements of utility services are dispersed among its 15 procurement offices, and centralized data are not available. Thus we cannot specify the extent to which the Department is obtaining utility services under contract and which of these contracts comply with the subcontracting plan requirements. On the basis of the 67 contract files we did review, however, and the discussions we had with Energy officials in the field offices, we were able to identify some instances where utility companies refused to enter into contracts with Energy and where contracts that should have had subcontracting plans did not. These include the following examples:

- Six utility companies have refused to enter into contracts with Energy because of objections in whole or in part to the subcontracting plan requirement.
- Three utility companies have signed contracts but insisted that the subcontracting plan requirement be removed from the contract.
- One company has a contract requiring a subcontracting plan but has refused to submit the plan.
- At least 14 formal written contracts were entered into before the implementation of Public Law 95-507 and therefore did not require subcontracting plans. Many of these contracts, however, are more than 10 years old in spite of federal and Energy regulations that limit contracts for utility services to 10 years. At least one utility company has refused to renew an existing contract because of the subcontracting plan requirement.

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## DOD

In fiscal year 1987 the Department of Defense purchased utility services costing almost \$2 billion. Defense officials said most of these services were acquired under formal written contract although some utility companies, as is the case at GSA and Energy, have refused to sign contracts with the military services. Because outdated guidelines are being used

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by procurement staff, however, it appears that few, if any, of the contracts for utility services that have been obtained contain subcontracting plans.

The Army and the Air Force have utility procurement specialists at the major command level who ensure that the government is paying the correct rate for utility services and who also review and assist in preparing contracts for utility services that are awarded at the base level. In the Navy, the procurement of utility services is centralized at six regional offices where staff are responsible for both the technical content and the actual awarding of contracts. When awarding contracts for utility services, each branch of the military follows the policies and procedures contained in a manual issued by the Department in 1974 that also provides a standardized format for utility contracts. Because the guidelines predate the law requiring subcontracting plans for certain federal procurements, contracts that are written in the suggested format do not state that subcontracting plans are required.

An official responsible for utility procurement on a Departmentwide basis said that, in all probability, utility contracts written for the military would not contain subcontracting plans because of the outdated guidelines. In order to confirm this, we discussed contracting for utility services with the utility procurement specialists at two major commands in the Air Force. We were told that these two commands are responsible for over half of the Air Force's total utilities procurement. We also spoke with utility procurement specialists at three major commands in the Army that, in total, are estimated to account for approximately 90 percent of the total utility procurements in the Army. Four of the specialists said they were not aware of the requirement for subcontracting plans and that, to their knowledge, none of the utility contracts they were familiar with contained subcontracting plans. The fifth specialist said that although he was aware of the requirement he was not aware of any utility contract within the command containing a subcontracting plan.

At the Navy, we spoke with a utility procurement specialist at three of the six regional centers. Two told us that they were not aware of the subcontracting plan requirement and that none of the contracts that they had awarded contained plans. The third said he was aware of the requirement but that none of the utility contracts within the region met the dollar threshold for requiring a plan. This individual, however, was applying the dollar threshold to the annual value of the contract rather than to the total value of the contract as required. Consequently, it is

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possible that many of the contracts that he determined did not require a subcontracting plan should in fact have had one.

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## Agency Comments and Our Evaluation

A draft of this report was provided to Energy, DOD, and GSA for comment. Energy commented that it may be misleading to include one utility company with those which had declined to sign a contract with GSA because, according to information Energy had received, the utility in question qualifies as a small business and therefore is exempt from the requirement to submit a subcontracting plan. As discussed in this report, federal agencies are required to enter into a formal written contract for all purchases exceeding \$25,000. This requirement for a formal contract is not contingent upon such factors as the size of the company or its possible exemption from the subcontracting plan requirements. Energy's comments, along with our response, are included as appendix II.

DOD concurred with the report's findings as they related to DOD and cited corrective action it had taken to ensure that utility procurement staff are aware of the subcontracting plan requirement. The Department's comments are included as appendix III.

GSA made several suggestions of an editorial nature and offered additional data it had discovered after our audit was completed.

GSA also took exception to our observation that the government's costs for utility services are unaffected by whether or not a formal contract exists. It said many utilities require formal contracts in order for customers to be eligible for special rates or discounts. However, when we discussed these comments with GSA officials, they cited only two utility companies that require some type of formal agreement in order for customers to obtain special rates or discounts. Therefore, we continue to believe that utility rates and discount provisions are generally unaffected by whether or not a formal contract exists. GSA's comments and our response are included as appendix IV.

