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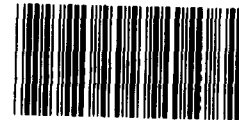
Testimony

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The Nuclear Regulatory Commission's Proposed
Withdrawal From Participation in the Small
Business Innovation Research Program

Statement of
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Before the
House Committee
on Small Business



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Mr. Chairman and Members of the Committee:

We are pleased to appear before you today in response to your February 25 request to discuss issues surrounding the Nuclear Regulatory Commission's proposed withdrawal from participation in the Small Business Innovation Research (SBIR) program. Due to the lack of time for thorough analysis of the complex issues raised, we are providing our preliminary views which are based on the information we have obtained in the last few days and our past reviews of the program.

BACKGROUND

In April 1986 NRC first wrote to SBA requesting procedures for withdrawing from the SBIR program. At that time, NRC estimated that its extramural research budget for fiscal year 1987 would be under \$100 million. On May 23, 1986, SBA responded to NRC by saying that withdrawal decisions would be made on a case-by-case basis and that the decision depended on a 3-year forecast of extramural research. Further exchanges took place between August and October 1986; in November 1986, NRC notified SBA that it would stay in the program because its FY 1987 budget would be over \$100 million--the threshold for mandatory participation set forth by the Small Business Innovation Development Act of 1982 (Public Law 97-219). However, on February 1, 1988, NRC notified SBA of its intention to withdraw from the SBIR program, on the basis that its fiscal year 1988 funding level for extramural research was estimated to be significantly below \$100 million. That, together with NRC's interpretation of the Competition in Contracting Act, has led to NRC's position that it is prevented from continuing its participation in the SBIR program and, in fact, from making any further SBIR expenditures--including any approval and funding of Phase II projects based on review of existing Phase I agreements.

SBA, on the other hand, questions whether NRC's extramural research spending is, in fact, under the \$100 million threshold and, even if it is, whether NRC can "unilaterally withdraw" from the program. SBA stated that its policy was that the decision to withdraw must be made on a case-by-case basis by SBA and the participating agency.

Because a complete withdrawal by NRC from SBIR may be in violation of the law and have serious effects on small businesses participating in the program, you requested our opinion on five questions.

NRC'S BUDGET

All the questions present legal issues, although your third question also asked us for factual information on the NRC budget. Turning to the budget first, you asked for the projected extramural R&D budget for NRC in fiscal years 1988 and 1989.

In its February 1988 budget submission to the Congress, NRC projects extramural research and development obligations of \$88.9 million for this fiscal year. While we did not have reason to question this estimate, I should point out that we did not have time to independently analyze it. The President's fiscal year 1989 budget request is for \$113.2 million in extramural research and development, but the NRC stated that there is considerable uncertainty as to whether it will reach \$100 million in future budgets.

LEGAL ISSUES

You also asked whether supplemental budgetary requests may be considered in determining whether an agency meets the requirement for SBIR program participation and for determining the amount of required SBIR funding. As we stated in our first report to the

Congress on the SBIR program,¹ SBIR funding is determined by actual obligations for extramural R&D. Therefore, any supplemental appropriations which are obligated would be part of the base on which the SBIR funding is calculated. However, according to an NRC official, it has not received a supplemental appropriation for extramural R&D in the last three years.

SBA AUTHORITY

You asked whether the authority to establish SBIR policy directives includes the authority to provide procedures for withdrawal from the SBIR program, based on a 3-year extramural R&D budget below the \$100 million floor.

Section 9 (j) of the Small Business Act, as added by the Small Business Innovation Development Act of 1982, states that SBA shall issue policy directives for the general conduct of SBIR programs within the federal government. Certain topics are required for inclusion in the directives. A withdrawal procedure is not one of them. However, the provisions do not exclude the issuance of a withdrawal procedure or any other directive relating to SBIR programs.

The Small Business Act does not itself provide withdrawal procedures for federal agencies that no longer meet the \$100 million threshold for mandatory participation in the SBIR program. Therefore, we think that the SBA may utilize its policy directive authority to establish orderly withdrawal procedures that are consistent with the purposes of the program. In so stating, however, we are not commenting on the merits of the particular procedure SBA has developed. Specifically, because of the limited time we have had to study this issue, we are unable to give an

¹Implementing the Small Business Innovation Development Act--The First 2 Years (GAO/RCED-86-13, Oct. 25, 1985).

opinion at this time, on whether the requirement for a 3-year budget trend below the \$100 million minimum, is reasonable.

