Audit Report

OFFICE OF THE INSPECTOR GENERAL

THE USE OF SMALL BUSINESS ADMINISTRATION SECTION 8(a) CONTRACTORS IN AUTOMATIC DATA PROCESSING ACQUISITIONS

Report Number 93-024 November 25, 1992

Department of Defense

The following acronyms are used in this report.

ADP.....Automatic Data Processing
CFR.....Code of Federal Regulations
CICA.....Competition in Contracting Act
DFARS.....Defense Federal Acquisition Regulation Supplement
DISA.....Defense Information Systems Agency
DPA.....Delegation of Procurement Authority
FAR.....Federal Acquisition Regulation
FSC.....Federal Supply Classification
FIRMR.....Federal Information Resources Management Regulation
GAO.....General Accounting Office
GSA.....General Services Administration
ISSAA.....Information System Selection and Acquisition Agency
OMB.....Office of Management and Budget
SADBU.....Office of Small and Disadvantaged Business Utilization
SBA.....Small Business Administration
SIC.....Standard Industrial Classification
USC.....United States Code

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INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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November 25, 1992

MEMORANDUM FOR ASSISTANT SECRETARY OF THE NAVY (FINANCIAL MANAGEMENT)
DIRECTOR, DEFENSE INFORMATION SYSTEMS AGENCY
DIRECTOR, DEFENSE PROCUREMENT
DIRECTOR, OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION
INSPECTOR GENERAL, DEPARTMENT OF THE ARMY

SUBJECT: Audit Report on the Use of Small Business Administration Section 8(a) Contractors in Automatic Data Processing Acquisitions (Report No. 93-024)

This final report is provided for your information and use. It addresses matters concerning the use of Section 8(a) contractors in automatic data processing acquisitions within DoD. Comments on a draft of this report were considered in preparing the final report.

DoD Directive 7650.3 requires that all audit recommendations be resolved promptly. Therefore, we request that the Director of Defense Procurement; the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development and Acquisition); and the Assistant Secretary of the Navy (Research, Development and Acquisition), provide final comments on the unresolved recommendations by January 26, 1993. The "Status of Recommendations" section at the end of each finding lists unresolved recommendations and the specific requirements for your comments.

As required by DoD Directive 7650.3, the comments must indicate concurrence or nonconcurrence with the findings and each recommendation addressed to you. If you concur, describe the corrective actions taken or planned, the completion dates for actions already taken, and the estimated dates for completion of planned actions. If you nonconcur, please state your specific reasons for each nonconcurrence. If appropriate, you may propose alternative methods for accomplishing desired improvements.

We did not quantify any monetary benefits; Appendix D lists other potential benefits of our audit. Recommendations are subject to resolution in accordance with DoD Directive 7650.3 in the event of nonconcurrence or failure to comment.

The courtesies extended to the audit staff are appreciated. If you have any questions about this audit, please contact Mr. F. Jay Lane, Program Director, at (703) 693-0430 (DSN 223-0430), or Mr. Kent E. Shaw, Project Manager, at (703) 693-0440 (DSN 223-0440). The planned distribution of this report is listed in Appendix F.

Ed Jones

Edward R. Jones
Deputy Assistant Inspector General
for Auditing

Enclosure

cc:
Secretary of the Army
Secretary of the Navy
Director, Defense Acquisition Regulations Council

Office of the Inspector General, DoD

AUDIT REPORT NO. 93-024 **November 25, 1992**
(Project No. 1FE-1003)

THE USE OF SMALL BUSINESS ADMINISTRATION SECTION 8(a) CONTRACTORS IN AUTOMATIC DATA PROCESSING ACQUISITIONS

EXECUTIVE SUMMARY

Introduction. The Small Business Administration's (SBA's) Section 8(a) (Section 8[a] of the Small Business Act) Program was established to encourage firms owned and controlled by socially and economically disadvantaged individuals to participate in Government acquisitions. During FY 1991, DoD made procurements totaling $2.1 billion through the Section 8(a) Program. The Business Opportunity Development Reform Act of 1988 (the Reform Act) (Public Law 100-656) amended the Small Business Act to encourage competition among Section 8(a) firms when there is a reasonable expectation of at least two Section 8(a) bidders and where the anticipated award is $5 million for manufacturing firms or $3 million for all other acquisitions. The Walsh-Healey Act requires that automatic data processing (ADP) equipment be purchased from manufacturers or regular dealers of the equipment to prevent the use of brokers. In addition, a delegation of procurement authority (DPA) must be obtained from the General Services Administration (GSA) if the acquisition exceeds the threshold established in the Federal Information Resources Management Regulation (FIRMR).

Objectives. The overall objective of the audit was to determine whether DoD Components used small businesses that qualify as minority firms under Section 8(a) of the Small Business Act solely to bypass requirements for full and open competition when acquiring ADP equipment. We also determined whether firms that procure ADP equipment for the Government were complying with the provisions of the Walsh-Healey Act that prohibit brokers from selling items to the Government. The audit also determined whether DoD Components were in compliance with the Brooks Act, which requires a DPA if the contract value exceeds the thresholds established in the FIRMR. The adequacy of internal controls applicable to the audit objectives was also reviewed.

Audit Results. The audit determined that DoD Components were not following specific guidance for the effective use of the Section 8(a) Program.

o The Navy was not taking full advantage of the opportunity to compete (offer for competitive bids) ADP acquisitions under the Reform Act. We identified six Navy Section 8(a) contracts that had exceeded competition thresholds but were sole-source acquisitions. Five of the six contracts were not competed because of a loophole in the regulations **(Finding A)**.

o Contractors who qualified for the Section 8(a) Program were not adequately screened to make sure the firms were manufacturers or regular dealers of ADP equipment. At least 26 percent of the Section 8(a) contractors reviewed were acting as brokers when providing ADP equipment to DoD, in violation of the Walsh-Healey Act and the Competition in Contracting Act. Based on this audit and prior audits, we believe that the use of Section 8(a) contractors as brokers in ADP acquisitions is common throughout DoD **(Finding B)**.

o Army procurement activities were not obtaining the required DPAs from GSA before acquiring ADP equipment. The activities were in violation of the Brooks Act, which can result in GSA reducing or terminating an agency's authority to procure ADP resources **(Finding C)**.

Internal Controls. The audit identified material internal control weaknesses as defined by Public Law 97-255, Office of Management and Budget Circular A-123, and DoD Directive 5010.38. Controls did not ensure that Section 8(a) contractors were complying with the Walsh-Healey Act because procuring officers did not perform the required compliance reviews **(Finding B)**. Controls also did not ensure that Army procurement activities obtained the required DPAs from GSA before acquiring certain computer-related resources **(Finding C)**. See Part I of the report for a description of the controls assessed.

Potential Benefits of Audit. We did not quantify any monetary benefits; other benefits are described in Appendix D.

Summary of Recommendations. We recommended that the Army, the Navy, and the Defense Information Systems Agency (DISA) require their Competition Advocates to review contract actions that would result in a contract that exceeds the competition thresholds under the Reform Act. We also recommended that DoD officials seek changes in SBA regulations that discourage competition under the Reform Act, and that the Defense Federal Acquisition Regulation Supplement (DFARS) be changed to require that contracting officers justify why proposed procurements cannot be competed under the Reform Act. In addition, we recommended that the Army and the Navy require Competition Advocates to review specifications for computer acquisitions to ensure that the specifications are not restrictive. We recommended that the Army and Navy require procuring activities to perform the required

reviews of contractors' compliance with the Walsh-Healey Act, and that the Army obtain a DPA from GSA.

Management Comments. The Army nonconcurred with Recommendations A.1., A.2., and B.2. The Army concurred with Recommendations B.1., C.1., and C.2. The Army partially concurred with Recommendation A.5. The Navy generally concurred with Recommendations A.1., A.5., B.1., and B.2. The Navy partially concurred with Recommendation A.2. The Director of Defense Procurement nonconcurred with Recommendation A.4., and DISA nonconcurred with Recommendation A.3. We request that the Director of Defense Procurement; the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development and Acquisition); the Assistant Secretary of the Navy (Research, Development and Acquisition); and the Director, Defense Information Systems Agency, reconsider their initial comments to the draft report and provide comments on the final report by January 24, 1993.

Audit Comments. As a result of comments on our draft report, we revised Finding A, deleted Recommendation A.1. from the final report, and redirected Recommendation C.1.

TABLE OF CONTENTS

This report was prepared by the Financial Management Directorate, Office of the Assistant Inspector General for Auditing, DoD. Copies of the report can be obtained from the Secondary Reports Distribution Unit, Audit Planning and Technical Support Directorate, (703) 614-6303 (DSN 224-6303).

PART I - INTRODUCTION

Background

Section 8(a) of the Small Business Act of 1953 (Section 8[a] Program), 15 United States Code (USC) 637(a), provides the statutory basis for the Small Business Administration's (SBA's) Minority Small Business and Capital Ownership Development Program. The purpose of the Section 8(a) Program is to foster business ownership by socially and economically disadvantaged individuals and to promote the competitive viability of such firms by providing contract, financial, technical, and managerial assistance as necessary. The Section 8(a) Program is predicated on a congressional finding that, to obtain social and economic equality and to improve the functioning of the economy, special attention should be given to the development of small businesses owned by disadvantaged individuals.

To be admitted to the Section 8(a) Program, a firm must be:

- a small business concern located in the United States;
- at least 51-percent owned and operated by socially and economically disadvantaged individuals; and
- have a reasonable prospect for success in the private sector.

A concern is a small business if it does not exceed established size standards for its industry. The size standards are defined either as a maximum number of employees or a maximum monetary average of annual receipts for the firm's preceding 3 fiscal years. These size standards are defined in 13 Code of Federal Regulations (CFR) 121 and Federal Acquisition Regulation (FAR) 19.102.

Public Law 99-661, section 1207, as amended, entitled, "Defense Authorization Act," established a DoD contracting goal of 5 percent of total procurements for each fiscal year 1987 through 1993 for minority small businesses. However, the DoD and SBA have negotiated a goal of 2.5 percent or $2.8 billion in total procurements through the Section 8(a) Program. DoD's actual total for all prime contract awards for FY 1991 was $125.9 billion. During FY 1991, the DoD made procurements totaling $2.1 billion (1.7 percent) through the Section 8(a) Program and $2.3 billion (1.8 percent) for small and disadvantaged businesses not in the Section 8(a) Program.

As of October 1, 1989, the Business Opportunity Development Reform Act (Reform Act) of 1988 (Public Law 100-656), as

implemented by FAR 19.805, required that solicitations intended for the Section 8(a) Program with an anticipated award price of over $3 million (over $5 million for procurements from manufacturing firms) are to be awarded on the basis of competition among eligible Section 8(a) participants. One of the purposes of the Reform Act was to ensure that businesses graduating from the Section 8(a) Program would be better prepared to compete in the nation's economic mainstream. The Senate Committee on Small Business was concerned that too few Section 8(a) graduates had been prepared to successfully compete in the open marketplace on competitive procurements and that many firms had developed an unhealthy dependency on sole-source contracts upon graduating from the Section 8(a) Program.

Objectives

The objectives of the audit were to:

o determine whether DoD Components are using small businesses that qualify as minority firms under Section 8(a) of the Small Business Act solely to bypass requirements for full and open competition when acquiring automatic data processing (ADP) equipment;

o determine whether firms that procure ADP equipment for the Government are complying with the provisions of the Walsh-Healey Act, which prohibits brokers from selling items to the Government;

o determine whether DoD Components were in compliance with the Brooks Act, which requires delegation of procurement authority if the contract value exceeds the thresholds established in the Federal Information Resources Management Regulation (FIRMR); and

o determine whether internal controls to prevent such misuse are adequate.

Scope

The 87 contracts that we audited were randomly selected from a data base of Individual Contracting Action Reports (DD Forms 350). The 87 contracts included 39 contracts for the purchase of computer equipment and commercial software. The remaining 48 contracts were for computer-related services, such as software development, installation of local area networks, and computer facilities management. The 87 contracts had total expenditures of $176 million at the time of our audit. Because the contracts were selected randomly, not all of the Defense activities included in our audit universe were audited. Those activities that were reviewed included the Army (44 contracts), the Navy (38 contracts), the Air Force (2 contracts), and the Defense Information Services Agency (3 contracts). DD Forms 350 are made by Defense contracting officers for transactions over

$25,000. Sample selections were limited to FY 1989 and FY 1990 contract actions involving the purchase of either ADP equipment or ADP-related services from vendors included in the Section 8(a) Program. A more detailed description of our sampling plan is provided in Appendix A. A list of the contracts reviewed during the audit is provided in Appendix B.

This program audit was performed from June 1991 through January 1992. The audit was made in accordance with auditing standards issued by the Comptroller General of the United States as implemented by the Inspector General, DoD, and accordingly included such tests of internal controls as were considered necessary. The activities we visited or contacted are listed in Appendix E.

Internal Controls

Controls assessed. We reviewed policies and procedures for compliance with the Walsh-Healey Act, the Brooks Act, the FIRMR, and the FAR, as they pertain to the acquisition of ADP resources under the Section 8(a) Program. The Federal Managers' Financial Integrity Act of 1982 and the Office of Management and Budget Circular A-123 require each Federal agency to establish a program to identify significant internal control weaknesses. Our audit showed that the Defense Information Systems Agency had established such a program and had performed the required reviews.