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As arranged with the Committee, we plan no further distribution of this report until 30 days from the issuance date unless you publicly announce its contents earlier. At that time we will send copies to the Administrator of General Services and the Secretaries of Defense and Energy. The major contributors to this report are listed in appendix V.

Sincerely yours,

A handwritten signature in cursive script that reads "L. Nye Stevens". The signature is written in black ink and is positioned above the printed name and title.

L. Nye Stevens  
Associate Director

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## Abbreviations

DOD	Department of Defense
GSA	General Services Administration
SBA	Small Business Administration

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# Public Utility Companies Declining to Sign Contracts With the General Services Administration

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Alaska Electric Light and Power Co.  
Juneau, Alaska<sup>a</sup>

Department of Public Works  
Arlington, Virginia<sup>a</sup>

Department of Public Utilities  
Newport News, Virginia<sup>a</sup>

Cleveland Electric Illuminating Company  
Cleveland, Ohio<sup>a</sup>

East Ohio Gas Company  
Cleveland, Ohio<sup>a</sup>

Florida Power & Light Company  
Miami, Florida

Long Island Lighting Company  
Patchogue, New York

Oklahoma Gas and Electric Company  
Oklahoma City, Oklahoma<sup>a</sup>

Potomac Electric Power Company  
Washington, D.C.<sup>a</sup>

San Diego Gas & Electric Company  
San Diego, California<sup>a</sup>

Tucson Electric Power Company  
Tucson, Arizona<sup>a</sup>

Washington Suburban Sanitary Commission  
Hyattsville, Maryland<sup>a</sup>

Arkansas Power & Light Company  
Little Rock, Arkansas

Baltimore Gas and Electric Company  
Baltimore, Maryland



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**Appendix I  
Public Utility Companies Declining to Sign  
Contracts With the General  
Services Administration**

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Consolidated Edison Company of New York, Inc.  
New York, New York

Consumers Power Company  
Jackson, Michigan

Florida Power Corporation  
St. Petersburg, Florida

Louisville Gas and Electric Company  
Louisville, Kentucky

New Orleans Public Service Inc.  
New Orleans, Louisiana

Public Service Company of North Carolina, Inc.  
Gastonia, North Carolina

Memphis Light, Gas and Water Division  
Memphis, Tennessee

Kentucky-American Water Company  
Lexington, Kentucky

Johnson City Power Board  
Johnson City, Tennessee

<sup>a</sup>Companies that objected in whole or in part to the requirement for a subcontracting plan for small and small disadvantaged businesses.

# Comments From the Department of Energy

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



**Department of Energy**  
Washington, DC 20585

OCT 21 1988

Mr. J. Dexter Peach  
Assistant Comptroller General  
Resources, Community, and  
Economic Development Division  
U.S. General Accounting Office  
Washington, D.C. 20548

Dear Mr. Peach:

The Department of Energy (DOE) appreciates the opportunity to review and comment on the General Accounting Office (GAO) draft report entitled "Procurement: Public Utilities' Compliance with Subcontracting Plan Requirements."

According to information provided by the Alaska Power Administration, we believe the inclusion by the GAO of the Alaska Electric Light and Power Co., Juneau, Alaska, in its list of "Public Utility Companies Declining to Sign Contracts with the General Services Administration" may be misleading. We are advised that this firm qualifies as a small business, its production falling well within the production of 4 million megawatt hours that is the size standard for Standard Industrial Classification Code 4911, Electric Service. Consequently, the company, as a small business, is exempt from the requirement to submit a subcontracting plan.

The Department also requests a copy of the legal opinion of the GAO finding that the subcontracting plan requirement applies without regard to the existence of a contract with the utility.

The DOE hopes that this comment will be helpful to the GAO in their preparation of the final report.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence F. Davenport".

Lawrence F. Davenport  
Assistant Secretary  
Management and Administration

See appendix I.

See comment 1, p. 17.

See comment 2, p. 17.

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The following are our comments on the Department of Energy's letter dated October 21, 1988.

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## GAO Comments

1. Energy believes the inclusion of the Alaska Electric Light and Power Company in our list of public utility companies declining to sign contracts with the General Services Administration (see app. I) is misleading since Energy has been advised that the company qualifies as a small business and is therefore exempt from the subcontracting plan requirement. The public utilities listed in appendix I are those that GSA attempted to negotiate a formal written contract with and the company declined. As discussed in this report, the requirement for a contract is not contingent on whether a company is considered a small business.
2. We have provided Energy a copy of our legal opinion.

