

GAO

Testimony

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FEDERAL PROCUREMENTS

Comments on Proposed Legislation Affecting Federal Procurements

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to the Comptroller General



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Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss S.1958, the proposed Federal Property and Administrative Services Authorization Act of 1992, and S.2619, the proposed Multiple Award Schedule Program Reform Act of 1992.

S.1958 - Federal Property and
Administrative Services Authorization Act
of 1992

Section 2 of S.1958 contains one of the bill's most important provisions. It would authorize appropriations for the General Services Administration only through fiscal year 1993, thus establishing a requirement for reauthorization of agency appropriations in lieu of the current permanent authorization.

We agree that there is a need for increased oversight of GSA on a regular basis. In recent years, Congress has been involved in several individual GSA projects and has kept a watchful eye over some GSA efforts, such as computer procurements and FTS 2000. Congress has not, however, taken as active a role in GSA's overall mission or performance as an agency.

A factor hindering sustained attention to GSA is that it does not rely on direct appropriated funds for much of its operations. The majority of GSA's operating funds are generated by charging agencies for goods and services. In fiscal year 1990, direct appropriations accounted for less than 4 percent of the total budget--about \$274 million of the \$8 billion total.

Section 2 of S.1958 is designed to improve legislative oversight. For this to be effective, the focus of periodic reauthorization considerations should be on defining and achieving a number of key agency-wide strategic goals and objectives, irrespective of how the activities involved are funded.

Title I

Title I of the bill would revise a number of statutory provisions governing civilian agency procurements to conform to recent changes in title 10 of the U.S. Code, which governs procurements by DOD and NASA. We favor consistency

in the administration of defense and non-defense procurements and support the provisions of Title I.

Title II - GSBCA

Title II of the bill would amend the provisions of the Brooks Act governing protests to the General Services Administration Board of Contract Appeals of automatic data processing equipment procurements. Many of the provisions of Title II would provide needed clarification of the authority that the Congress intends the Board to exercise, particularly with regard to dismissing protests brought in bad faith (section 205) and available relief (sections 203 and 206). Three sections of Title II are of particular relevance to the General Accounting Office.

Section 202 - "By or For"

Section 202 of the bill is intended to reverse U.S. West Communications Services, Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), in which the United States Court of Appeals for the Federal Circuit held that the GSBCA lacks jurisdiction to review protests by subcontractors challenging the awards of subcontracts by government prime contractors even though the procurements involve the acquisition for the government of ADP equipment as defined in the Brooks Act. The court held that in the absence of a clear showing of contrary congressional intent in the legislative history, the plain meaning of the Brooks Act limits the jurisdiction of the GSBCA to reviewing protests of acquisitions by Federal agencies. Section 202 would effectively expand the authority of the GSBCA to consider protests of contracts awarded on behalf of Federal agencies.

We support a clarification of GSBCA's protest authority and, indeed, recommend that a similar provision be adopted with respect to protests filed with GAO. The Court of Appeals did not directly rule on GAO's practice, which predates the Competition in Contracting Act of 1984 (CICA), of accepting protests involving awards of subcontracts issued by prime contractors "by or for the government." In order to avoid potential litigation and uncertainty, a similar provision addressing GAO's jurisdiction would be appropriate. We have provided your Committee proposed language to accomplish this.

Section 208 - Settlements

Section 208 of the bill would require that agreements to settle GSBCA protests be made public. The section also would provide for payment from the Judgment Fund of cost awards by the GSBCA as well as amounts due under settlement agreements. Agencies would be required to reimburse the

Fund out of their procurement budgets. The requirement for public disclosure and the provision requiring reimbursement of the Judgment Fund are consistent with the recommendations in our 1990 report, ADP BID PROTESTS: Better Disclosure and Accountability of Settlements Needed, GAO/GGD-90-13 (March 1990). We support these proposed changes.

Section 209 - Vendor protests

Section 209(b) would allow a potential subcontractor whose product did not comply with the specification in a solicitation falling under the Brooks Act to protest to the GSBCA.

Currently, protests that specifications are unnecessarily restrictive of competition are raised by prospective prime contractors who plan to include in their proposals particular items that the specifications exclude. In large system acquisitions, particularly integration contracts, there may be potential subcontractors that are not able either to persuade the agency to modify its specifications or to persuade potential offerors to protest specifications that unreasonably exclude the subcontractor's products. Section 209(b) would give those potential subcontractors an independent right to protest.

While an expanded protest right may be warranted in these cases, we are concerned about its application to all procurements under the Brooks Act, in view of the delay to procurements and resources needed by agencies and the Board to respond to additional protests adequately. This expansion could also lay the groundwork for arguments that subcontractors should be able to protest specifications in all procurements. The Committee may wish to consider limiting the provisions of Section 209(b) to a more narrow class of large system integration procurements in which it perceives a problem or including a "sunset" provision under which the right of subcontractors to protest would expire. This would allow the Congress to evaluate the impact of the new provision before adopting it as permanent legislation.

Title III - Debriefings and GAO Protests

Section 301 - Cost Awards

Section 301 would revise the provisions of the Competition in Contracting Act dealing with protest costs. Since enactment of CICA in 1984, the Comptroller General has been authorized to declare that a successful protester is entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees. Just about a year ago, the Department of Justice filed suit in federal district court challenging the constitutionality of this

authority. United States v. Instruments, S.A. Inc. and Fisions Instruments/VG Instruments, No. 91-1574 (D.D.C. filed June 26, 1991). That litigation is still pending.