Internal control weaknesses. The audit identified material internal control weaknesses as defined by Public Law 97-255, Office of Management and Budget (OMB) Circular A-123, and DoD Directive 5010.38. The internal control weaknesses included noncompliance with the Walsh-Healey Act requirement that Government supplies be obtained from either regular dealers or manufacturers, and noncompliance with the General Services Administration (GSA) requirement for a delegation of procurement authority for an acquisition of ADP equipment that exceeds established thresholds. Recommendations B.1., B.2., and C.1., if implemented, will help to correct these weaknesses. A copy of the final report will be provided to the senior official responsible for internal controls within the Department of Defense and Departments of the Army and the Navy.

Monetary Benefits

This audit did not identify any quantifiable monetary benefits; however, other benefits are described in Appendix D.

Prior Audits and Other Reviews

The OIG, DoD, has performed three audits pertaining to the use of Section 8(a) contractors in the acquisition of ADP equipment. Two of the audits stemmed from allegations from six computer

vendors that two Section 8(a) contractors had been used to circumvent competition for ADP equipment.

The "Audit of the Naval Military Personnel Command Planned Procurement of Automated Data Processing Equipment," Report No. 90-019, December 15, 1989, and the "Audit of the Navy Regional Data Automation Center, Washington, D.C., Procurement of Automatic Data Processing Equipment," Report No. 90-103, August 24, 1990, involved acquisition of ADP equipment through contractors qualified under the Section 8(a) Program. For both audits, we concluded that the contractors had been used as brokers in violation of the Walsh-Healey Act and that specifications used in the acquisition were biased or restrictive. The Navy generally agreed with the recommendations in the reports and has taken appropriate corrective actions on the two procurements that were reviewed. During the current audit, we did not follow up on either prior report because actions taken by the Navy on the two procurements had been responsive, and a follow-up review by the Assistant Inspector General for Analysis and Follow-up on Report No. 90-019 had been favorable.

The on-going "Audit on Contract Award Protest of a Small Business 8(a) Contract," Project No. 2CD-8010, resulted from a Hotline complaint that the Army Information System Selection and Acquisition Agency (ISSAA) did not comply with the requirements of the Walsh-Healey Act in its attempt to execute a sole-source procurement for up to 6 mainframe computers, valued at about $64.5 million, from a Section 8(a) contractor. The minimum order value under the solicitation was $2.6 million. A draft report was issued on October 13, 1992.

On January 31, 1992, the General Accounting Office (GAO) published a report titled "Problems in Restructuring SBA's Minority Business Development Program," (Report No. GAO/RCED-92-68). The report concluded that the Small Business Administration has had difficulty in implementing many of the changes mandated by the Reform Act. The GAO found that of approximately 8,300 Section 8(a) contracts (totaling about $3 billion) awarded in FYs 1990 and 1991, only 67 (totaling $136 million) were awarded competitively. The GAO was not able to identify how many of the contracts met the Reform Act's requirements for competition. The GAO recommended that the SBA improve its management information systems, enforce requirements that Section 8(a) firms provide the required business plans to the SBA, and improve management of its financial assistance program and its management and technical assistance program. On March 4, 1992, the GAO testified on the audit (Testimony Report No. GAO/T-RCED-92-35) before the House Committee on Small Business. During that testimony, the GAO reiterated its concerns expressed in the report.

PART II - FINDINGS AND RECOMMENDATIONS

A. COMPETITION

Army and Navy procurement activities were not competing large Section 8(a) procurements under the Business Opportunity Development Reform Act of 1988 (Reform Act). The Reform Act, as implemented by FAR 19.805, requires that contracts with anticipated award prices over $3 million ($5 million for manufacturing-related acquisitions) be competed among eligible Section 8(a) firms. Of 87 contracts in our sample, 6 had total values exceeding the dollar thresholds but were not competed. Contracting officers for 5 of the 6 contracts used a loophole in the SBA regulations implementing the Reform Act to avoid competition, and the contracting officer for one contract used an estimate of anticipated contract value that was below competition thresholds. Additionally, specifications were unnecessarily restrictive for 16 of 39 contracts involving ADP hardware and software. Further, competition under the Reform Act has not been promoted by the DoD. As a result, the Government paid more than necessary for goods and services.

DISCUSSION OF DETAILS

Background

The Competition in Contracting Act of 1984 (CICA), Public Law 98-369, generally provides that full and open competition should be used when soliciting offers and awarding Government contracts. The goal of the CICA is for the Government to acquire goods and services from responsible bidders at the least total cost to the Government. Contracting through the Section 8(a) Program is one of the statutory exceptions to the rule requiring full and open competition. Appendix C compares a procurement under full and open competition to a procurement made through the Section 8(a) Program. The differences apply to all Section 8(a) awards except those affected by the Reform Act.

Under the Reform Act, passed by Congress and implemented by FAR 19.805, large acquisitions accepted into the Section 8(a) Program after October 1, 1989, should be competitively awarded to eligible program participants. The Reform Act requires that there be a reasonable expectation that at least two eligible Section 8(a) program participants will submit offers, that the award can be made at a fair market price, and that anticipated award price of the contract (including options) will exceed $5 million for procurements from manufacturing firms and $3 million for all other procurements. If a contract is an indefinite delivery-, indefinite quantity-type contract, the contracting officer (under 13 CFR 124.311) should use the minimum guaranteed value, including all option years, specified in the solicitation to determine whether competition is required.

Competitive Procedures in the Army and Navy

Competition. When awarding contracts with actual values above the thresholds requiring competition, Navy procuring activities did not use competitive procedures. A loophole in the SBA regulation allowed procuring activities to circumvent competition. We reviewed 87 randomly selected contracts with a total value of about $176 million (Appendix B). The following six contracts exceeded the thresholds established for competition, yet they were not competitively awarded. Procuring activities for five of the six contracts used the loophole in the regulations to bypass competition.

Navy Contracts Subject to the Reform Act But Awarded Noncompetitively

Contract Number	Effective Date of Contract	Guaranteed Minimum Value	Total Value of Contract Actions to Date
N0060089D0435*	January 1, 1990	$ 258,644	$ 8,189,406
N0060090D3334*	July 30, 1990	173,987	4,687,743
N00014900D106*	May 1, 1990	75,000	4,050,597
N0060090D0684*	March 15, 1990	168,835	3,536,926
N0001490D0097*	May 1, 1990	125,000	3,078,299
N0014090C0952	May 23, 1990	None**	3,036,461
Total			$26,579,432

* Indefinite delivery-, indefinite quantity-type contract.
** Anticipated award price was $2,200,000.

On all six contracts, the guaranteed minimum values and anticipated award prices were significantly below the actual values of the contracts. The guaranteed minimum value is equal to the funds needed to pay for the minimum quantity of supplies or services specified in the contract (FAR 16.504). The anticipated award price is the contracting officer's best estimate of the award price of the contract.

Loophole in regulations. The Reform Act requires the contracting officer to use the anticipated award price when determining whether competition is required. However, for indefinite quantity, indefinite delivery contracts, the SBA has developed 13 CFR 124.311(a)(2), which we believe created a loophole for circumventing the Reform Act. 13 CFR 124.311 states:

> (a) Competitive thresholds. A contract opportunity offered to the 8(a) program for award shall be awarded

> on the basis of a competition restricted to eligible Program Participants if:
>
> (1) There is a reasonable expectation that at least two eligible program participants will submit offers and that award can be made at a fair market price; and
>
> (2) The anticipated award price of the contract, including options, will exceed $5,000,000 for contracts assigned manufacturing Standard Industrial Classification (SIC) codes and $3,000,000 for all other contracts. For all purposes of indefinite quantity/delivery contracts, the thresholds will be applied to the guaranteed minimum value of the contract. [Emphasis Added]

Additionally, the SBA regulation includes an example showing that if the anticipated award price is below the competitive threshold but the contract price exceeds the threshold after negotiations, then a sole-source award will be valid.

Neither the Reform Act nor the FAR contains this special provision for indefinite delivery, indefinite quantity contracts. The five indefinite delivery, indefinite quantity contracts that were subject to the Reform Act but awarded noncompetitively show how this loophole can be used to circumvent the competition requirement. The contracting officers responsible for the five contracts told us that they were aware of the SBA Regulation and that because the guaranteed minimum values were below $3 million, they had not competed the contracts. However, the contracting officers should have taken the initiative to identify a potential opportunity for competition to their commands and to request permission from the SBA to compete the contracts. Furthermore, the DoD should request a change in the SBA regulation to eliminate the loophole.

Potential for competition. There is a strong potential for competitive procurements for ADP equipment and services within the small business and Section 8(a) Program arena. For example, we analyzed an Air Force solicitation in the Commerce Business Daily for hardware, software, and services related to a local area network. The response to the solicitation was overwhelming. Of the 195 contractors that responded to the announcement, 89 stated they were small business concerns, 24 stated they were qualified as Section 8(a) Program concerns, 16 stated they were female-owned, and 25 stated they were minority-owned companies but did not indicate Section 8(a) Program status.

We estimated that only 38 percent of eligible Defense contracts had been competed under the Reform Act. The SBA indicated that a total of 81 DoD Section 8(a) contracts had been competed since the Reform Act took effect. In addition to the 6 Navy contracts that were not competed, 121 eligible Section 8(a) contracts (with contract actions exceeding $780 million) had not been competed.

We identified the 121 eligible contracts through inquiries into the data base of Individual Contracting Action Reports (DD Forms 350). We derived the 38-percent estimate by dividing the 81 competed contracts by the 208 (81 + 121 + 6) total contracts. Overall, we believe that DoD is not taking advantage of the potential cost savings inherent in competition. Inspector General, DoD, Audit Report No. 85-113, "Defense Logistics Agency Contracts for Data Processing Equipment and Services," September 5, 1985, showed that competitive acquisitions can result in cost savings of as much as 42 percent compared to sole-source acquisitions.

Specifications. Of the 87 randomly selected contracts reviewed, 39 involved the acquisition of commercial hardware or software. We found that 16 of the 39 ADP solicitations were unnecessarily restrictive. Before April 29, 1991, FIRMR 201-30.013, 1984 edition, permitted five types of specifications to be used for acquisitions of ADP equipment. The following list shows the types of specifications available starting with the least restrictive type:

- functional ADP specifications;
- equipment-performance specifications;
- software and equipment "plug-to-plug" compatible functionally equivalent specifications;
- brand name or equal specifications; and
- specific make and model specification.

Functional ADP specifications were to be used whenever possible. When functional specifications could not be used, contracting officers were to select one of the other specifications in the above order of precedence.

Of the 39 contracts for ADP supplies, 5 contracts used specific make and model specifications, and 11 used brand name or equal specifications. The type of specification used is shown in the chart below.

Specifications Used For Contracts For ADP Supplies

Type of Specification Used	Number of Contracts
Functional	18
Equipment Performance	0
Plug-to-Plug Compatible	0
Brand Name or Equal	11
Specific Make and Model	5
No Specifications Found	5
Total Contracts	39

Agencies are encouraged to use the lowest specification applicable to encourage as much competition as possible. One of the first four specifications must be used in order for the award to be considered competitive. Additionally, FAR 10.002(a)(3) requires agencies to use restrictive specifications only to the extent necessary to satisfy an agency's minimum needs. A contract that specifies a particular make and model specification is considered a sole-source contract, and FAR 6.303 and 6.304 require that formal justifications be given and that approval authority be obtained. We did not find such justifications or approvals for four of the five contracts with specifications restricting the ADP supplies to a specific make and model. Additionally, the procuring activity's Competition Advocate had not reviewed the contracts to challenge the restriction on competition. We did not find any specifications for five of the contracts.

The requirement for Defense agencies to appoint Competition Advocates was established by the CICA. The Competition Advocate is required by FAR 6.502 to challenge barriers to and promote full and open competition by identifying competitive opportunities in an agency's acquisition of supplies and services. However, our audit showed that the Competition Advocates rarely reviewed Section 8(a) contracts, because Section 8(a) procurements are an authorized exception (FAR 6.302-5[4]) to full and open competition. Nevertheless, we believe that the Competition Advocate's responsibilities should include identification of opportunities to compete under the Reform Act, as well as identification of restrictive specifications for noncompetitive acquisitions under the Section 8(a) Program.

RECOMMENDATIONS FOR CORRECTIVE ACTION

1. In the draft report, this recommendation recommended that the acquisition executives for the Army, Navy, and DISA require their Competition Advocates to review 10 of the sampled contracts to determine whether the current contracts should be terminated and the requirements should be competed under the Business Opportunity Development Reform Act of 1988. This recommendation has been deleted from the final report; see below for Management Comments and Audit Response to the Recommendations.

2. We recommend that the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development and Acquisition); and the Navy Acquisition Executive, Office of the Assistant Secretary of Navy (Research, Development and Acquisition), require their respective Competition Advocates to approve all future Section 8(a) Program contract actions for noncompeted contracts that would result in a total contract value above the dollar thresholds specified in Federal Acquisition Regulation 19.805-1(a).

3. We recommend that the Director, Office of Small and Disadvantaged Business Utilization, request that the Small Business Administration regulatory language in the Code of Federal Regulations, title 13, section 124.311(a)(2), be changed from "the guaranteed minimum value of the contract" to "the estimated total lifetime value of the contract."