# Comments From the Department of Defense



ASSISTANT SECRETARY OF DEFENSE  
WASHINGTON, D.C. 20301-8000

PRODUCTION AND  
LOGISTICS

21 NOV 1988

(L/EP)

Mr. Frank C. Conahan  
Assistant Comptroller General  
United States  
General Accounting Office  
National Security and International  
Affairs Division  
Washington, DC 20548

Dear Mr. Conahan:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report entitled, PROCUREMENT: Public Utilities' Compliance With Subcontracting Plan Requirements, dated September 19, 1988 (GAO Code 014413, OSD Case 7777). The Department concurs with the report findings insofar as they involve the DoD.

The Department has taken steps to remind Defense utility contracts personnel of the responsibility to include the requirement for the small and small disadvantaged business utilization subcontracting plans in all applicable future contracts. The DoD comments on the detailed report findings are provided in the enclosure.

Sincerely,

A handwritten signature in black ink, appearing to read "Jack Katzen".

Jack Katzen

Enclosure

GAO DRAFT REPORT - DATED SEPTEMBER 19, 1988  
(GAO CODE 014413) OSD CASE 7777

"PROCUREMENT: PUBLIC UTILITIES' COMPLIANCE WITH  
SUBCONTRACTING PLAN REQUIREMENTS"

DEPARTMENT OF DEFENSE COMMENTS

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FINDINGS

- o **FINDING A: Subcontracting Plan Requirements.** The GAO reported that the General Services Administration (GSA) has statutory authority to enter into long-term contracts for utility services for periods not to exceed 10 years. The GAO further reported that the GSA also delegates authority to other agencies to negotiate and award their own utility contracts. The GAO observed that section 211 of Public Law 95-507, enacted on October 24, 1978, requires that Federal contracts and contract modifications exceeding \$500,000, contain a subcontracting plan providing for the maximum practicable utilization of small and small disadvantaged businesses. The GAO further observed that the subcontracting plans are prepared by contractors and must include;
- separate goals for using small and small disadvantaged businesses as subcontractors;
  - the name/and duties of the contractor employee who will administer the program;
  - a description of the efforts to be made by the contractor to ensure that small business concern will have an equitable opportunity to compete for contracts;
  - assurances that the contractor will require all subcontractors (except small business) receiving awards in excess of \$500,000 to also prepare and implement a subcontracting plan; and
  - a description of the contractor records that demonstrate compliance with the plan.

The GAO emphasized that failure to comply in good faith with the plan can be considered a material breach of contract. The GAO pointed out that subcontracting plans are not

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Now on pp. 2 and 3.

required for contracts with small businesses, personnel services, outside the United States or where no subcontracting opportunities exist. (pp. 3-5/GAO Draft Report)

**DoD Response:** Concur in so far as finding concerns DoD.

- o **FINDING B: GSA Does Not Acquire All Utility Services Under Contract.** The GAO noted that the GSA is responsible for negotiating for the Government's public utility needs in the most cost-effective manner, usually through the use of formal contracts. According to the GAO, however, a number of utility companies have refused to enter into formal contracts with the Federal Government because of objections to one or more of the clauses required to be in the contract. The GAO explained that, in this regard, agencies have no choice but to accept and pay for utility services without a contract since alternative sources are not available. The GAO found that the GSA has made progress in increasing the number of public utilities providing services to the Government under contract and, as of June 1988, there was an increase of 26 utility contracts from 1987. The GAO found, however, that there were 23 utilities continuing to decline entrance into formal contracts with the GSA. (pp. 9-10/ GAO Draft Report)

Now on pp. 4 and 5.

**DoD Response:** Concur in so far as finding concerns DoD.

- o **FINDING C: Utilities Not Providing Services Under Formal Written Contract Are Still Subject To Subcontracting Plan Requirements.** It is the opinion of the GAO, based on a review of applicable Federal law that a public utility that sells services to the Federal Government, but that declines to enter into a formal contract with the Government, is nonetheless legally required to justify the subcontracting plan requirements of section 211 of Public Law 95-507. The GAO stated that, in its opinion, the most appropriate remedy available to the Government in cases where no formal contract with a public utility exists would be to seek judicial enforcement of the subcontracting plan requirements by obtaining an injunction order enjoining the Utility from failing or refusing to comply with the statutory requirements. The GAO observed, however, that the practicality of pursuing this remedy is a matter that should be considered in light of the individual circumstances. (pp. 10-11, GAO Draft Report)

Now on p. 5.

