UNITED STATES GENERAL ACCOUNTING OFFICE

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STATEMENT OF

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OF THE UNITED STATES

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

ON

GAO VIEWS ON H.R. 5184

Mr. Chairman and Members of the Committee:

We are pleased to be here today to comment on H.R. 5184, the Competition in Contracting Act of 1984. We generally support this legislation as containing many positive provisions for improving federal procurement, including GAO's bid protest function. There are a few areas in the bill, however, where we believe refinements would be useful. We would be glad to work with the Committee on these matters.

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MAGNITUDE OF THE PROBLEM

Federal contract awards totaled $168 billion in fiscal year 1983. Awards exceeding the small purchase ceiling totaled $152 billion.[1] Of this amount, only about a third, $54.7 billion, was categorized as competitive.

Most of the dollars that federal agencies obligated were for actions under existing contracts. New contract decisions are, therefore, especially significant because they tend to limit the government to use of the same contractor when contract modifications or additions are necessary.

MANY UNWARRANTED SOLE-SOURCE DECISIONS

Our Office has examined statistical samples of new, sole-source contracts above the small purchase ceiling awarded by the Department of Defense and six major civil agencies--the National Aeronautics and Space Administration; the Veterans Administration; and the Departments of Energy, Interior, Transportation, and Health and Human Services.

The reviews showed that the Department of Defense and these major civil agencies frequently did not base their contract awards on competition to the maximum extent practical, as required. We found that the Department of Defense should have

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[1]For fiscal year 1983 the small purchase ceiling was $25,000 for DOD and $10,000 for civil agencies. Currently, this ceiling is $25,000 government-wide.

competed 25 of 109 new, sole-source contracts we reviewed.[2] We estimated that DOD lost opportunities to obtain available competition on about $289 million in new fiscal year 1979 contract awards. The six civil agencies lost opportunities to obtain available competition on an estimated $148.5 million in new contract awards.[3] The dollar amounts for both defense and civil agencies represent initial contract obligations, which in some cases may be substantially increased through later contract modifications.

CAUSES OF MISSED OPPORTUNITIES TO OBTAIN COMPETITION

Why did agency officials fail to obtain competition on awards that could have been competitive? The major factors we identified included:

--Ineffective procurement planning or the failure of contracting officers to perform market research adequate to ensure that sole-source procurement was appropriate.

--Inappropriate reliance by procurement officials on the unsupported statements of agency program, technical, or higher-level officials.

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[2]DOD Loses Many Competitive Procurement Opportunities, dated July 29, 1981 (GAO/PLRD-81-45).

[3]Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting, dated April 7, 1982 (GAO/PLRD-82-40).

In addition, a general lack of commitment to competition on the part of key agency personnel was a major problem. There were also instances of overly restrictive specifications and failure to use available data packages.

H.R. 5184

H.R. 5184 proposes several important changes to address these and other problems and also provides a comprehensive statutory prescription for GAO as a bid protest forum.

To improve federal procurement, first, the bill would authorize noncompetitive procurements only under special and strictly limited circumstances. Based on our work, we have specifically recommended this type of requirement.

Second, the bill would require agencies to use advance procurement planning and market research. As previously mentioned, our reviews of defense and civil agency sole-source contracts identified ineffective procurement planning and inadequate market research as deficiencies needing correction.

Third, the bill would require the use of full and open competition, allowing all qualified sources to submit offers, but would permit the use of competitive practices that are "less rigorous than full and open competition" in several specific circumstances. This recognition of degrees of competition should increase its use and reduce the tendency toward sole-source awards in certain circumstances.

Fourth, the bill specifies the minimum information that must be included in written justifications for noncompetitive procurements. This includes the facts supporting use of the noncompetitive exception and, when appropriate, a description of the market survey conducted to locate competitive sources, or the reasons why one was not conducted, as well as the reasons for excluding any potential sources that expressed an interest in competing. In reviewing noncompetitive contract awards, we found that frequently the justifications did not include such information and reviewing officials did not have the information needed to establish the appropriateness of decisions to make awards on a sole-source basis. Competition was in fact available in a number of these instances.