4. We recommend that the Director of Defense Procurement, Office of the Under Secretary of Defense for Acquisition, direct the Defense Acquisition Regulations Council to change the Defense Federal Acquisition Regulation Supplement, Section 219.8, to require that contracting officers justify in the "Agency Offering," as defined in Federal Acquisition Regulation 19.804-2, why a proposed procurement that exceeds the dollar thresholds cannot be competed under the Business Opportunity Development Reform Act of 1988.

5. We recommend that the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development and Acquisition); and the Navy Acquisition Executive, Office of the Assistant Secretary of Navy (Research, Development and Acquisition), require their respective Competition Advocates to review specifications for computer acquisitions through the Section 8(a) Program to ensure that the specifications are not overly restrictive.

MANAGEMENT COMMENTS AND AUDIT RESPONSE TO THE FINDING

Office of Small and Disadvantaged Business Utilization (SADBU) comments. The SADBU made several comments and suggested changes to our draft report. The SADBU stated that the Background, Part I - Introduction, describing the Section 8(a) Program, should state that an 8(a) firm must be "51 percent owned and controlled by socially and economically disadvantaged individuals." The SADBU said that our "Background" section in "Part I - Introduction" needs to more accurately state that $23 billion was awarded to small and disadvantaged businesses outside the Section 8(a) Program. The SADBU stated that much of the $23 billion was probably awarded to 8(a) firms. The SADBU stated that our "Scope" section in "Part I - Introduction" implies that the audit covers not only Section 8(a) firms, but all small businesses (i.e., small business set-asides), and that the "Background" section in Finding A needs to state that the 8(a) program is a "statutory exception" to CICA, not an "approved exception."

The SADBU nonconcurred with our use of the word "loophole" to describe the SBA's implementation of the Business Opportunity Reform Act. The SADBU believed that our statement that "DoD is not taking the necessary steps to fully implement that Act" is not supported, and does not recognize that DoD is required to compete only those 8(a) contracts that meet or exceed the dollar thresholds. The SADBU stated that our description of "full and open competition" in Appendix C applies only to sealed bids, and

does not recognize negotiated procurements or contract awards based on "best value." The SADBU did not believe that it was appropriate to compare the 8(a) program to full and open competition, since the Section 8(a) Program, as a preference program, is a statutory exception to the CICA. The SADBU also nonconcurred with the description of benefits of Recommendations A.1., A.2., and A.4.

Audit response to SADBU comments. We believe that the word "loophole" appropriately describes the SBA regulation discussed in Finding A. Our review of the legislative history of the Reform Act (House Report 100-460, Senate Report 100-394, and Conference Report 100-1070) showed that the Congress clearly intended that potentially large contracts offered to the SBA under the Section 8(a) Program be competed. None of the six sampled contracts, valued at over $3 million each, had been competed, and we estimated that only 38 percent of all DoD contracts valued in excess of $3 million had been competed. While we recognize that DoD must follow the thresholds in the SBA regulation, the contracting officer may request that the SBA compete a limited number of contracts under FAR 19.805-1(c). None of the contracting officers for the six sampled contracts had requested competition under FAR 19.805-1(c).

We also believe that the discrepancy between the SBA regulations and the Reform Act may persuade contracting officers to use indefinite delivery, indefinite quantity-type contracts when another type of contract may be more suitable for a particular requirement. Although the SBA decides whether to compete a contract under FAR 19.805-1(c), we believe that contracting officers can make a persuasive argument for competing contracts, considering that Section 8(a) contractors compete actively for ADP acquisitions, and the fact that anticipated award prices would exceed the competition thresholds under the Reform Act.

A recent GAO report (Report No. GAO/RCED/92-68), summarized in Part I, indicated that compliance with the Reform Act may be a Government-wide problem. Appendix C was added to summarize the differences between procurements under the Section 8(a) Program and those made under full and open competition. Other changes suggested by the SADBU, including changes to Appendix C, have been incorporated into the final report. The SADBU reference to $23 billion was an error. The correct amount was $2.3 billion.

Army comments. The Army nonconcurred with Finding A, stating that the report erroneously required contracts to be competed in accordance with the Business Opportunity Development Reform Act (Reform Act) even though the contracts were awarded before the effective date of the Reform Act. The Army also believed that the report was faulty because it implied that some contracts, even though they were awarded in accordance with the existing SBA regulations, were not awarded competitively in accordance with the Reform Act.

The Army also said that according to the General Services Administration Board of Contract Appeals, although it may be legitimate to question the SBA's implementation, it is incorrect to conclude that procurement activities are not competing contracts in accordance with the Reform Act when they are in compliance with federal regulations. Drawing such a conclusion presumes that DoD procurement personnel are allowed to ignore SBA regulations for the Section 8(a) Program. The Army stated that our report fails to recognize that the General Services Administration Board of Contract Appeals has reviewed this issue and has determined that SBA regulations are reasonably founded (General Services Administration Board of Contract Appeals Case No. 11291-P, August 2, 1991).

The Army said that our report fails to recognize that although the Reform Act allows the SBA to authorize competition below the statutory thresholds, the Act specifically states that "such approval shall be granted only on a limited basis." The Army said this indicates that Congress did not intend for systemic requests to be submitted or approved for competition below the threshold. The Army also said that the report of the conference committee on the Reform Act stated that the SBA should resist requests to compete below the threshold when the requests are based on inability to reach an agreement on fair market price.

With regard to the use of restrictive specifications for ADP Section 8(a) buys, the Army stated that few, if any, procurements fit neatly and solely into one of the categories cited in the FAR Part 10 or the FIRMR. The Army stated that Army Regulation 25-1, "The Army Information Resources Management Program," gives specific guidance on use of "brand name or equal" specifications. Army Regulation 25-3, "Army Life Cycle Management of Information Systems," gives the requirements for fully competitive specifications and states that competition should be maximized in all phases of the acquisition strategy. The Army disagreed with our statement that 11 out of 39 contracts used brand name or equal specifications; they said this figure was too high since "plug-to-plug compatible" specifications are more common in ADP procurements. True brand name or equal ADP procurements are rare. To the uninitiated, "plug-to-plug compatible" procurements may resemble brand name procurements.

Concerning Appendix C, the Army stated that the citation should have been FAR 5.202(a)(4), rather than FAR 2.202(a)(4) and that certain competitive Section 8(a) buys are synopsized in accordance with FAR 5.205(f). The Army disagreed with our analysis that the Section 8(a) contracts are not subject to protests, stating that protests have been raised with the GAO. The Army stated that the Competition Advocate reviews only those actions that are not conducted under full and open competition. The Army also stated that sole-source Section 8(a) actions are not "counted as competitive;" instead, they are recorded as "Not Available for Competition" (DFARS 253.204-70(c)(4)(iii)(B)(3)).

Audit response to Army comments. After reviewing comments from the Army, the SADBU, and DISA, we have rewritten Finding A and deleted Recommendation A.1. Finding A reflects the fact that none of the contracts in our sample with total values exceeding competition thresholds were competed. We were not aware of the General Services Administration Board of Contract Appeals ruling on the SBA regulation (13 CFR 124.311), but we believe that unless this regulation is changed, the Reform Act will not effectively promote competition on large Section 8(a) contracts, which was Congress's intent.

We agree with the Army's statement that specifications used in ADP procurements do not always fit in the categories specified in the FAR and FIRMR. Some of the solicitations we reviewed used a hybrid of specifications. Generally, if any of the significant items in the solicitation used restrictive specifications such as "specific make and model," we categorized that solicitation as using "specific make and model." We believe that contracting officers are using more restrictive specifications on Section 8(a) procurements than on competitive procurements because Section 8(a) procurements are generally awarded on a sole-source basis and are not subject to protest by other contractors, and because specifications used in Section 8(a) procurements are generally not reviewed or challenged by the agency or its Competition Advocate.

In Appendix C, we have changed the FAR citation to FAR 5.202(a)(4), as suggested by the Army. According to the FAR 5.202(a)(4), the Small Business Administration's Section 8(a) Program is generally exempt from publishing solicitations in the Commerce Business Daily. Appendix C pertains only to Section 8(a) contracts that were not competed. As the Army pointed out, protests have been made to the GAO concerning the substance of the acquisition. For clarification, we have changed the wording in Appendix C from "Subject to Vendor Protest" to "Contractor Subject to Vendor Protest." The Competition Advocate should challenge barriers to full and open competition, and should promote full and open competition in the acquisition of supplies and services, as stated in FAR 6.502. To accomplish this properly, we believe that solicitation specifications must be reviewed to ensure that specifications and terms are not restrictive. We also made other changes to the report, as suggested by the Army.

Defense Information Systems Agency (DISA) comments. DISA nonconcurred with part of Finding A. DISA believed that our "Comparison of Procurement Methods" (Appendix C) stated erroneously that DISA's Section 8(a) Program was not reviewed by the Competition Advocate.

> The DISA acquisition process provides for a formal, rigorous review at three different points. The Activity Competition Advocate serves a key role in (1) the Advanced Acquisition Plan

> which is an annual review of the next fiscal year's projected contract requirements, (2) the Acquisition Review Council (ARC), chaired by the Vice Director, DISA, in which individual acquisition plans of all O&M (Operations and Maintenance) packages in excess of one million dollars are reviewed, and (3) the Directorate Acquisition Review Panel in which the full purchase request package is reviewed and finalized.

Audit response to DISA comments. When we received DISA's comments on the Competition Advocate's involvement in Section 8(a) procurements, we contacted DISA's Competition Advocate and verified the comments. We have changed the footnote in Appendix C accordingly.

Additional DISA comments. DISA also nonconcurred with the discussion in Finding A of the Competition Advocate's responsibilities. DISA stated that requiring the Competition Advocate to review competition under the Reform Act, and to identify restrictive specifications for noncompetitive acquisitions under the Section 8(a) Program, would impede the acquisition process. DISA stated that our proposed change assumes that all Competition Advocates are technically qualified to identify restrictive specifications. DISA said this is not always true; under the Small Business Program, small business specialists perform this function, and personnel in DISA's Small Business Office identify restrictive specifications. DISA said that involving the Competition Advocate in the area of small business suggests a conflict of interest.

Audit response to additional DISA comments. FAR 9.106 requires Competition Advocates to challenge barriers to full and open competition and to promote full and open competition by identifying competitive opportunities under the CICA. The Section 8(a) Program is a statutory exception to the CICA, and we found that Competition Advocates do not usually work with Section 8(a) procurements. Because the Reform Act added competitive procedures to the Section 8(a) Program, Federal agencies can benefit from having Competition Advocates review contracts that meet the competition threshold. A review of restrictive specifications could also result in less expensive procurements. The Competition Advocates' involvement would not be a conflict of interest, because the decision to procure through the Section 8(a) Program, rather than through full and open competition, would already have been made. The Competition Advocates are as well-qualified as small business specialists to identify restrictive specifications and to determine whether a procurement should be competed under the Reform Act.

MANAGEMENT COMMENTS AND AUDIT RESPONSE TO THE RECOMMENDATIONS

Army comments. The Army nonconcurred with Recommendations A.1., A.2., and A.4., and partially concurred with Recommendations A.3. and A.5. The Army said that implementing Recommendation A.1. would mean applying the statutory requirements retroactively to these acquisitions, which would not be appropriate. The Army gave the following reasons for its objection.

o If there is a continuing need for items or services procured through these contracts, efforts to reprocure these items will begin in the near future.

o Reports from the conference committee on the statute do not support the recommendation.

o The SBA has already considered contract options in its business plans for Section 8(a) contractors, and implementing Recommendation A.1. would upset those plans.

o In the past, agencies have been criticized when they justifiably failed to exercise unpriced options under Section 8(a) contracts.

o Congress could interpret the recommendation to mean that statutory requirements should be applied retroactively.

The Army nonconcurred with Recommendation A.2. The Army stated that the recommendation appears to require retroactive application of the statute, and that they are nonconcurring, for the reasons listed above. The Army stated that if the intent of the recommendation is to review indefinite delivery-type contracts where the actual value may exceed $3 million, although there is a guaranteed minimum below the threshold, the Army nonconcurs. The Army said that it is unclear what actions should be taken based on the review by the Competition Advocates. The Army nonconcurred with any recommendation to terminate or discontinue options that comply with SBA regulations implementing the Reform Act. The Army also stated that it was unclear why the threshold for reviews would differ from the statutory threshold (i.e., $5 million for contracts for supplies from manufacturers and $3 million for all other contracts).

Although Recommendation A.3. was not addressed to the Army, the Army partially concurred with the recommendation. Because the audit focused on ADP services and supplies, the Army believed that the recommendation should be limited to that area. The Army also stated that we should explain that the "estimated total lifetime value" is not a maximum usage figure, but is the most likely estimate, normally used for a competitive baseline and selection.

Although Recommendation A.4. was not addressed to the Army, the Army nonconcurred with the recommendation. The Army stated that the FAR already requires competition of 8(a) offers that exceed the thresholds, unless an agency requests that the action be processed noncompetitively (FAR 19.805-1[(b)]) and the SBA approves the request. The Army did not believe that the DFARS needs to include a separate requirement for justifying noncompetitive acquisitions that exceed the threshold.

The Army partially concurred with Recommendation A.5. The Army agreed that the Competition Advocate should review specifications for ADPE acquisitions, which are to be solicited on the basis of specific make or model, to ensure compliance with the FIRMR and FAR. The Army nonconcurred with any recommendation to require review of requests below the statutory thresholds to determine whether they should be competed.