**DoD Response:** Concur in so far as finding concerns DoD.

- o **FINDING D: The Government's Utility Costs Are Not Affected By The Lack Of Formal Contracts.** According to the GAO, the prices charged by public utilities are generally determined by the rate schedules that apply to all users and are based on factors such as industrial or private users, volume, and peak hour usage. The GAO stated that, because contracts for utility services do not specify a rate to be paid by the Government, costs for utility services are unaffected by the existence of a formal contract. The GAO concluded, however, that Federal procurement regulations nonetheless require formal contracts for utility services or connections exceeding a certain minimum. (pp. 11-12/GAO Draft Report)

Now on p. 6.

**DoD Response:** Concur in so far as finding concerns DoD.

- o **FINDING E: Some Subcontracting Plans Have Had Unauthorized Changes.** The GAO found that, in January 1984, the GSA proposed, subject to Small Business Administration (SBA) approval, that plans within utility contracts also be required from subcontractors receiving subcontracts of more than \$500,000 to construct or operate facilities providing services to the Government. The GAO concluded that, since the language of the regulatory clause covered "all subcontractors" meeting the requisite dollar threshold, the revised clause clearly was more limited in its coverage of subcontractors. The GAO noted that, while the SBA approved the modification, the following month (in response to a House Committee inquiry) if the SBA reversed its position on allowing substitution of this modified clause in subcontracting plans. The GAO found, however, that 26 contracts had already been awarded containing the modified clause in their plans. The GAO concluded that neither the GSA nor the SBA has the authority to modify the original regulatory clause, which affects the implementation of the statutory subcontracting plan requirements. The GAO noted that the GSA has corrected three of the subcontracting plans that were modified and will attempt to correct the others as time and resources permit. (pp. 11-14/GAO Draft Report)

Now on pp. 6 and 7.

**DoD Response:** Concur in so far as finding concerns DoD.

- o **FINDING F: Comparison Of Utility Contracts With Subcontracting Plans At GSA, Energy And Defense.** The GAO stated that it compared the efforts of the GSA with those of the Departments of Energy (DOE) and Defense to ensure contracts for utility services comply with plan requirements. According to the GAO, as with the GSA, some utility companies have refused to enter contracts with the DOE and the DoD. The GAO found that all the GSA contracts

with utility services contained subcontracting plans but that, at the DOE, five contracts for utility services did not have subcontracting plans. The GAO further found that, at the DoD, officials indicated that very few if any of the military utility contracts contain subcontracting plans. (pp. 14-15/GAO Draft Report)

Now on pp. 7 and 8.

**DoD Response:** Concur in so far as finding concerns DoD.

- o **FINDING G: Subcontracting Plans For Utility Contracts Within The Department Of Defense.** The GAO found that, in FY 1987, the DoD purchased utility services of \$2 billion and, while most of the services were acquired under contract, some utility companies refused to sign contracts with the Military Services. The GAO reported that the Army and the Air Force have utility procurement specialists at the major command level who (1) ensure that the correct utility service rate is paid and (2) review and assist in preparing contracts for utility services that are awarded at the base level. The GAO noted that, in the Navy, utility services procurement is centralized at six regional offices where staff are responsible for both technical content and the awarding of contracts. The GAO found that the Policy and Procedures Manual used by the Services as a guide when awarding contracts for utility services was issued in 1974 (Supplement 5 to the Armed Services Procurement Regulations (ASPR); therefore, the guidelines predate the law requiring subcontracting plans and contracts written in the suggested format do not state that subcontracting plans are required. The GAO was informed by a DoD official that, in all probability, utility contracts written for the Military would not contain subcontracting plans because of the outdated guidelines. The GAO reported that this was confirmed by procurement specialists at various locations in each Service, who said that they were not aware of the requirement for subcontracting plans and to their knowledge, none of the Service utility contracts contained subcontracting plans. The GAO concluded that, because outdated guidelines are being used by procurement staff within the Military Services, it appears that few, if any, of the contracts for utility services contain subcontracting plans. (pp. 18-20/GAO Draft Report)

Now on pp. 8 to 10.