Section 301 would resolve the issue the Justice Department has raised by making the Comptroller General's determination that a protester should be reimbursed its costs a recommendation to the federal agency. This would be consistent with GAO's responsibility to make recommendations for corrective action when it sustains a protest. Section 301 also would provide authority for courts to award as damages the costs of having protested to GAO when the court agrees that the agency prejudicially violated a procurement statute or regulation.

We are vigorously defending the constitutionality of the current statutory provisions. At the same time, we would welcome legislative resolution of this dispute. Section 301 fully addresses the Justice Department's concerns with the current statute, and we do not think that Section 301 would have any adverse effect upon our ability to provide meaningful relief to successful protesters. We expect that recommendations regarding protesters' costs would receive the same level of agency compliance as do our decisions on the merits of protests. Since enactment of CICA in 1984, GAO has reported to Congress only three occasions on which an agency has failed to comply with a protest recommendation.

Section 302 - Debriefings

Section 302 would require agencies to provide a requested debriefing to any disappointed offeror where a contract is awarded on a basis other than price alone. The section would establish the minimum information that must be disclosed. Failure to provide a requested debriefing or to satisfy the minimum informational requirement could be protested. If an agency reopens a procurement after award by requesting a new round of offers, this section would require that all offerors be given all of the information disclosed in any debriefing.

It is clear to us from having reviewed protests for many years that firms often are frustrated in their efforts to learn the basis for agency procurement decisions. When the agency does provide a comprehensive debriefing, it often comes too late for the firm to challenge apparent errors in the award.

We welcome this effort to improve the usefulness of debriefings through explicit statutory standards and requirements. We have some concerns about the proposed provision making debriefings an independent basis for

protest. Long delays would result from two sequential protests, the first about the debriefing and the second about contract award. This remedy may prove unnecessary with clear statutory standards for an adequate debriefing.

S.2619 - Multiple Award Schedule Program
Reform Act of 1992

The Committee is also considering S.2619. We support the three major changes in the award of multiple award schedule contracts contained in the bill. As requested by the Committee, our comments address the bill as amended by the draft language provided to us.

First, S.2619 would enact into law and clarify the price negotiation aims for schedule contracts. Currently, GSA policy is for negotiators to seek a price equal to that available to a firm's most favored comparable customer. The bill would establish that the goal for schedule contracts is the same as for all federal purchases, a "fair and reasonable" price. It would allow GSA to continue to seek the prospective contractor's price to its most favored customers, but would make clear that all of the relevant circumstances should be taken into account. These include the differences in terms and conditions between commercial customers and the government, such as volume of expected purchases, the number of ordering and delivery sites, and warranties.

Second, the bill seeks to prevent unwarranted information burdens on offerors by limiting the amount of commercial pricing information requested by GSA to the minimum amount necessary to obtain fair and reasonable prices.

Third, the bill would make available an appeal procedure to any firm dissatisfied with a GSA determination that it is not offering a fair and reasonable price.

We strongly share the goals of S.2619 to improve the multiple award schedule program. While we have not looked at the program comprehensively since 1979, at that time we found that GSA's ineffective management was costly, serious, and long-standing.

With respect to prices of schedule contracts, we reported to the Congress in 1977 that some multiple award schedule contractors were charging the government more for their products than they charged commercial customers who bought smaller or comparable quantities of those products. We found that if GSA had sought and obtained prices from five contractors comparable to those given other customers, the government would have saved about \$1.2 million on purchases

totalling \$11.2 million. Federal Supply Service Not Buying Goods at Lowest Possible Price (PSAD 77-69, March 4, 1977). In 1982, GSA adopted its current policy of seeking to obtain the prices offered most favored customers except where offerors show that because of different conditions and terms, offering the government their best price is not warranted.

In 1986, we revisited the issue at the request of this Committee. We sampled 20 contracts and found that the prices generally appeared fair and reasonable. In 19 of the 20 contracts GSA negotiators obtained at least most favored customer pricing or justified obtaining less favorable prices. We noted and discussed with GSA several actions that GSA could have taken to possibly obtain even better prices for schedule items. GSA Procurement: Are Prices Negotiated for Multiple Award Schedules Reasonable? (GAO/GGD-86-99 BR, July 8, 1986).

We have not collected any data or analyzed how successful GSA's negotiators have been in obtaining the best prices on multiple award schedule contracts since 1986. We are aware from some of our other recent work, however, that there is concern among some schedule contractors that the information required by GSA when negotiating a schedule contract is excessive. We also recognize that some schedule contractors believe that GSA negotiators do not take proper account of commercial marketing practices in setting their pricing objectives.

S.2619 would set forth statutory ground rules for negotiation of schedule contracts that all parties can understand and rely upon. The bill should also reduce unnecessary paperwork burdens by providing prospective contractors and agencies a standard for commercial pricing information to be provided.

We share the expectation that these changes will increase the number of participants in the schedule program, resulting in benefits from enhanced competition and the wider availability of products and services to agencies.

Mr. Chairman, this concludes my prepared statement. I will be pleased to respond to any questions you or other Members of the Committee might have.