The Army nonconcurred with the benefits described in Appendix D, "Summary of Potential Benefits Resulting from Audit," for Recommendations A.1. and A.2. On Recommendation A.1., the Army stated that there is no evidence that the 10 contracts were not awarded in compliance with regulations. The Army also said that while competition of the requirements could result in some future noncomparable price differences, retroactive application of the statutory requirements would be contrary to congressional intent. The Army stated that implementation of Recommendation A.2. would be in conflict either with congressional language or with SBA rules established in the CFR. On Recommendation A.4., the Army stated that while competition below the threshold may increase economy and efficiency, it may conflict with the statutory requirements that permit only limited competition below the competition thresholds.

Navy comments. The Navy concurred with Recommendations A.1. and A.5 and planned to take corrective action. The Navy partially concurred with Recommendation A.2., stating that Competition Advocates should review contract actions that meet the threshold in FAR 19.805-1(a)(2) for competitive Section 8(a) procurements. Secretary of the Navy Instruction No. 4210.10 requires Competition Advocates to review all noncompetitive requirements over $25,000 and to challenge barriers to competition. The Navy nonconcurred with the use of any criteria other than the SBA regulation (13 CFR 124.311) to determine when the threshold is met.

DISA comments. DISA nonconcurred with Recommendation A.1. DISA stated that the DISA contract identified in our report should not be reviewed by the Competition Advocate because the contract had expired on November 26, 1990; the contract was exempt from the Reform Act, since it had been accepted for the Section 8(a) Program before October 1989; and there was no follow-on contract.

Although Recommendation A.4. was not addressed to DISA, DISA nonconcurred with the recommendation. DISA did not agree with the proposed change to the DFARS if the contracting officer's justification is subject to approval. DISA stated that some agency contracts awarded to Section 8(a) contractors are for urgent requirements, and that using the Section 8(a) Program to make timely sole-source awards has been essential. If these actions are delayed in order to determine why a procurement cannot be competed, the DISA mission could be jeopardized.

Office of Small and Disadvantaged Business Utilization (SADBU) comments. The SADBU concurred with Recommendation A.3. and has requested that the Small Business Administration revise 13 CFR 124.311. Although Recommendation A.1. was not addressed to the SADBU, the SADBU nonconcurred with the recommendation. The SADBU said there is no substantiation for our finding that the 10 contracts should have been reviewed for competition, and that our report concedes that these contract actions were begun before the statute became effective. The SADBU said that these contracts were awarded consistent with the SBA's policy at the time. By recommending that these contracts should be reviewed and possibly terminated, the SADBU said we are applying the statute retroactively to Section 8(a) firms.

Concerning Recommendation A.2., the SADBU did not wish to promote competition under the Section 8(a) Program because the FAR clearly defines the circumstances under which Section 8(a) competition should occur. The SADBU believed that there is no need for the Competition Advocate to review Section 8(a) requirements for competition. The SADBU stated that DoD's goal is to simplify the acquisition process, not to burden it with additional requirements. The SADBU stated that if Recommendation A.2. remains in our report, we should recommend that the Competition Advocate review only those contracts that meet or exceed the dollar threshold for competition.

Director of Defense Procurement comments. The Director of Defense Procurement (the Director) nonconcurred with Recommendation A.4., stating that the proposed changes to the DFARS were not needed. The Director stated that FAR 19.895-1 requires that when acquisitions above the Section 8(a) competitive threshold are offered for the Section 8(a) Program, contracts are to be awarded on the basis of competition if certain conditions are met. She stated that the SBA may accept a sole-source Section 8(a) contract only if the SBA agrees with the agency that the conditions for competition have not been met. The Director said that our recommendation is contrary to the Reform Act for acquisitions below the competitive threshold, because the SBA may approve competition below the threshold only on a limited basis.

Audit response to Army comments. In Recommendation A.1. in the draft report, we recommended that the acquisition executives for the Army, Navy, and DISA require their Competition Advocates

to review 10 of the sampled contracts to determine whether the current contracts should be terminated and the requirements should be competed under the Business Opportunity Development Reform Act (the Reform Act) of 1988. The 10 contracts had a total value of over $80 million. All 10 sole-source contracts were initiated before the Reform Act was passed. However, we believed that the Services and DISA should review each contract to determine whether remaining contract options should be exercised, and if they concluded that options should not be exercised, recurring requirements should be competed under the Reform Act. We believed that competition under the Reform Act would result in cost savings to the agencies and would achieve the objectives of the Section 8(a) Program. One of the 10 sole-source contracts, valued at over $24 million, had been renewed several times, and the contractor had lost 8(a) status. Based on the comments we received from the Army, the SADBU and DISA, we believe that our recommendation was misinterpreted to mean that these contracts should be cancelled. Nevertheless, many of the points raised in Army's comments were valid. After considering these points and those made by the SADBU and DISA, we have deleted this recommendation from the final report.

Concerning the Army's comments on Recommendation A.2., this recommendation applies only to future modifications to Section 8(a) contracts, after the Army and Navy acquisition executives have issued implementing memorandums. We made the recommendation in order to ensure that Competition Advocates know when orders are placed under noncompetitively awarded, indefinite quantity, indefinite delivery contracts with Section 8(a) firms, and to allow the Competition Advocates to determine when the dollar amounts of these orders indicate that new, competitively awarded contracts are appropriate. For example, a Competition Advocate may approve orders that put an indefinite quantity, indefinite delivery contract over the $3 million or $5 million threshold by 5 or 10 percent, if the program manager can assure the Competition Advocate that no additional orders will be placed on that contract. However, we do not believe that the SBA regulation (13 CFR 124.311[a][2]), allows unlimited orders above the FAR thresholds to be placed against noncompetitively awarded, indefinite quantity, indefinite delivery contracts. This was occurring under the five contracts identified on page 6 of this report. We have revised Recommendation A.2. to reflect the $5 million threshold for manufacturers. We request that the Army provide revised comments on Recommendation A.2. in the final report. The "Status of Recommendations" chart, below, lists the requirements for those comments.

Concerning the Army's comments on Recommendation A.3., the SADBU could make inquiries to determine whether the problems we identified also occur in non-ADP acquisitions, and if appropriate, could request that the proposed change to the SBA regulation (13 CFR 124.311) apply only to ADP acquisitions or apply to all acquisitions. Our audit focused only on ADP acquisitions, and we believe that our recommendation addresses

the problems we identified. We agree with the Army that the "estimated total lifetime value" should not be a maximum usage figure, but should be the contracting officer's best estimate of the lifetime value of the contract. We believe that this interpretation is consistent with the Reform Act.

Recommendation A.4. would require approval of all contract actions with a total value of $5 million or more for manufacturing contracts and $3 million or more for all other contracts. We do not believe that Recommendation A.4. conflicts with congressional language or with the Code of Federal Regulations. This recommendation would ensure that the continuation of contract actions on a particular contract does not violate the intent of the Reform Act and is in the best interests of the Government. Recommendation A.4. was made because DoD was not competing Section 8(a) contracts under the Reform Act. Also, see our response to the Director of Defense Procurement's comments on Recommendation A.4.

Concerning the Army's comments on Recommendation A.5., the recommendation was intended to require the Competition Advocate to review noncompetitive specifications, including Section 8(a) specifications, to determine whether they were overly restrictive. In making the recommendation, we did not intend for the Competition Advocate to review requests below the competition thresholds. Although the Army's response partially met the intent of the recommendation, the Army did not describe corrective actions taken or planned, or provide any completion dates. We request that the Army provide comments on Recommendation A.5. in the final report. The "Status of Recommendations" chart, below, lists the requirements for those comments.

Audit response to Navy comments. The comments by the Navy were fully responsive to Recommendation A.5. Regarding Recommendation A.2., we agree that the Navy should follow SBA guidance. However, the Navy should request that the SBA compete acquisitions when there is reason to believe that an acquisition will exceed competition thresholds. Although the Navy's policy, outlined in Secretary of the Navy Instruction 4210.10, was adequate, our audit showed that the policy was not applied to Section 8(a) procurements at the sites we visited. We request that the Navy reconsider its partial concurrence to the draft report and provide comments on Recommendation A.2. in the final report. The "Status of Recommendations" chart lists the requirements for the Navy's comments.

Audit response to DISA comments. DISA comments regarding Recommendation A.1. were valid and we have deleted the recommendation. Concerning DISA's comments on Recommendation A.4., we made the recommendation because the DoD was not taking advantage of the opportunity to compete Section 8(a) contracts under the Reform Act. If the timeliness of a particular acquisition is critical to the performance of a mission, an

agency should use the authorized approval process for such exceptions. However, when contracts are expected to exceed the Reform Act thresholds, competitive procedures should be the rule, not the exception.

Audit response to SADBU comments. The SADBU comments to Recommendation A.3. were responsive.

Audit response to Director of Defense Procurement comments. Concerning the Director of Defense Procurement's comments on Recommendation A.4., the FAR 19.804-2(a)(14) states that an agency may recommend to the SBA in its agency offering that a particular acquisition be made competitively. The SBA decides whether to compete the contract or use sole-source procedures; however, we believe that contracting officers have a responsibility to either recommend a competitive award, or explain why a contract cannot be competed under the Reform Act. Because the recommendation was not addressed to the Army, no further comments from the Army are required. We request that the Director of Defense Procurement reconsider her nonconcurrence and provide comments on the final report. The "Status of Recommendations" chart, below, lists the requirements for those comments.

The complete text of management's comments on the finding and recommendations is in Part IV.

STATUS OF RECOMMENDATIONS

Responses to the final report are required from the addressees shown for the items indicated with an "X" in the chart below.

		Response Should Cover:		
Number	Addressee	Concur/ Nonconcur	Proposed Action	Completion Date
A.2.	Army	X	X	X
A.2.	Navy	X	X	X
A.4.	Defense Procurement	X	X	X
A.5.	Army	X	X	X

B. WALSH-HEALEY ACT

Contracting officers were not performing the required reviews for Section 8(a) Program contractor compliance with the Walsh-Healey Act. The DoD contracting officers erroneously believed that the SBA was performing the reviews required by FAR 22.608 and that Walsh-Healey Act certifications were not required for service-type contracts, even when the contract included supplies. As a result, contracts for supplies in our sample, valued at $3.5 million, were acquired without the required reviews. Additionally, at least 7 of 27 contractors (26 percent) who provided Walsh-Healey certifications were merely acting as brokers when providing ADP equipment to the DoD, which is in violation of the Walsh-Healey Act and the CICA. Use of brokers adds unnecessary costs to the acquisition.

DISCUSSION OF DETAILS

Background

The Walsh-Healey Act, passed in 1936, applies to contracts and subcontracts that exceed $10,000, under Section 8(a) of the Small Business Act, for the manufacture or furnishing of supplies within the United States, Puerto Rico, or the Virgin Islands. The Walsh-Healey Act requires that a Government contract for the manufacture or furnishing of materials, supplies, articles, and new or used ADP equipment in an amount exceeding $10,000 be made with contractors that are either the manufacturer or a regular dealer of the items to be manufactured or used in the performance of the contract.

FAR 22.608 requires the contracting officer to obtain contractor documentation that the firm is either the manufacturer of or a regular dealer of the needed supplies. Additionally, the contracting officer is required to investigate the vendor's certifications for the first contract requiring Walsh-Healey Act compliance for that particular procurement office.

The intention of the Walsh-Healey Act was to prohibit the purchasing of goods by the Government from contractors that were "bid brokers." As stated in the SBA Regulation (13 CFR 124.109), brokers are ineligible to take part in the Section 8(a) Program, since brokers do not satisfy the definition of a manufacturer or regular dealer. The Walsh-Healey Act is implemented by 50 CFR 201.101 and gives specific definitions for both manufacturers and regular dealers:

> 'Manufacturer' ... means a person that owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

> 'Regular dealer' ... means a person that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.

In addition to regularly maintaining an inventory of items similar to that sold to the Government, a regular dealer must also meet the following requirements of FAR 22.606-2.

o The stock maintained is a true inventory from which sales are made. This requirement is not satisfied by stock of sample or display items, stock consisting of surplus items remaining from prior orders, stock unrelated to the supplies offered, or stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made.

o Sales are made regularly in the usual course of business to the public.

o The business is an established and ongoing concern.

Vendor certifications. Contracting officers did not always obtain the required Walsh-Healey Act certifications before awarding contracts. We identified 39 of 87 contracts that required a vendor certification that the firm was a manufacturer or a regular dealer of supplies subject to the Walsh-Healey Act. However, files for the six contracts (15 percent of those requiring certifications) did not contain the required certifications, as shown below.

Contracts Lacking the Required Walsh-Healey Act Certifications

Contract Number	Supplies Purchased	Total Expenditure As of Audit
N0014090C0952	$2,041,404	$ 3,036,461
N0014090C0346	626,151	1,642,848
DABT6090C0024	499,961	909,369
M0002788D0059	286,285	26,612,617
MDA90389C0172	45,475	656,971
DACA6589D0109	30,621	675,052
Totals	$3,529,897	$33,533,318

Each of the contracts included the purchase of materials valued at $10,000 or more. Thus, the requirements of the Walsh-Healey Act should have been enforced. However, the contracting officers

responsible for the six contracts told us that the Walsh-Healey Act did not apply because the contracts were defined as service contracts. For example, Contract No. N0014090C0952 involved the acquisition of a minicomputer system valued at $2,041,000, services valued at $700,000, and $300,000 in contract fees to cover general and administrative expenses and profit. Because the main purpose of the contract was the designing of the microcomputer system, the contracting officer assigned the Standard Industrial Classification (SIC) Code of 7373 (Computer Integrated System Design) to the contract and treated it as a service contract. The contracting officer believed that since it was a service contract, it was not subject to the Walsh-Healey Act, even though supplies made up approximately 67 percent of the contract value. According to the Department of Labor, which was responsible for the overall administration of the Walsh-Healey Act, a vendor certification is required whenever supply purchases exceed $10,000, whether or not the supplies are included in a service contract.

