Dear Chairman Horn:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am pleased to respond to your request for comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The views expressed herein are presented on behalf of the Section of Public Contract Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

General Comments on the Discussion Draft

The Section generally supports the overall goal of the draft legislation to provide broad and fair competition in the federal acquisition arena. During the past few years, there has been a marked increase in questions pertaining to privatization and outsourcing of activities performed by the Government. Two trends have emerged. The first reflects efforts to shrink the federal budget deficit and to limit the work of Government employees to performing only "inherently governmental functions". At the same time, there is a second trend of increasing instances of Government agencies acting in entrepreneurial fashion -- they have
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reorganized themselves to approximate corporate structures, and have exhibited interest in making commercial use of excess capacity by partnering with private industry and offering their services to other agencies.

Current procurement rules do not adequately address these two trends. OMB Circular A-76 commonly is viewed as being dispositive in conducting cost comparisons between private industry and the Government. However, it is not statutorily mandated, is not uniformly used by all agencies, and, despite recent revisions, has been criticized as being unrealistic in its costing assumptions. Yet, the Federal Acquisition Regulation (FAR) which is usually applied to procurements from the private sector by the Government, cannot meaningfully be applied when one of the bidders is the Government.

As a result, the Section believes it is appropriate for Congress and the Executive Branch to address the rules governing these two trends. Not doing so would leave resolution primarily to the litigation process or to ad hoc legislation, which are inferior ways of establishing policy on such important issues. The draft legislation is one way of moving toward that end.

At the same time, the Section recognizes that the bill attempts to codify guidelines in areas where there has not been uniformity, and to do so on highly controversial issues. The Section neither intends to comment on any unsettled policy issues raised by the bill nor to provide, at this point in time, an exhaustive review of the discussion draft's provisions. Nor do these comments intend to imply any endorsement of the public-private competition policy which underlies the bill. However, the Section does offer three general areas of comments pertinent to the procurement rules that will be affected by these policy issues.

Public-Private Competitions Should be Conducted on a Level Playing Field

First, to the extent that public-private competitions take place, there should be a level playing field when private industry and Government agencies compete. The selection process should be fair, open and unbiased to both public and private offerors.

It is generally accepted that greater competition for Government requirements results in lower prices, greater innovation, and best value for the Government buyer, and consequently, U.S. taxpayers. In order to encourage as many sources as possible to compete and to allow meaningful evaluation of those sources, the Federal procurement laws have traditionally sought to provide a level playing field to all competitors. When both private sources and Federal Government sources compete for Government requirements, such as under the public/private competition scenario contemplated under the discussion draft, providing a level playing field remains equally important, but more elusive.

The Section believes that the draft bill has appropriately made fairness and equal opportunity to compete key objectives. Specifically, section 102(b)(4) of the draft bill requires that Federal Government sources be evaluated on the basis of the same evaluation factors, including relevant technical and non-cost factors, on which offers of private sources are evaluated; section 102(b)(3)(A) subjects public/private competitions to the same set of procurement laws that apply to private/private competitions; and section 102(b)(3)(A) requires that all direct and indirect costs that are relevant to performance be reflected in the evaluation of offers by Federal Government sources.

Although the draft bill's objective of providing a level playing field is appropriate and necessary, there are serious issues concerning how Federal Government sources will be subjected to the same requirements as private sources and vice versa. For example, under section 102(b)(1) of the draft Bill, both private and Federal Government offerors would be subject to the same panoply of source selection and general procurement requirements that apply in traditional procurements. However, the exact import of this provision is not clear. For example, private offerors are required to comply with certain labor requirements, such as the Service Contract Act, 41 U.S.C. § 351, if applicable, whereas the Government is exempt. This distinction has been allowed by GAO in public-private competitions under OMB Circular A-76. Inter-Con Security Systems, Inc., Comp. Gen. Dec. B-243728, 94-2 CPD para. 187. Thus, the intent of this critical provision of the legislation needs to be fully understood and carefully crafted.