Regarding GAO's bid protest function, the bill to a great extent reflects GAO's current protest procedures (4 C.F.R. part 21). There are, however, significant additions.

The bill would preclude an agency from either awarding a contract or continuing with contract performance when a protest is pending before GAO, unless the agency head or the agency's senior procurement executive determines that the vital interests of the United States will not permit awaiting GAO's decision. At present there is no requirement that contract performance be discontinued pending a protest. Although agency procurement regulations limit the authority of the contracting officer to make an award while a protest is pending, the contracting

officer is authorized to make an award in the face of a protest where he determines that the award would be advantageous to the government.

We think that limiting continuation of the government's business except where the vital interests of the United States are at stake may be too rigid a standard to apply realistically. We recognize the bill's purpose but are concerned that an unrealistic standard may ultimately result in necessary dilution of the standard through interpretive decisions. We would prefer a less rigid standard applied, perhaps, at the agency head level to assure proper consideration.

Second, the bill would require agencies to submit their report within 25 working days--and in some cases within 10 days--after receiving notice of a protest. It would further provide that if an agency report is not timely filed, GAO may consider the agency's failure to do so as an admission of the protester's contentions. GAO's current procedures state that agency reports should be submitted as expeditiously as possible within a set goal of 25 working days. A late report has no effect on the merits of the protest.

We would suggest it be made clear that the Comptroller General may grant extensions in situations where there are legitimate reasons making these time periods unreasonable.

Third, the bill would require agencies to provide protesting parties with all nonprivileged relevant documents. Existing procedures call for this information to be furnished.

In addition, the bill would provide that GAO may declare the entitlement of a successful protester to the costs of pursuing its protest as well as to its bid and proposal preparation costs. Under existing law, GAO may award bid and proposal preparation costs only.

These proposed changes to the existing protest system would clearly enhance GAO's ability to provide protesters with meaningful relief. Thus, the bill would help assure that procurements are awarded in accordance with the requirements of law. In keeping with the bill's enhancement of GAO as a protest forum we would want to expedite our processing of protest cases. After enactment we may find that we need to augment our staff to meet increased demands placed upon us in meeting the bill's underlying objectives.

We should point out that the bill's tightened competition requirements together with stricter protest requirements could cause delay in the government procurement programs and attendant increase in costs. Whether contracting agencies should be required to accept the resulting delays in their procurement programs and any increased costs is a matter we leave for the Congress to consider.

There are several other provisions in the bill which we think should be refined or changed. The bill would provide that interested parties may file protests with the General Services Administration Board of Contract Appeals concerning procurements made under section 111 of the Federal Property and Administrative Services Act of 1949. This would be in addition to a right to protest to our Office. Procurements under section 111 of the Act for automatic data processing equipment (ADPE) are, like all other procurements, subject to the provisions of this bill. Establishing additional protest jurisdiction in the Board could therefore result in inconsistent rulings from the Board and from GAO. While ADPE procurements are also subject to section 111 of the Federal Property and Administrative Services Act, they do not necessarily concern the technical aspects of the ADPE being purchased. Most often they concern the same procurement-related issues that affect all acquisitions. We see no reason to treat ADPE protests differently and recommend this provision be deleted.

In addition, circumstances authorizing the use of noncompetitive practices need to be better defined. Under the bill agencies would likely justify the need for noncompetitive follow-on contracts under section 202 (c)(1)(A) on the ground that the property or services required are available from only one source. The bill should specify the conditions under which such follow-on awards are appropriate.

Our specific suggestion relating to follow-on procurements as well as several additional suggestions intended to define and limit the important exception to the use of competition provided by section 202(c)(1)(A) are set forth in the attachment to this statement.