Additionally, another 6 of the 39 contracts (see chart below) subject to the Walsh-Healey Act were awarded to contractors who certified that they were neither manufacturers nor regular dealers.

Contracts Awarded to Contractors Who Were Not Manufacturers Or Regular Dealers

Contract Number	Supplies Purchased	Total Expenditure (As of 1/92)
N0001489D0080	$4,018,741	$10,243,236
N0001490D0097	1,268,811	3,078,299
N0001489C0285	1,415,792	2,000,000
DAAD0590C0277	166,704	499,595
N0060089D0440	22,802	331,122
N0014090CBA38	312,076	322,666
Totals	$7,204,926	$16,474,918

Questionable Walsh-Healey Act certifications. The contractors for the remaining 27 contracts certified that they were in compliance with the Walsh-Healey Act by being either regular dealers, manufacturers, or both. We checked with the credit bureau of Dun & Bradstreet, Inc., which compiles financial information on commercial firms. The Dun & Bradstreet reports we received on the 27 contractors indicated that only 13 (48 percent) maintained inventories as required by FAR 22.606 and that 7 (26 percent) showed no inventory at all. Details are shown in the table below.

Dun & Bradstreet Information on Inventories Maintained by Contractors

Status Claimed	Contractors With Inventories	Contractors Without Inventories	Inventory Status Not Provided	Total
Regular Dealer	10	6	4	20
Manufacturer	0	1	2	3
Both Regular Dealer and Manufacturer	3	0	1	4
Total Contracts	13	7	7	27

We attempted to verify the accuracy of the inventory information in the Dun & Bradstreet reports by selectively reviewing four contractors who reported no inventories and one contractor who was questionable. During our on-site reviews, we asked the contractors to show us the required inventories that supported the Walsh-Healey Act certifications. We also asked for copies of financial statements and invoices or sales receipts for inventories that might support the representations. Only the questionable contractor had the required inventories.

Based on our site reviews, the Dun & Bradstreet information was accurate. In some instances, the contractors indicated that they would be purchasing the required supplies through GSA schedule suppliers. In other instances, the contractors accepted bids from potential suppliers and sent copies of the bids to the contracting offices. Thus, we concluded that the contractors were acting as brokers and were not in compliance with the Walsh-Healey Act. Additionally, we believe that contractor actions, such as taking bids and seeking permission to acquire supplies through GSA schedules, should have further prompted the contracting officers to question the Walsh-Healey compliance certification made by the contractors.

Contracting officer's responsibilities. As stated in FAR 22.608, the contracting officer is responsible for ensuring compliance with the Walsh-Healey Act. The FAR also states that the contracting officer is required to investigate and determine the contractor's eligibility as a manufacturer or regular dealer. The contracting officer is not to rely solely on the contractor's self-certification, either when the contracting officer has information that makes the certification questionable or when the contractor has never performed a contract requiring Walsh-Healey Act compliance. However, at the 14 procurement activities we visited, none of the contracting officers checked the contractors for compliance with the Walsh-Healey Act. Generally, at all the procuring activities visited, the contracting officers assumed that the SBA had performed all the necessary investigations. All the contracting officers stated that they relied solely on the certification letters provided by the contractors and the

Certificates of Competency from SBA in evaluating Walsh-Healey Act compliance. However, the Certificate of Competency, according to FAR 19.601(a), merely states that the holder is responsible for the purpose of receiving and performing a specific Government contract. This certification implies that the contractor is capable, competent, credit worthy, and has the capacity, integrity, perseverance, and tenacity to perform the work. The contracting officers mistakenly believed that the Certificates of Competency from SBA ensured compliance with the Walsh-Healey Act.

Based on the results of our prior audits as well as this audit, we believe that the use of Section 8(a) contractors as brokers in ADP acquisition is common throughout the DoD. Brokering results in additional and unnecessary costs to the Government because of additional layers of profit and overhead.

RECOMMENDATIONS FOR CORRECTIVE ACTION

We recommend that the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development and Acquisition); and the Navy Acquisition Executive, Office of the Assistant Secretary of the Navy (Research, Development and Acquisition) require their respective contracting officers to:

1. Obtain from prospective contractors, for acquisitions subject to the Walsh-Healey Act, certifications stating that the contractor is a manufacturer or regular dealer of the supplies offered in compliance with Federal Acquisition Regulation 22.608.

2. Perform an investigation to ensure that the contractor is in compliance with the Walsh-Healey Act in accordance with Federal Acquisition Regulation 22.608.

MANAGEMENT COMMENTS AND AUDIT RESPONSE TO THE FINDING

SADBU comments. The SADBU stated that the Walsh-Healey Act does not "prohibit brokers;" rather, it mandates the use of manufacturers or regular dealers. The SADBU suggested that the statute's exact language be used. The SADBU also stated:

> The discussion on the Walsh-Healey Act appears to suggest the Walsh-Healey applies even if the contract is classified as a service contract. Are we suggesting that Walsh-Healey should apply to construction contracts and janitorial contracts? Our interpretation is that contractors must either comply with Walsh-Healey or the Service Contract Act, depending on how the contract is classified. Our interpretation is that Walsh-Healey applies only if the contract is for the manufacture or furnishing of supplies. If the contract is for services and supplies are incidental, we do not believe that Walsh-Healey

should apply rather the Service Contract Act should govern the performance of the contract.

The SADBU also said that our report should state whether the supplies are deliverable items under the contract, or are only incidental to the performance of the contract. The SADBU also believed that it may be reasonable for the contracting officer to assume that the SBA has investigated Walsh-Healey compliance, since the SBA regulation (13 CFR 124.313[a]), states that the SBA is responsible for certifying that an 8(a) contractor is eligible under Walsh-Healey. The SADBU said that we did not substantiate our claim that "the use of Section 8(a) contractors as brokers in ADP acquisitions is pervasive."

Audit response to SADBU comments. The Department of Labor regulation (41 CFR 50-206.50[a][1]), states that the Walsh-Healey Act was intended to eliminate the award of contracts to "bid brokers." Finding B gives details of the Walsh-Healey Act's requirements concerning manufacturers and regular dealers; therefore, we did not make the change suggested by the SADBU. In discussions with the Office of General Counsel, Department of Labor, and with a research attorney in the Air Force Legal Services Agency, we asked whether the Walsh-Healey Act should apply to contracts that are subject to the Service Contract Act of 1965 (41 USC 351-358). The Air Force Legal Services Agency Services Center uses computer assisted legal research systems to provide research services to Government agencies. We were told that the two acts are not mutually exclusive, and that a contract can be subject to requirements of both acts. This position is also supported by the Department of Labor regulation (29 CFR 4.132). For this reason, we consider it irrelevant whether the supplies were a specified deliverable item under the contract or were incidental to the performance of the contract.

While the SBA regulation (13 CFR 124.313[a]), may be confusing to some contracting officers, a Senior Analyst in the Wage and Hour Branch of the Department of Labor told us that the primary responsibility for determining whether a contractor including Section 8(a) contractors meets the Walsh-Healey Act rests with the procuring contracting officer as specified in FAR 22.608-2. The Department of Labor's regulation (41 CFR 50-206.50[b]) also supports this position. The Department of Labor has long held that all requirements of the Walsh-Healey Act apply to Section 8(a) contractors. They also stated that since the Secretary of Labor administers and interprets the Walsh-Healey Act, the views of the Secretary of Labor, unless clearly contrary to law, must prevail over the SBA's views (Comptroller General Decision B-195118, May 22, 1981). The SBA told us that they perform reviews for Walsh-Healey Act compliance whenever a Manufacturing Business Plan or a Wholesale or Retail Business Plan is given to an Section 8(a) applicant. SBA field visits, however, are at the option of SBA's regions. Our position, that "the use of Section 8(a) contractors as brokers in ADP acquisitions is pervasive," is supported by prior audit reports and by our

conclusions in Finding B. However, we have changed "pervasive" to "common" in the body of this report.

Army comments. The Army said that we did not acknowledge that under 13 CFR 124.313(a), the SBA is required to certify, for each contract, whether a Section 8(a) firm is eligible under the Walsh-Healey Act. The Army also said we did not acknowledge that under the Small Business Act (Section 8[b][7][B] and [C]), when the SBA decides that a Section 8(a) contractor meets the Walsh-Healey Act requirements, the SBA's decision is final. Although contracting officers may not have performed the reviews required by FAR 22.608, the Army said there is some reason for confusion.

The Army also stated that DoD may propose legislation to eliminate the Walsh-Healey Act for commercial acquisitions, and that the Department of Labor has recently issued a rule that revises the definition of a "regular dealer" for ADP systems integrators. The Army also stated that "regular dealers" of used ADP equipment and some other commodities may meet alternate qualifications that differ from those cited in FAR 22.606-2(a).

Audit response to Army comments. We agree that the SBA regulation (13 CFR 124.313[a]), may be confusing to contracting officers. However, for the reasons discussed in our response to the SADBU's comments, we believe that contracting officers have the primary responsibility for obtaining Walsh-Healey Act certifications and performing the required investigations. If the contracting officer has personal knowledge that an offeror's representations of eligibility may not be valid; if a protest against the offeror's eligibility has been lodged; or if the offeror has not previously been awarded a contract subject to the Walsh-Healey Act, the contracting officer may not rely on the offeror's representations. The contracting officer must instead conduct an investigation of relevant evidence that may include preaward surveys, information from the contracting office, and on-site inspection. The contracting officer's negative determination of eligibility is subject to review by the SBA (as specified by Section 8[b][7][B] and [C] of the Small Business Act). If the negative determination is affirmed, it is forwarded to the Wage and Hour Administrator of the Department of Labor for a final determination.

We were unable to obtain additional information from the Army on the DoD planned proposal for legislation to eliminate the Walsh-Healey Act for commercial acquisitions. Therefore, we are unable to comment on any such proposal.

We agree with the Army's statement that a bona fide "systems integrator" is now considered to be a regular dealer. The Department of Labor made this new regulation, effective on August 17, 1992. The House Government Operations Committee had urged the Department of Labor to issue this regulation in a manner that would close the loophole for sales to the Government

by "bid brokers." In House of Representatives Report No. 101-987, the committee stated:

> The Committee continues to be concerned that the Walsh-Healey Act is being violated or circumvented by 'system integrators' that may not be eligible for contract awards under the Act as manufacturers or regular dealers. This situation is especially acute in the area of ADP procurement, where it is commonplace for a number of 'integrators' to offer identical equipment manufactured by the same manufacturer. It is clear that what results from these circumstances is not 'competition' as required by the Competition in Contracting Act. However, the Committee recognizes that bona fide systems integration contracts, which provide the government with substantial value added services, can improve the efficiency and effectiveness of Federal information resources management. Therefore, the Committee urges the Department of Labor to clarify the eligibility of systems integrators under the Walsh-Healey Act as soon as possible, in a manner that closes the loophole for sales to the government by 'bid brokers'.

This new regulation (41 CFR 50-201.101[a][2][xii]), requires agencies to use nonrestrictive specifications for hardware and software specifications, and prohibits the use of specifications for a particular make or model. Additionally, the systems integrator is required to perform specific services such as requirements analysis, systems development, assembly, installation, and testing. The integrator assumes the risk for correcting any deficiencies.

We were aware of the alternative qualifications for "regular dealers" of used ADP equipment; however, all ADP acquisitions in our sample were for new equipment.

MANAGEMENT COMMENTS AND AUDIT RESPONSE TO THE RECOMMENDATIONS

Army comments. The Army concurred with Recommendation B.1. and nonconcurred with Recommendation B.2. On Recommendation B.1., the Army stated that regulations already require prospective contractors to provide Walsh-Healey Act certifications. The Army stated that if 15 percent of contracts excluded the requirement for Walsh-Healey certifications because the procuring contracting officer did not believe the requirements were applicable, the FAR should be revised to require that solicitation clauses (FAR 52.222-19 and 52.222-20) be included in all solicitations, including service contracts, that are subject to the Walsh-Healey Act. The Army stated that procurement executives should not issue their own contracting

requirements unless these requirements are unique to the Service and are approved by the Director of Defense Procurement.

On Recommendation B.2., the Army stated that the FAR already requires contracting officers to investigate whether contractors are in compliance with the Walsh-Healey Act. The Army also did not understand whether we were recommending that existing or future contracts be investigated.

Audit response to Army Comments. Although the Army concurred with Recommendation B.1., the Army did not describe corrective actions taken or planned, or provide any completion dates. We recognize that the Walsh-Healey Act regulation (FAR 22.608) already requires investigations; however, Walsh-Healey Act certifications are not being provided in all cases. The Army should issue a memorandum to its contracting officers, reminding them of their responsibility to obtain such certifications. We request that the Army provide comments on Recommendation B.1. in the final report. The "Status of Recommendations" chart lists the requirements for those comments.