Another difficult issue concerns the manner in which Federal Government sources will be subject to the
requirement that offerors have their past performance evaluated. Past performance is an evaluation factor required by FAR 15.304, except where the contracting officer finds that past performance is not an appropriate evaluation factor in accordance with OFPP Policy Letter 92-5. Its application to federal agencies could tend to favor selection of Federal Government sources. Also, the draft bill contains no mechanism to prevent competing Federal Government sources from accessing sensitive information pertaining to private sources, such as past performance data. Unauthorized access to such "source selection" or "proprietary" information during an agency procurement is prohibited by law. Finally, treating the Government as a competitor denies the Government as buyer a number of "traditional" Government contract remedies, from damages to debarment.

On the other hand, there are many constraints and requirements that are uniquely imposed on Government agencies which are absent in the private sector. For example, Government agencies are required to follow the acquisition procedures of the FAR when contracting for supplies and services. Thus, presumably a federal agency participating in a public-private competition would have to "subcontract" for supplies and services using the FAR procedures whereas private concerns have considerably more flexibility at the subcontracting level. Similarly, government agencies are subject to special employment and purchasing obligations such as the Javits-Wagner-O'Day Act, 10 U.S.C. § 2461.

Another disparity is provided in the draft bill itself, at section 102(b)(3)(A)(ii), which appears to require the inclusion of excess capacity facility costs in the indirect cost pools of Federal Government sources. The Section appreciates the drafter's efforts to "level" the field by including these costs. However, we believe that any statute or regulation on the subject must address how Federal Government sources should account for the costs of maintaining idle capacity when those costs are being incurred for strategic or national defense purposes. Unlike private sources, Federal Government sources incur many costs for reasons other than economic ones and may not have the authority to simply sell or dispose of a facility to enhance their competitiveness. There is also a real concern about what costs are, and how these costs should be, allocated to an agency.

In sum, while it may be desirable to impose exactly the same requirements on public and private competitors, the inherent differences between public and private sources may cause unintended consequences. Any attempt to level the playing field must address these distinctions. A policy decision may be necessary to determine whether to attempt to equalize disparities or to accept the disparities and regulate or otherwise compensate for them.

The Government Should Fulfill Its Requirements Using the Most Cost Effective Source

Second, public-private competitions should be structured so as to allow the Government to identify and select the source that is the most cost effective, or best value, for the Government.

In a traditional competitive source selection, the Government evaluates cost and other technical factors among similarly situated private sector bidders to determine the most cost effective source. In public-private competitions, the comparisons of costs between industry bids and Government bids raises significant issues because of the fundamentally different accounting systems used by public and private entities. One issue, for example, is that the Government competitor would not be subject to the Cost Accounting Standards that currently apply to industry. Because Government agencies do not have in place activity based or cost-based accounting systems, meaningful cost comparisons with industry competitors is currently difficult if not impossible.

As the draft bill recognizes, the A-76 process does not work well in allowing true cost comparisons. At the same time, calculating the complete cost of a Government bid is a controversial subject, especially when it comes to calculations of overhead and G&A costs. Again, inherent differences in private and public operations need to be factored into the process. For example, the Government does not incur some costs that industry incurs -- such as, taxes and cost of capital -- and is not motivated (or allowed) to earn profits. However, the Government cannot avoid incurring certain costs, especially in the area of national security, or certain cost inefficiencies, which result from compliance with statutory or regulatory requirements. The draft bill should recognize these differences and address them.
A further issue relates to the terms of any resulting contract and whether the Government will be required to perform in accordance with its proposal. For example, a fundamental issue concerns how an agency is to be treated when it "overruns" a fixed price contract. Allowing the procuring agency to fund the overrun would create an uneven playing field, but not allowing this raises the question of whether, or how the agency could fund any overrun to continue performance. Whether or not fiscal law needs to be modified as part of this process is a question which requires additional study.

Finally, the draft does not define "private sector source" and thus is not clear as to whether agencies may contract with Government corporations, federally funded research and development centers, public-private partnerships, mixed ownership enterprises, etc.