**DoD Response:** Concur. The DoD already has initiated remedial action.

On July 1, 1988, after being made aware of the lack of awareness of the subcontracting plan requirement at the Service utility procurement officer level by the GAO study



personnel, the Office of the Secretary of Defense sent a memorandum to the members of the Defense Utilities Energy Coordinating Council requesting that each utility procurement officer be made aware of the requirement. The Defense Utilities Energy Coordinating Council has been recently established in order to ensure better coordination and communication of legal, regulatory, and technical changes affecting the provision of reliable, cost-effective mission support utility energy through the Department of Defense.

**RECOMMENDATIONS**

- o **NONE.**

# Comments From the General Services Administration

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



Administrator  
General Services Administration  
Washington, DC 20405

November 3, 1988

Mr. Richard L. Fogel  
Assistant Comptroller General  
U.S. General Accounting Office  
Washington, DC 20548

Dear Mr. Fogel:

Thank you for the opportunity to review draft GAO audit report GAO/GGD-88 entitled "PROCUREMENT: Public Utilities' Compliance with Subcontracting Plan Requirements." The General Services Administration's (GSA) response to the report consists of the clarification of our policy positions on subcontracting plans and the correction of the use of certain terminology that was utilized in the report. We have also included a report on the progress that has taken place regarding our efforts to obtain new plans and upgrade the deficient plans.

GSA would like to submit the following comments:

1. Page 2, Results in Brief, delete second paragraph.

GSA has executed two areawide contracts with VEPCO and Washington Gas Light Company that offer special rates to Federal customers when they use the areawide contract. Also, in many instances, GSA can negotiate reduced connection charge when a public utility is offered a 10-year service contract. Many utilities require formal contracts in order for a customer to be eligible for special rates.

2. Bottom of page 4, add the additional clause stated in paragraph (d)(3) of chapter 2, as required by paragraph (d)(6)(D) of chapter 2, section 211, 92 Stat. 1767, 15 U.S.C. 637(d)(6)(D).

GSA refers to this clause as the small business policy clause.

3. Top of page 5, add the following subparagraph required by P.L. 95-507, section 211 (d)(6)(E), 92 Stat. 1769, 15 U.S.C. 637(d)(6)(E):

"...assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and..."

Now on p. 1.

See comment 1, p. 28.

Now on p. 2.

See comment 2, p. 28.

Now on p. 2.

See comment 2, p. 28.

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Now on p. 4.  
See comment 3, p. 28.

4. Page 9, in footnote add "steam and sewage service" as other utilities covered by subpart 8.3 of the Federal Acquisition Regulation.

Now on p. 5.  
See comment 4, p. 28.

5. Page 10, change 23 to 25.

GSA's Public Utilities Services Division identified two additional companies after the GAO audit. They are the National Fuel Gas Distribution Corporation, Buffalo, New York 14203 and the Hawaiian Electric Company, Inc., Honolulu, Hawaii 96840.

Now on p. 6.  
See comment 5, p. 28.

6. Page 12, delete the first full sentence "Because contracts for utility...formal contract exists," and add:

Long-term contracts, such as the areawide contracts that have a term of 10 years, provide for both the purchases of utility services at tariff rates and special rates like those offered by VEPCO and Washington Gas Light Company. Public utility contracts also permit the Government to eliminate or negotiate reduced connection charges when 10-year contract terms are offered.

See comment 1, p. 28.

In the last line of the same paragraph, change "federal procurement regulations" to "federal acquisition regulations."

See comment 6, p. 28.

Now on p. 6.  
See comment 7, p. 29.

7. Page 13, first full paragraph, change 26 contracts to 28 contracts, and add:

Breakdown is as follows: 8 accepted corrected flow-down clause, requested 10 utilities to correct flow-down clause, 7 utilities are being monitored for annual small business accomplishments, and 3 more to be monitored shortly. Requests for corrected flow-down will follow monitoring.

Now on p. 6.  
See comment 8, p. 29.

8. Page 13, last paragraph, GAO gave GSA only one realistic alternative and that was to modify the contract so that the plan contains the correct flow-down clause. To re-solicit or to terminate utility procurements are impractical because of the monopolistic nature of utility purchases. GSA is proceeding to amend each plan that contains a modified flow-down clause and replace it with a corrected clause. GSA will unilaterally amend the contract to the extent that the contractor will not execute a bilateral amendment to the plan.