We do not believe that solicitation clauses in FAR 52.222-19 ("Walsh-Healey Public Contracts Act Representation") and FAR 52.222-20 ("Walsh-Healey Public Contracts Act") should be revised to cover service contracts. A Department of Labor regulation (29 CFR 4.132) states that Walsh-Healey Act provisions can be included in service contracts and that provisions of both the Walsh-Healey Act and the Services Contract Act can apply to separate specifications within a single contract:

> **Services and other items to be furnished under a single contract.** If the principal purpose of a contract is to furnish services through the use of service employees within the Act [Services Contract Act], the contract to furnish such services is not removed from the Act's coverage merely because, as a matter of convenience in procurement, the service specifications are combined in a single contract document with specifications for the procurement of different or unrelated items. In such case, the Act would apply to service specifications but would not apply to any specifications subject to the Walsh-Healey Act or to the Davis-Bacon Act. . .

The procuring contracting officer must determine whether to include the provisions of the Walsh-Healey Act in a service contract when the solicitation includes specifications that are subject to Walsh-Healey.

The Army is correct in stating that the FAR already requires contracting officers to investigate whether contractors are in compliance with the Walsh-Healey Act. We found that contracting officers were not performing the investigations. The intent of the recommendation was to encourage the Army to take actions to

ensure that the required investigations are performed. The Army should issue reminders to its contracting officers that the investigations are required. Recommendation B.2. applies to future contract awards. We request that the Army provide comments on Recommendation B.2. in the final report. The "Status of Recommendations" chart lists the requirements for those comments.

Navy comments. The Navy concurred with Recommendations B.1. and B.2. The Navy said that in September 1992, the Defense Acquisition Regulations Council is scheduled to report on FAR Case No. 92-036, "Walsh-Healey Definitions." Shortly thereafter, the Deputy for Acquisition Policy, Integrity, and Accountability (Office of the Assistant Secretary of the Navy [Research, Development and Acquisition]), will issue guidance to Navy contracting activities on Walsh-Healey definitions. The memorandum will remind Navy contracting activities of contracting officers' responsibilities as described in FAR 22.6, "Walsh-Healey Public Contracts Act."

Audit response to Navy comments. The comments from the Navy were fully responsive to the recommendations.

The complete text of management's comments to the finding and recommendations is in Part IV.

STATUS OF RECOMMENDATIONS

Responses to the final report are required from the addressees shown for the items indicated with an "X" in the chart below.

		Response Should Cover:		
Number	Addressee	Concur/ Nonconcur	Proposed Action	Completion Date
B.1.	Army		X	X
B.2.	Army	X	X	X

C. DELEGATION OF PROCUREMENT AUTHORITY

Four Army contracts were awarded under the Section 8(a) Program without obtaining the required delegation of procurement authority (DPA) from the GSA. Contracting officers used the wrong dollar-value thresholds for three contracts when determining whether the DPA was required. For the remaining contract, the contracting officer did not obtain the required DPA due to an oversight. As a result, contracts contained line items purchased in violation of the Brooks Act (Public Law 89-306). Continued violation of the Brooks Act can result in the GSA reducing or terminating an agency's procurement authority.

DISCUSSION OF DETAILS

Background

The basic legislation providing for Government-wide acquisitions of ADP resources is the Brooks Act (Public Law 89-306). The Brooks Act, enacted in October 1965, permits only the Administrator of GSA to purchase, lease, and provide maintenance for Federal ADP equipment. To implement the Brooks Act, GSA published the FIRMR. Contracting officers must follow both the FIRMR and the FAR when procuring ADP resources.

By establishing dollar thresholds in the FIRMR, GSA grants limited authority to Federal agencies to acquire ADP resources. Therefore, procurements with values below the thresholds may be purchased by an agency without special permission from GSA. When it is determined that a procurement will exceed the blanket authority, the procuring officer must submit an Agency Procurement Request to GSA, requesting that the Federal agency be delegated the specific authority to make the acquisition. FIRMR Bulletin C-5 provides procedures to be followed in submitting an Agency Procurement Request.

Delegation of Procurement Authority

Thresholds for DPAs. The general thresholds for determining whether a DPA is required are shown in the following table.

Thresholds for Blanket DPAs for ADP Resources

Type of Resources	Contracting Strategy	Thresholds before April 29, 1991	Thresholds as of April 29, 1991
Hardware	Competitive	$2,500,000	$2,500,000
	Noncompetitive	250,000	250,000
Software	Competitive	$1,000,000	$2,500,000
	Noncompetitive	100,000	250,000
Maintenance	Competitive	$1,000,000	$2,500,000
	Noncompetitive	100,000	250,000
Commercial ADP Services	Competitive	$2,000,000	$2,500,000
	Noncompetitive	200,000	250,000
Commercial ADP Support Services	Competitive	No approvals required	$2,500,000
	Noncompetitive		250,000

Source: FIRMR 201-23.104 (1984 FIRMR Edition); FIRMR 201-20.305-1 (FIRMR, 1991 Edition)

On February 14, 1991, GSA made major modifications to the thresholds in the FIRMR, which became effective April 29, 1991. However, as of the time of our audit, Army Regulation 25-3, "Army Life Cycle Management of Information Systems," still contained the old thresholds. The thresholds as of April 29, 1991, apply to all Defense agencies, the Army, and the Navy. GSA authorized the Air Force to use higher thresholds, i.e., $15 million for competitive and $1 million for noncompetitive ADP procurements.

Application of thresholds to the Section 8(a) Program. According to GSA, Section 8(a) contract awards are considered to be competitive procurements when applying the DPA thresholds, unless the specifications call for the purchase of a specific make and model. Contracting officers are to apply the thresholds for a noncompetitive buy when specific make and model specifications are used.

We determined that 4 of the 87 contracts (see table below) included in our sample required a DPA.

Army Contracts That Required a DPA

Contract Number	Item Procured	Contracting Strategy	Item Costs	Applicable Threshold
DAAD0589C0164	Hardware	Noncompetitive*	$1,939,841	$ 250,000
MDA90389C0140	Maintenance	Competitive	1,002,502	1,000,000
DAAA2190C0130	Hardware	Noncompetitive*	539,109	250,000
DABT6090C0024	Hardware	Noncompetitive*	288,373	250,000
Total			$3,769,825	

* Solicitation used specific make and model specifications

Although we found few instances of violations of the Brooks Act, such violations can result in GSA reducing or terminating an agency's authority to procure ADP equipment.

RECOMMENDATIONS FOR CORRECTIVE ACTION

1. We recommend that the Director, Information Systems (Command, Control, Communications and Computers), U.S. Army, require contracting officers to use noncompetitive thresholds for determining whether a delegation of procurement authority is required for the acquisition of automatic data processing resources when a contract requires specific make and model specifications.

2. We recommend that the Director, Information Systems Command, U.S. Army, revise Army Regulation 25-3, "Army Life Cycle Management of Information Systems," to reflect the thresholds specified in Federal Information Resources Management Regulation 201-20.305-1, effective April 29, 1991, for delegations of procurement authority.

MANAGEMENT COMMENTS AND AUDIT RESPONSE TO THE FINDING

Army comments. Army management stated that they could not determine from reading our report whether solicitations (not contracts) were actually reviewed, since the report cites contract numbers. The Army said that contracts resulting from "plug-to-plug compatible" solicitations may cite the specific make and model of equipment proposed by the contractor and accepted by the Government. The Army also said that Defense Supply Service, Washington, was not an Army contracting activity at the time of these awards, but received its contracting authority from the Office of the Secretary of Defense.

Audit response to Army comments. During the audit, we reviewed the entire contract file for each acquisition in our sample. FAR 4.803 requires the contracting officer to maintain solicitation documents in the contract file. We reviewed the solicitation documents and other information in the contract file to identify the specifications used and to determine whether a Delegation of Procurement Authority had been obtained. When contract files were incomplete or inconsistent, we interviewed the responsible contracting officer. We cited contract numbers to identify the acquisitions we had reviewed. Army officials told us that contracting authority for Defense Supply Service, Washington, was transferred to the Army in March 1991.

MANAGEMENT COMMENTS AND AUDIT RESPONSE TO THE RECOMMENDATIONS

Army comments. The Army concurred with Recommendations C.1. and C.2. On Recommendation C.1, the Army stated that Army, DoD, and Federal regulations already require noncompetitive thresholds. The Army stated that the Director of Information Systems for Command, Control, Communications and Computers (the Director of Information Systems) should issue any guidance on this matter. The Director of Information Systems reports to the Secretary of the Army and the Army Acquisition Executive on the acquisition of information resources. On Recommendation C.2., the Army stated that it plans a complete revision of Army Regulation 25-3, beginning in September 1992. Army contracting activities were also notified of the new thresholds in Army Acquisition Letter 91-4, issued on May 8, 1991.

Audit response to Army comments. At the Army's request, we redirected Recommendation C.1. to the Director of Information Systems (Command, Control, Communications and Computers), instead of the Director, Information Systems Command, U.S. Army. On Recommendation C.1., the Army should provide a date when guidance will be sent to contracting officers, reminding them to use noncompetitive thresholds in order to determine whether a DPA is needed for the acquisition of ADP resources when contracts require a specific make or model. The "Status of Recommendations" chart, below, lists the requirements for those comments. The Army's comments to Recommendation C.2. were responsive. Army Regulation 25-3 is in the process of being revised.

The complete text of management's comments on the finding and recommendations is in Part IV.

STATUS OF RECOMMENDATIONS

Responses to the final report are required from the addressees shown for the items indicated with an "X" in the chart below.

		Response Should Cover:		
Number	Addressee	Concur/ Nonconcur	Proposed Action	Completion Date
C.1.	Army	X	X	X

PART III - ADDITIONAL INFORMATION

APPENDIX A - Sampling Plan

APPENDIX B - Contracts Reviewed During Audit

APPENDIX C - Comparison of Procurement Methods

APPENDIX D - Summary of Potential Benefits Resulting from Audit

APPENDIX E - Activities Visited or Contacted

APPENDIX F - Report Distribution

APPENDIX A: SAMPLING PLAN

The sample universe consisted of 267 contracts that were extracted from a data base containing information extracted from DD Forms 350, "Individual Contracting Action Report." The contracts were selected based on the assigned Standard Industry Classification (SIC) codes and their Federal Supply Classification (FSC) codes. The codes helped identify Section 8(a) contracts that dealt with ADP equipment or service acquisitions.

The universe was first arranged into 15 geographical clusters and was then divided into two strata based on the number of contracts within each geographical cluster. The attribute sample was developed using a 90-percent confidence level, 5-percent error rate, and 10-percent occurrence rate. The resulting audit sample consisted of 87 contracts. The contracts in the sample were selected based on a random number that was assigned to each contract within the selected geographical locations of the universe. The breakdowns by geographical cluster and by strata for the universe and the sample are shown in the table below. Appendix B identifies the contracts reviewed during the audit.

Number of Contracts by Geographical Region

Stratum 1	Number of Contracts in Universe		Number of Contracts in Sample	
Washington, DC Area	94		33	
Philadelphia Area	29		17	
Maryland	30		16	
Subtotal		153		66
Stratum 2				
Southern Virginia	18		10	
West Virginia	5		-	
Northern New Jersey	8		8	
Ohio	5		-	
New Mexico	10		-	
Georgia	7		-	
Florida	9		-	
Illinois	5		-	
Southern California	5		3	
Northern California	3		-	
Alabama	2		-	
Other	37		-	
Subtotal		114		21
Totals		267		87

APPENDIX B: CONTRACTS REVIEWED DURING AUDIT

Contract Number	Procuring Activity	Component	Total Expenditure As of Audit
DAAD0589C0004	Aberdeen Proving Ground	Army	$ 1,889,352
DAAD0589C0164	Aberdeen Proving Ground	Army	2,275,413
DAAD0589C0166	Aberdeen Proving Ground	Army	1,249,696
DAAD0589C0274	Aberdeen Proving Ground	Army	847,221
DAAD0589C4141	Aberdeen Proving Ground	Army	61,737
DAAD0589D4032	Aberdeen Proving Ground	Army	1,404,600
DAAD0590C0002	Aberdeen Proving Ground	Army	75,776
DAAD0590C0167	Aberdeen Proving Ground	Army	52,780
DAAD0590C0195	Aberdeen Proving Ground	Army	92,644
DAAD0590C0277	Aberdeen Proving Ground	Army	499,595
DAAD0590C0362	Aberdeen Proving Ground	Army	2,821,445
DAAD0590D7034	Aberdeen Proving Ground	Army	87,152
DAAA2189C0146	Chemical Research and Development Center	Army	2,496,839
DAAA2189D0017	Chemical Research and Development Center	Army	4,746,557
DAAA2189D0027	Chemical Research and Development Center	Army	4,019,318
DAAA2190C0027	Chemical Research and Development Center	Army	360,504
DAAA2190C0110	Chemical Research and Development Center	Army	42,104
DAAA2190C0112	Chemical Research and Development Center	Army	179,991
DAAA2190C0130	Chemical Research and Development Center	Army	1,129,804
DAAA2190C0132	Chemical Research and Development Center	Army	2,491,340
MDA90389C0047	Defense Supply Service, Washington	Army	1,250,053
MDA90389C0102	Defense Supply Service, Washington	Army	772,757
MDA90389C0110	Defense Supply Service, Washington	Army	116,492
MDA90389C0117	Defense Supply Service, Washington	Army	447,840
MDA90389C0140	Defense Supply Service, Washington	Army	1,002,502
MDA90389C0172	Defense Supply Service, Washington	Army	656,971
MDA90389D0022	Defense Supply Service, Washington	Army	268,654
MDA90389D0032	Defense Supply Service, Washington	Army	5,745,177
MDA90389D0037	Defense Supply Service, Washington	Army	254,110