There Should Be Oversight of the Public-Private Competition Process

Third, the bill should ensure adequate oversight of determinations as to whether an activity is commercial, and as to whether a contractor or Government agency should be awarded the work. Appropriate oversight of source selection decisions is another basic element of federal procurement law. As to contract award disputes, the draft bill presumably would allow a Government agency to pursue the bid protest process, in the event it was not awarded the work. Because this is such a basic change, this should be made explicit if that is the bill's intent. Going a step further, however, the bill would have to resolve the question of whether a disappointed agency bidder could pursue its dispute in the Court of Federal Claims and who would represent the disappointed agency bidder in that forum. This is not clear from the language of the proposed bill, but should be.

The draft bill's procedure -- whereby a protest first must be decided by GAO before the case could proceed to the Court of Federal Claims -- should be examined. This is a departure from the current protest procedure for which there is no clear rationale. Another element of the bill's procedure -- the elimination of the GAO stay provision -- also should be closely examined because this, too, is a departure from existing rules without clear rationale.

Although the bill explicitly addresses the issue of oversight reviews in the contract award setting, it is not explicit as to the agency decision on whether an activity is commercial or not. While the bill provides for an administrative review within the agency, it is silent as to whether further review outside the agency is permitted. The language of the bill implies that it does not intend to provide judicial review of an agency's determination of whether an activity is commercial or not. Because courts have taken differing views about this issue, the Section recommends that the bill be explicit as to whether it permits or prohibits judicial review.

Clarification re Legislative Construction

Finally, the draft bill notes, at section 302, that its provisions are in addition and "paramount" to any other law. The Section notes that there are a number of existing statutory provisions that may be inconsistent with the draft bill. Thus, the Section suggests that the Subcommittee consider proposing the revision of Chapter 146 of Title 10 of the U.S. Code or revising the draft bill, if necessary, to ensure that no conflict exists between Chapter 146 and the intent behind the draft bill. For example, revision may be needed to 10 U.S.C. § 2462, which requires the Department of Defense to procure supplies or services from a private source if such a source can provide the supply or service at a cost lower than the cost at which the Department can provide. It is our understanding of the draft bill that competitions based on a "best value" standard would be permitted.

Also, section 2469a of Title 10, which describes competitive procedures in contracting for performance of depot-level maintenance and repair workloads formerly performed at certain military installations, should be reviewed to determine if any revisions are needed for consistency with the draft bill. In this regard, we note that section 2469(d) requires the inclusion of certain costs in certain public/private depot-level maintenance competitions which may or may not be supportive of the Subcommittee's objective of achieving a level playing field.
Further, the Section suggests that the Subcommittee state its intent regarding the applicability of acquisition procedures under FAR Part 12, which pertain to commercial item acquisitions, to situations in which a Federal Government source participates in a procurement. When a procurement is one for "commercial items," FAR Part 12 offers a streamlined procurement approach that is intended to attract a greater number of commercial firms to the Government market through the use of terms and conditions in procurement solicitations that are more consistent with customary commercial practice.

We note, however, that, absent Congressional guidance, FAR Part 12 may not be available when a Federal Government source is a procurement participant. For example, 41 U.S.C. § 403 defines "commercial item" as it relates to services to include installation services, maintenance services, repair services, training services, and certain other services where such services are offered by the source to the general public. Because a Federal Government source does not generally offer the types of services at issue to the general public, it does not appear that a Federal Government source could participate in a FAR Part 12 commercial item competition. We suggest that the draft bill be clarified concerning its effect on FAR Part 12 commercial item acquisitions.

Conclusion

In sum, the Section considers the bill to be timely, and to have addressed some key issues involving competition for commercial activities. However, many unresolved issues remain, some of which we have discussed in this letter. Resolving these issues inevitably will require Congress to make a number of difficult policy decisions -- most notably in resolving the difficulties involved in establishing a level playing field, while recognizing the inherently governmental nature of some activities. We would be pleased to offer further comments, as you continue your policy making process.

Thank you for the opportunity to provide comments.

Sincerely,

Marcia G. Madsen
Chair
Section of Public Contract Law

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