Now on p. 7.  
See comment 9, p. 29.

9. Page 14, 2nd paragraph change the number three to eight.

GSA has corrected a total of eight subcontracting plans since the GAO audit.

10. Page 20.

GSA staff is following up on the letters sent by the House Committee to the utilities that refused to contract. GSA staff is visiting each of these companies to discuss the areawide contract, including required Government clauses such as the subcontracting plan. The first three trips were to a California utility, a Southwest utility, and one Texas utility. These trips were successful in that each utility is preparing a subcontracting plan as required by P.L. 95-507. This will lead to the execution of an areawide contract with each of the three utility companies. In addition, GSA staff will visit the following utility companies:

Schedule of Site Visits

<u>Location</u>	<u>Name of Utility Company</u>	<u>Total Gov't Procurement (Million \$)</u>
Cleveland, OH	The Cleveland Elec. Illuminating Co.	5.0
Cleveland, OH	The East Ohio Gas Co.	2.0
Buffalo, NY	National Fuel Gas Distr. Co.	2.0
NYC, NY	Con. Ed. of NY	24.0
Minneola, NY	Long Island Lighting Co.	4.0
Miami, FL	Florida Power & Light Co.	40.0
St. Petersburg, FL	Florida Power Corp.	4.0
Baltimore, MD	Baltimore Gas & Elec. Co.	20.0
Hyattsville, MD	Wash. Sub. Sanitary	2.0
Newport News, VA	City of Newport News	0.8
Arlington, VA	Arlington County	0.7
Washington, DC	Potomac Elec. Power Co.	200.0

11. In the appendix of the report, delete the word "The" from each utility firm's name where shown, with the exception of "The Cleveland Electric Illuminating Company" and "The East Ohio Gas Company."

See comment 10, p. 29.

Now on pp. 14 and 15.  
 See comment 11, p. 29.

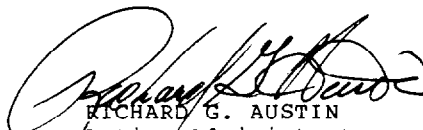
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Now on p. 16.  
See comment 11, p. 29.

12. Also, in the appendix, correct "The Oklahoma Electric Company" to read "Oklahoma Gas and Electric Company."

Sincerely,



RICHARD G. AUSTIN  
Acting Administrator

Enclosures

The following are our comments on GSA's letter dated November 3, 1988:

## GAO Comments

1. The referenced paragraph concerns our observation that the absence of a formal contract does not affect the rates the government pays for utility services. GSA differed with this observation, saying many utilities require formal contracts in order for a customer to be eligible for special rates and discounts. In discussing this comment with GSA officials, they could identify only two such companies. One of the two has signed a government-prepared contract but the other refuses to do so.

Because it is possible that, at least in the one situation just described, the government may not have obtained the rates and discounts it would be otherwise entitled to because of the absence of a formal contract, we have modified our report to say that, in general, the rates paid by the government are not affected by whether utility services are acquired under formal contract. We continue to believe this because, as discussed in this report, the rates for utility services are set by public regulation. When negotiating contracts with utility companies, GSA attempts to ensure that the government will receive every discount and special consideration to which it is otherwise entitled. These rates, however, are available to all users with similar service characteristics. Similarly, any user has the right to negotiate with utility companies concerning special fees, such as connection charges.

2. Our list of subcontracting plan requirements was not intended to be all-inclusive and several were omitted for purposes of brevity and clarity. However, we have subsequently added one requirement noted by GSA.

3. Footnote supplemented as GSA suggested.

4. Two firms were identified by GSA as declining to enter into formal contracts after our audit work was completed. Since we did not verify this new information, we are not including it in our report.

5. This sentence has been revised slightly so that it no longer appears exactly as quoted.

6. The report refers to procurement regulations in general rather than the Federal Acquisition Regulation.

7. After our audit work was completed, GSA identified two additional contracts that contained modified clauses in their subcontracting plans. Since we did not verify this new information, we are not including it in our report.

8. GSA's comment is consistent with our observation that some remedies may not be practical in individual circumstances.

9. Since this action was taken after our audit work was completed, we are not including it in our report.

10. GSA's page reference is to a section in the draft that was left blank to incorporate agency comments. Because GSA is summarizing actions taken after we completed our audit work, which we did not verify, we are not including it in our report.

11. We have changed the appendix to generally comply with GSA's suggestion.

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# Major Contributors to This Report

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