APPENDIX B: CONTRACTS REVIEWED DURING AUDIT (cont'd)

Contract Number	Procuring Activity	Component	Total Expenditure As of Audit
MDA90389D0042	Defense Supply Service, Washington	Army	$1,512,527
MDA90389D0927	Defense Supply Service, Washington	Army	58,126
MDA90390C0012	Defense Supply Service, Washington	Army	315,931
MDA90390C0061	Defense Supply Service, Washington	Army	941,506
MDA90390C0093	Defense Supply Service, Washington	Army	343,013
MDA90390C0169	Defense Supply Service, Washington	Army	217,159
MDA90390C0179	Defense Supply Service, Washington	Army	130,222
MDA90390D0034	Defense Supply Service, Washington	Army	840,114
DAAL0289C0078	Harry Diamond Laboratory	Army	98,653
DAAL0289C0117	Harry Diamond Laboratory	Army	2,769,900
DAMD1789C9166	U.S. Army Medical Research Acquisition Activity	Army	564,952
DAMD1790D0016	U.S. Army Medical Research Acquisition Activity	Army	1,017,853
DACA6589D0109	U.S. Army Engineer District	Army	675,052
DABT6090C0024	U.S. Army Training Support Center	Army	909,369
DABT6090D0008	U.S. Army Training Support Center	Army	547,088
M0002788D0059	Marine Corps Base, Camp Pendleton	Navy	26,612,617
N0014089CTB17	Naval Regional Contracting Center, Philadelphia	Navy	1,984,662
N0014089CTC07	Naval Regional Contracting Center, Philadelphia	Navy	1,199,273
N0014089CWC38	Naval Regional Contracting Center, Philadelphia	Navy	6,105,879
N0014089D2138	Naval Regional Contracting Center, Philadelphia	Navy	5,918,550
N0014089D3309	Naval Regional Contracting Center, Philadelphia	Navy	558,000
N0014089DTC08	Naval Regional Contracting Center, Philadelphia	Navy	591,963
N0014090C0346	Naval Regional Contracting Center, Philadelphia	Navy	1,642,848
N0014090C0952	Naval Regional Contracting Center, Philadelphia	Navy	3,036,461

APPENDIX B: CONTRACTS REVIEWED DURING AUDIT (cont'd)

Contract Number	Procuring Activity	Component	Total Expenditure As of Audit
N0014090C4005	Naval Regional Contracting Center, Philadelphia	Navy	$1,718,224
N0014090CBA38	Naval Regional Contracting Center, Philadelphia	Navy	322,666
N0014090CBB33	Naval Regional Contracting Center, Philadelphia	Navy	724,107
N0014090CBB49	Naval Regional Contracting Center, Philadelphia	Navy	270,558
N0014090CBC07	Naval Regional Contracting Center, Philadelphia	Navy	493,077
N0014090CBC48	Naval Regional Contracting Center, Philadelphia	Navy	2,859,627
N0014090D2171	Naval Regional Contracting Center, Philadelphia	Navy	602,491
N0014090DBC10	Naval Regional Contracting Center, Philadelphia	Navy	1,451,677
N0014091CBA00	Naval Regional Contracting Center, Philadelphia	Navy	76,322
N0012389C0105	Naval Regional Contracting Center, Long Beach	Navy	1,374,824
N0012389C0254	Naval Regional Contracting Center, Long Beach	Navy	498,328
N0060089C0378	Naval Regional Contracting Center, Washington	Navy	2,353,351
N0060089C3120	Naval Regional Contracting Center, Washington	Navy	2,067,929
N0060089D0435	Naval Regional Contracting Center, Washington	Navy	8,189,406
N0060089D0440	Naval Regional Contracting Center, Washington	Navy	331,122
N0060089D2484	Naval Regional Contracting Center, Washington	Navy	4,040,913
N0060090D0390	Naval Regional Contracting Center, Washington	Navy	834,311
N0060090D0684	Naval Regional Contracting Center, Washington	Navy	3,536,926
N0060090D3334	Naval Regional Contracting Center, Washington	Navy	4,687,743
N6092189CA229	Naval Surface Warfare Center	Navy	1,130,025
N6092189DA416	Naval Surface Warfare Center	Navy	7,933,348
N6092190CA204	Naval Surface Warfare Center	Navy	1,709,000
N6092190CA229	Naval Surface Warfare Center	Navy	228,029
N6092190DA426	Naval Surface Warfare Center	Navy	1,122,127

APPENDIX B: CONTRACTS REVIEWED DURING AUDIT (cont'd)

Contract Number	Procuring Activity	Component	Total Expenditure As of Audit
N0001489C0285	Office of Naval Research	Navy	$ 2,000,000
N0001489D0080	Office of Naval Research	Navy	10,243,236
N0001490D0097	Office of Naval Research	Navy	3,078,299
N0001490D0106	Office of Naval Research	Navy	4,050,597
N0001490D0157	Office of Naval Research	Navy	2,002,416
F4465089C0017	4400 Contracting Squadron	Air Force	490,119
F4465089D0002	4400 Contracting Squadron	Air Force	972,270
DCA10089C0054	Defense Information Systems Agency	DISA	2,040,019
DCA10090C0011	Defense Information Systems Agency	DISA	1,439,393
DCA10090C0024	Defense Information Systems Agency	DISA	4,988,588
Total			$175,791,210

APPENDIX C: COMPARISON OF PROCUREMENT METHODS

Comparison of a Procurement Made Through the SBA's Section 8(a) Program and a Procurement Made Using Full and Open Competition

	Small Business Administration Section 8(a) Program	Full and Open Competition
Required to Advertise in the Commerce Business Daily?	No FAR 2.202(a)(4)	Yes FAR 5.301
Agency allowed to select contractor?[1]	Yes FAR 19.803(c))	No FAR 6.003
Contractor Subject to Vendor Protest?	No FAR 19.805-2(e))	Yes FAR 33.102
Reviewed by the Competition Advocate?	No[2]	Yes FAR 6.501
Regarded as Competitive for Statistical Purposes?	Yes DFARS 204.6-16	Not Available for Competition DFARS 253.204-70
Specific Make/Model Specifications Require Approval?	Yes FIRMR 201-20.103-5 FAR 6.303, 6.304	Yes FIRMR 201-20.103-5 FAR 6.303, 6.304
Award Objective?	Current Fair Market Price FAR 19.806	Agency Determination[3] FAR 15.607(b)

1/ In full and open competition, a Defense agency normally selects the lowest cost offeror's proposal. Under the Section 8(a) Program, the agency is generally allowed to select the contractor it would like to negotiate with, unless the proposed solicitation is subject to the new competition requirements.

2/ Our audit showed that Competition Advocates do not generally review individual acquisitions under the Section 8(a) Program because such acquisitions are exempt from the Competition in Contracting Act. However, the Defense Information Systems Agency did have a review process that involved the Competition Advocate.

3/ FAR 15.607(b) states that the evaluation factors that apply to acquisitions and the relative importance of those factors are within the broad discretion of agency acquisition officials. Price or cost to the Government are to be considered in every procurement.

APPENDIX D: SUMMARY OF POTENTIAL BENEFITS RESULTING FROM AUDIT

Recommendation Reference	Description of Benefit	Amount and/or Type of Benefit
A.1.	[Deleted from draft report]	
A.2.	Economy and Efficiency. Improves cost-effectiveness of ADP purchases.	Undeterminable. We found no reasonable basis to quantify future monetary benefits.
A.3.	Compliance with intent of Business Development Opportunity Reform Act of 1988. Improves cost-effectiveness through competitive procurements of ADP resources.	Undeterminable. We found no reasonable basis to quantify future monetary benefits.
A.4.	Compliance with the intent of the Business Development Opportunity Reform Act of 1988. Improves cost-effectiveness through competitive procurements of ADP resources.	Undeterminable. We found no reasonable basis to quantify future monetary benefits.
A.5.	Economy and Efficiency. Improves cost-effectiveness of ADP resource acquisitions.	Undeterminable. We found no reasonable basis to quantify future monetary benefits.
B.1	Economy and Efficiency. Allows the purchase of ADP equipment without additional markups due to brokering. Ensures compliance with Walsh-Healey Act.	Undeterminable. We found no reasonable basis to quantify future monetary benefits.
B.2	Economy and Efficiency. Allows the purchase of ADP equipment without additional markups due to brokering. Ensures compliance with Walsh-Healey Act.	Undeterminable. We found no reasonable basis to quantify future monetary benefits.
C.1.	Compliance with regulations.	No monetary benefits.
C.2.	Compliance with regulations.	No monetary benefits.

APPENDIX E: ACTIVITIES VISITED OR CONTACTED

Office of the Secretary of Defense

Assistant Secretary of Defense (Command, Control, Communications, and Intelligence), Washington, DC

Department of the Army

Assistant Secretary of the Army (Financial Management), Washington, DC
U.S. Army Test and Evaluation Command, Aberdeen Proving Ground Support Activity, Aberdeen, MD
Administrative Assistant to the Secretary of the Army, Defense Supply Service-Washington, Washington, DC
U.S. Army Laboratory Command, Harry Diamond Laboratory, Army Materiel Command, Adelphi, MD
U.S. Army Medical Research and Development Command, U.S. Army Medical Research Acquisition Activity, Frederick, MD
U.S. Army Armament, Munitions and Chemical Command, Chemical Research and Development Center, Dover, NJ
Department of the Army, Chief of Engineers, U.S. Army Engineer District, Norfolk, VA
U.S. Army Training and Doctrine Command, U.S. Army Training Support Center, Fort Eustis, VA

Department of the Navy

Assistant Secretary of the Navy (Financial Management), Washington, DC
Office of Naval Research, Washington, DC
Naval Supply Systems Command
- Naval Regional Contracting Center, Washington, DC
- Naval Regional Contracting Center, Philadelphia, PA
- Naval Regional Contracting Center, Long Beach, CA
- Naval Surface Warfare Center, Dahlgren, VA

Headquarters, U.S. Marine Corps, Marine Corps Base, Camp Pendleton, CA
U.S. Marine Corps Systems Command, Marine Corps Tactical Support and Systems Activity, Camp Pendleton, CA

Department of the Air Force

Assistant Secretary of the Air Force (Financial Management and Comptroller), Washington, DC
Director of Contracting for Air Combat Command, 4400 Contracting Squadron, Air Combat Command/Logistics, Langley Air Force Base, VA

APPENDIX E: ACTIVITIES VISITED OR CONTACTED (cont'd)

Defense Agencies

Defense Information Systems Agency, Arlington, VA

Non-DoD Activities

Department of Labor, Washington, DC
General Services Administration, Washington, DC
Small Business Administration, Washington, DC

Non-Government Activities

Digital Support Corporation, Reston, VA
Electronic Component Sales, Baltimore, MD
Pulsar Data Systems, Lanham, MD
RJO Enterprises, Lanham, MD
SITA Corporation, McLean, VA
Systems Resources Incorporated, Bethesda, MD
Westco Automated Systems and Sales, Silver Spring, MD

APPENDIX F: REPORT DISTRIBUTION

Office of the Secretary of Defense

Under Secretary of Defense for Acquisition
Assistant Secretary of Defense (Command, Control, Communications, and Intelligence)
Assistant Secretary of Defense (Public Affairs)
Comptroller of the Department of Defense
Deputy Assistant Secretary of Defense (Procurement)
Director, Defense Acquisition Regulations Council
Director, Office of Small and Disadvantaged Business Utilization

Department of the Army

Secretary of the Army
Assistant Secretary of the Army (Research, Development and Acquisition)
Inspector General, Department of the Army
Auditor General, U.S. Army Audit Agency
Director of Information Systems for Command, Control, Communications and Computers
Aberdeen Proving Ground Support Activity, Test and Evaluation Command
Defense Supply Service-Washington, Administrative Assistant to the Secretary of the Army
Harry Diamond Laboratory, Army Materiel Command
U.S. Army Medical Research Acquisition Activity, Office of the Army Surgeon General
Chemical Research and Development Center, U.S. Army Armament, Munitions and Chemical Command,
U.S. Army Engineer District, Norfolk
U.S. Training Support Center, U.S. Army Training and Doctrine Command

Department of the Navy

Secretary of the Navy
Assistant Secretary of the Navy (Financial Management)
Assistant Secretary of the Navy (Research, Development and Acquisition)
Auditor General, Naval Audit Service
Comptroller of the Navy
Competition Advocate General
Commander, Naval Information System Center
Naval Computer and Telecommunications Command
Naval Supply Systems Command
  Naval Regional Contracting Center, Washington
  Naval Regional Contracting Center, Philadelphia
  Naval Regional Contracting Center, Long Beach

Naval Surface Warfare Center, Dahlgren, Naval Sea Systems Command
Office of Naval Research, Assistant Secretary of the Navy (Research, Development and Acquisition)
Headquarters, Marine Corps, Camp Pendleton
Marine Corps Tactical Support and Systems Activity, Camp Pendleton