CORRESPONDENCE AS POLICY DIRECTIVES

Another question concerned whether the correspondence sent by the SBA to NRC over the past two years constitutes policy directives and whether they are binding on NRC.

As previously stated, Section 9 (j) requires the issuance of policy directives "for the general conduct of the SBIR programs." Based on our limited review of this matter, we think that this language contemplates policy directives of general applicability consistent with the desire to establish SBIR programs "through a uniform process." It seems to us that correspondence about specific, individual circumstances does not constitute the formal policy directive provided for in Section 9 (j).

COMPETITION IN CONTRACTING

You also asked if an agency's extramural R&D budget falls below \$100 million in any given year, whether the Competition in Contracting Act of 1984 (CICA) prohibits the continuation of that agency's SBIR program on a voluntary basis.

The CICA, as amended, 41 U.S.C. 253 (b)(2), authorizes an executive agency to limit competition in the procurement of property or services to small businesses when it is "in furtherance" of SBIR programs. We think that additional awards to small businesses, which might be part of orderly termination procedures, might be regarded as furthering SBIR programs, and therefore in accord with CICA requirements. Voluntary continued

participation not part of a termination procedure might also be regarded as furthering the SBIR provisions of the Small Business Act, which does not mandate withdrawal from the SBIR program when yearly extramural R&D obligations fall below \$100 million. Further, the amendment to CICA which permits limiting competition for property or services to small business when an agency is participating in an SBIR program does not specify that the participation must be mandatory. As long as an agency is participating--regardless of the reason--it may limit the field of competition to small business.

NRC WITHDRAWAL

Finally, let me turn to the question that is at the heart of the dispute--on what basis a federal agency may unilaterally withdraw from the SBIR program. We are here precisely because there is no clear-cut answer to that question. Neither the authorizing legislation nor the SBA policy directives provide any explicit guidance for a situation in which an agency's extramural research budget drops below \$100 million in one year or for several years.

INTERIOR'S WITHDRAWAL

The only previous case of an agency withdrawing from the SBIR program was the Department of the Interior, which dropped out of the program as of fiscal year 1987. However, both the budgetary issues and the manner in which the case was handled, differ considerably from the present case of the Nuclear Regulatory Commission. In that case, Interior--even though confronted with a much more drastic budget reduction than NRC's--phased out its program in an orderly manner.

On April 29, 1985, Interior sent a letter to SBA listing its actual and projected extramural research obligations. The data showed that obligations in FY 1984 had already dropped to \$76.4 million. Interior estimated that its obligations for fiscal years 1985 and 1986 would further drop to \$71.7 and \$54.4, respectively. Interior continued in the program in 1984 and 1985. However, because of the declining budgets, Interior stated, "We plan, therefore, to discontinue the SBIR program as soon as our present commitments are satisfied." Interior sent a similar letter in March 1986, in which it formally notified SBA that it would not issue a solicitation in 1986. However, in FY 1986 Interior followed through on the program by providing Phase II funding to previous awardees.

SBA agreed with Interior's approach and sent a letter in reply stating that "it is clear that Interior's extramural research is no longer at a level to support a meaningful participation in the program."

Three points should be reiterated with regard to this case. First, Interior's obligations were lower and the budgetary trend was even further downward than the current NRC case. Secondly, SBA had not previously issued any guidance or directives in general or specifically to Interior regarding withdrawal from the program. Rather, in a brief letter SBA simply acceded to Interior's statement (not a request) that it was dropping out of the program. Finally, Interior went through a Phase I award cycle in FY 1985 even though it was already considerably below the \$100 million threshold and it followed through with those awardees by considering them for Phase II funding in 1986.

Because the case of Interior proceeded differently and apparently in the absence of explicit policy guidance from SBA, the

current case of NRC and future cases that may be on the horizon still raise management and policy issues regarding orderly procedures for an agency to withdraw from the program.

We believe SBA needs to develop a policy framework addressing the issue of withdrawal. This would seem particularly appropriate since there are presently at least two other agencies with R&D funding just over the \$100 million threshold for which similar questions might arise. It would seem that for the purposes of the program to be served, there should be an explicit process by which agencies would fulfill any existing commitments with small businesses by extending Phase II funding to worthy Phase I participants even during years when agency funding levels are estimated to fall below \$100 million.

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Thank you for this opportunity to present our preliminary analysis. We will be pleased to answer any questions.