Section 202(c)(4) of the bill provides that "In no case shall an executive agency be authorized to engage in noncompetitive procurement on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions." Although we have found that agencies generally need to improve their advance procurement planning efforts, we believe that for at least some procurements this provision would be too costly and burdensome to the government. Therefore, we suggest the provision be revised to require instead a report to the Committee in each case where the lack of advance planning caused a noncompetitive procurement. The report should include the steps taken to avoid such problems in the future.

Also, the bill should provide that failure to obligate funds by reason of a pending protest shall not cause such funds to lapse if the protest is ultimately resolved in favor of the agency position.

Subsection (a) of section 204 of the bill states in part that protests concerning violations of this title shall be given priority consideration by GAO. We recommend that this provision

be modified to give GAO some discretion to determine how best to handle its case load.

Technical concerns we have regarding specific provisions of the bill are shown in the attachment. This concludes my prepared statement. I will be happy to address any questions you may have.

ATTACHMENT

ADDITIONAL SUGGESTIONS RELATING TO H.R. 5184

The Committee report should make clear that the use of noncompetitive practices under section 202(c)(1)(A) for follow-on contracts covers the avoidance of (1) unacceptable delays in accomplishing the agency's mission objectives or (2) substantial duplication of costs to the government for the property or service being procured, which cannot be expected to be recovered through competition.

The Committee report accompanying the bill should also include an explanation along the following lines to define several other important bases for single-source availability determinations under 202(c)(1)(A):

--The agency head determines that it is in the public interest to procure technical equipment or parts which require standardization and interchangeability where only one source can provide such standardization and interchangeability and it is neither practical nor economical to establish more than one source. Determinations under this paragraph shall not be made for the initial procurement of equipment and spare parts which ultimately will be standardized or for the purpose of arbitrarily selecting the equipment of certain suppliers.

--Data, such as drawings or other specifications, needed for competition are not available and there is no alternative way of obtaining competition, such as through redescribing requirements in terms of function or performance required. However, agencies are responsible for avoiding such noncompetitive situations by obtaining adequate data wherever feasible.

--There is existing equipment and only one source can satisfy the government's legitimate need for an item compatible with it. If other sources can modify or adjust their products to produce acceptable items, they must be given the opportunity to compete.

We also have some concerns about the wording of section 202(c)(5) relating to spare parts. We suggest that the words "in the parts or their manufacture" be deleted because a firm's proprietary interest would relate to the data needed by the government for competition rather than the parts themselves.

Section 202(j)(1)(D) provides that full and open competition means "the contract is entered into only after the executive agency has received, from qualified sources, a sufficient number of sealed bids or competitive proposals to ensure that the government's requirements are filled at the lowest possible price given the nature of the product or service being

acquired." This is a very strict standard and could necessitate repeated resolicitations to achieve full and open competition as defined. We suggest that the words "a fair and reasonable" be substituted for "the lowest possible" price.

In addition, as part of this same definition, subsection (j)(1)(A)(iii) states that each bid or proposal must be "fully evaluated" in the selection of a contract recipient. We are uncertain whether this term would needlessly add to agency administrative burdens and we suggest that the term "fairly evaluated" be used instead.

Section 203 of the bill does not exempt agencies from publishing a preaward notice in The Commerce Business Daily inviting bids or proposals under certain circumstances that we believe should be exempted. This includes section 202(c)(1)(C) and (D) under which noncompetitive practices would be authorized based on international agreements, procurements directed by foreign governments reimbursing the agency for their cost, and statutes requiring procurement from specified sources. Current law does not require publishing notices inviting competitive offers in these situations when noncompetitive awards are determined to be necessary (see Public Law 98-72).

This type of notice is primarily intended as a final check on the marketplace to identify potential competitors that have not yet been solicited either (1) in competitive situations or (2) when agency officials claim that a noncompetitive procurement is necessary because the property or service required

are available from only one source (section 202(c)(1)(A)). Publishing such notices in all other noncompetitive situations is burdensome and most likely not worthwhile. The Committee may also wish to consider exempting procurements made by an order placed under an existing contract, including orders for perishable subsistence supplies, as currently provided by Public Law 98-72.

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