Department of the Air Force

Secretary of the Air Force
Assistant Secretary of the Air Force (Financial Management and Comptroller)
Assistant Secretary of the Air Force (Acquisition)
Auditor General, Air Force Audit Agency
Deputy Chief of Staff for Command, Control, Communications and Computers
Director of Contracting for Air Combat Command, 4400 Contracting Squadron, Air Combat Command/Logistics

Defense Agencies

Defense Contract Audit Agency
Defense Information Systems Agency
Defense Intelligence Agency
Defense Logistics Agency
National Security Agency
Defense Logistics Studies Information Exchange

Non-DoD Activities

Department of Labor
Department of State
General Accounting Office
  Information Management and Technology Division
  National Security and International Affairs Division, Technical Information Center
General Services Administration
Office of Management and Budget
Office of Federal Procurement Policy
Small Business Administration

Chairman and Ranking Minority Member of the Following Congressional Committees:

  Senate Committee on Appropriations
  Senate Subcommittee on Defense, Committee on Appropriations
  Senate Committee on Armed Services
  Senate Committee on the Budget
  Senate Committee on Governmental Affairs
  Senate Committee on Small Business

APPENDIX F: REPORT DISTRIBUTION (cont'd)

Senate Subcommittee on Competition and Antitrust Enforcement, Committee on Small Business
Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs
House Committee on Appropriations
House Subcommittee on Defense, Committee on Appropriations
House Committee on Armed Services
House Committee on the Budget
House Committee on Energy and Commerce
House Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce
House Subcommittee on Readiness, Committee on Armed Services
House Committee on Government Operations
House Subcommittee on Legislation and National Security, Committee on Government Operations
House Committee on Small Business
House Subcommittee on Small Business Administration, the General Economy, and Minority Enterprise Development, Committee on Small Business

MANAGEMENT COMMENTS: DIRECTOR OF DEFENSE PROCUREMENT

OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, DC 20301-3000

ACQUISITION

AUG 25 1992

DP(DARS)

In reply refer to
DAR Case: 92-H724-02

MEMORANDUM FOR DIRECTOR, FINANCIAL MANAGEMENT DIRECTORATE, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

THROUGH: CHIEF, CONGRESSIONAL ACTIONS AND INTERNAL REPORTS

SUBJECT: Draft Audit Report on the Use of Small Business Administration Section 8(a) Contractors in Automatic Data Processing Acquisitions (Project No. 1FE-1003)

This responds to your memorandum of June 25, 1992, requesting comments on your draft audit report.

Recommendation 4 suggested that the Director of Defense Procurement direct the Defense Acquisition Regulations Council to revise the Defense Federal Acquisition Regulation Supplement (DFARS) to require contracting officers to justify in agency offerings to the Small Business Administration (SBA) why the proposed procurement cannot be competed.

We do not believe that language is needed in the DFARS. FAR 19.805-1 requires that acquisitions above the 8(a) competitive threshold that are offered for the 8(a) program be awarded on the basis of competition if certain conditions are met. SBA may accept the requirement for a sole source 8(a) award only if it agrees with the agency's findings that the conditions for competition have not been met.

If your recommendation is intended to apply to acquisitions below the competitive threshold, it would directly conflict with the Business Opportunity Development Reform Act of 1988 which provides that approval to compete below the threshold may be granted on a limited basis only.

Thank you for the opportunity to comment.

Eleanor Spector

Eleanor R. Spector
Director, Defense Procurement

MANAGEMENT COMMENTS: OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION
WASHINGTON, DC 20301-3061

OFFICE OF SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS UTILIZATION

16 SEP 1992

MEMORAMDUM FOR MR. KENT SHAW, DOD INSPECTOR GENERAL FOR AUDITING

SUBJECT: OSD SADBU Comments re: Draft Audit on Contract Award Protest of a Small Business 8(a) Contract (Project No. 2CD-8010)

The enclosed comments concerning subject report are furnished in accordance with your request.

Also as requested, we have initiated a request to the Small Business Administration regarding a proposed revision to 13 CFR 124.311, as follows:

"Revise 13 CFR 124.311(a)(2) from "the guaranteed minimum value" to "the estimated total lifetime value of the contract." This request is limited to the area of ADP services and supplies."

As discussed in our meeting on September 3, 1992, a similar recommendation was proposed to the DAR Council (re: DAR Case 92-H724-02) following a review of subject report by the Small Business Committee on July 27, 1992.

Horace J. Crouch

HORACE J. CROUCH
Director

Enclosure

Final Report Page No.

Comments on the Draft Audit Report
On the Use of SBA 8(a) Contractors in
ADP Acquisition

1. In the Executive Summary the purpose and history of the 8(a) program is more accurately stated in the Background Section contained in "Part I - Introduction"

2. In the Background Section describing the 8(a) program - an 8(a) firm must be "51% owned and controlled by socially and economically disadvantaged individuals".

1 3. On page 2, second paragraph, fourth line, there is no need to lead in with "But". The last line needs to more accurately state that $23 billion was awarded to SDBs outside of the 8(a) program. It is highly probable that many of these dollars were awarded to 8(a) firms.

2 4. On page 3 regarding the objectives of the audit there are other reasons for contracting officers to use the 8(a) program, i.e, to facilitate the accomplishment of the command's SDB goal. It is doubtful that the program is being used "solely" to bypass competition requirements. Nevertheless, the word "solely" should be put in this paragraph.

2 5. On page 4, Walsh Healy does not "prohibit brokers" rather, it mandates the use of manufacturers or regular dealers. The exact language in the statute or regulation should be referenced.

2 6. On page 4, regarding the scope, the first sentence leads one to believe that the audit covers all small businesses, ie small business set-asides, not just 8(a) firms.

5 7. On page 8, we non concur with the use of the word loophole to describe the SBA's implementation of the Business Opportunity Reform Act. The use of this word is prevalent throughout the report. With regard to the 8(a) program contracting officers are required to abide by SBAs regulations and procedures implementing this program. Also, the finding that the 10 contracts should have been reviewed for competition is unsubstantiated. The report concedes that these contracts were initiated before the statute became effective. The handling of these requirements were consistent with the SBA policy that was in effect at the time. The recommendation of a review to determine if these contracts should be terminated in effect, singles out 8(a) firms for retroactive implementation of a statute. Additionally, we see no need to promote competition under the 8(a) program since the circumstances under which 8(a) competition is to take place is clearly stated in the FAR.

5 8. On page 9, it needs to be stated that the 8(a) program is a "statutory" exception to CICA not an "approved" exception.

7 9. On page 14, the statement that DoD is not taking the necessary steps to fully implement the Act is not supported and does not recognize that DoD is only required to compete 8(a) contracts that meet or exceed the dollar thresholds.

Final Report Page No.	
9	10. On page 16, it is unnecessary to inject the competition advocate into the process to review 8(a) requirements for competition. The DoD effort is to streamline the acquisition process not overly burden it. The regulations are clear as to when competition in the 8(a) program should take place. Should this recommendation go forward notwithstanding, it should be clarified to state that the competition advocate's review should be applicable only to those contracts that meet or exceed the dollar threshold for competition.
	11. We non concur with recommendation A.1 based on reasons stated in 7 above.
	12. The discussion on the Walsh Healy Act appears to suggest that Walsh Healy applies even if the contract is classified as a service contract. Are we suggesting that Walsh Healy should apply to construction contracts and janitorial contracts? Our interpretation is that contractors must either comply with Walsh Healy or the Service Contract Act, depending on how the contract is classified. Our interpretation is that Walsh Healy applies only if the contract is <u>for</u> the manufacture or furnishing of <u>supplies</u>. If the contract is for services and supplies are incidental, we do not believe that Walsh Healy should apply rather the Service Contract Act should govern the performance of the contract.
23	13. On page 23, the statement at the top of the page needs to clarify whether the supplies are a deliverable under the contact or are they incidental to the performance of the contract.
24	14. On page 25, It may be reasonable for the contracting officer to assume that SBA had performed the necessary investigation into Walsh Healy compliance in light of the SBA regulation contained in 13 CFR 124.313(a) that states that it is SBA's responsibility to certify whether an 8(a) firm is eligible under Walsh Healy.
25	15. On page 26, the report does not substantiate the statement that "the use of 8(a) contractors as brokers in ADP acquisition is pervasive".
	16. Appendix C states that "in full and open competition a Defense Agency should select the lowest responsible bidder. This only applies in a sealed bid scenario, and gives not recognition to negotiated procurements or contracts awards based on "best value". Also, it is not appropriate to compare the 8(a) program to full and open competition since this program is a preference program and as such is afforded a statutory exception to CICA. What is the relevance of this comparison?
	17. We non concur with the descriptions of benefits in A.1, A.2, and A.4.

MANAGEMENT COMMENTS: DEPARTMENT OF THE ARMY

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

09 SEP 1992

SARD-PC

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, ATTN: DIRECTOR, FINANCIAL MANAGEMENT DIRECTORATE

SUBJECT: Draft Audit Report on the Use of Small Business Administration Section 8(a) Contractors in Automatic Data Processing Acquisitions (Project No. 1FE-1003)

This responds to your June 25, 1992, request for comments on subject Draft Report. The Department of Army generally does not concur with your findings, conclusions and recommendations, primarily on the basis of law, legislative history, and prevailing regulations issued by the Small Business Administration (SBA) in implementation of the Business Opportunity Development Reform Act of 1988. Our detailed comments are set forth in the enclosure.

To the extent that the report encourages updates, reminders, or clarifications to the acquisition and contracting communities about current regulations, these will be accomplished by the appropriate element of the Office of the Army Acquisition Executive, which includes the Army's Director of Information Systems for Command, Control, Communications and Computers (DISC4).

We agree that there may be opportunities to subvert the intent and purpose of the SBA 8(a) program by circumventing established ADP acquisition approvals, including General Services Administration delegations of procurement authority for FIP resources. Army contracting officers and supporting directors of information management or deputy chiefs of staff for information management, are required to ensure that all functional approvals, e.g., for specific make and model ADPE, are obtained prior to any procurement action, such as a competitive or non-competitive 8(a) contract action.

(Signed) George E. Dausman

Stephen K. Conver
Assistant Secretary of the Army
(Research, Development and Acquisition)

Enclosure

COMMENTS ON DODIG DRAFT REPORT

AUDIT REPORT ON THE USE OF SMALL BUSINESS ADMINISTRATION SECTION 8(a) CONTRACTORS IN DATA PROCESSING ACQUISITION

PROJECT NO. 1FE-1003

FINDING A. COMPETITION

"Army and Navy procurement activities were not competing large Section 8(a) procurements under the Business Opportunity Development Reform Act of 1988 (Reform Act) ...Additionally, specifications for 16 of 39 contracts involving ADP hardware and software were unnecessarily restrictive. Further, competition under the Reform Act has not been promoted by the DoD. As a result, the Government paid more than necessary for goods and services."

Army Comment. Non-concur. The data in the DoDIG report does not support the conclusion that competition under the Reform Act has not been accomplished as explained below.

The Report indicates 16 contracts exceeded the dollar threshold established in the Reform Act for competition. Of these, 9 were awarded prior to the effective date of the Reform Act, and 1 was awarded after the effective date of the Act, but in compliance with SBA regulations (13 CFR 124.311(B)), which exempt 8(a) requirements accepted for the 8(a) Program before 1 October 1989. [Note: 13 CFR 124.311(B) is consistent with the conference language attendant to the Reform Act (TAB A).] Citing these 10 contracts to support a finding/conclusion that 8(a) contracts were not competed in accordance with the Reform Act is erroneous and improper.

The remaining 6 of the 16 contract were awarded in accordance with SBA regulations implementing the Reform Act, which is a revision to the Small Business Act. Five of these six contracts were Indefinite Delivery Type Contracts (IDTC) awarded using the minimum guaranteed threshold as the dollar value for determining competition requirements, in accordance with SBA's regulations at 13 CFR 124.311(a)(2). While it may be legitimate to question the advisability of the SBA's implementation, to conclude that procurement activities are not competing in accordance with the Reform Act when they are in compliance with federal regulation issued by the proponent for the statute is faulty, and appears to presume that DoD procurement personnel are at liberty to ignore SBA's regulations under the 8(a) program. The report fails to recognize that the GSBCA has reviewed this issue and determined that SBA's regulations are reasonably founded (GSBCA 11291-P, 2 Aug 91, TAB B).

The report suggests that the DoD is under some obligation to promote competition under the 8(a) program at a level below the dollar thresholds established in the Reform Act and to encourage resolicitation for competition purposes for those contracts awarded prior to the effective date of the Reform Act. The report suggests that these actions should be taken, in part, to reduce prices.

The report fails to recognize that while the Reform Act allows the SBA to authorize competition below the statutory thresholds, the Act specifically states that "such approval shall be granted only on a limited basis". This would indicate that Congress did not intend that class/systemic requests would be submitted, or approved, for competition below the threshold. The conference language regarding the impact of acquisitions in process at the time of implementation of the Act indicates that there was clearly no Congressional intent to apply the competition requirements of the Act to contracts issued prior to the effective date of the Act or to contract actions in process at the time of implementation. The conference language at TAB A also states that requests to compete below the threshold should be resisted by SBA where the request would be based on inability to reach an agreement on fair market price; this would argue against using "price reductions" as a rationale for competition below the threshold.

With regard to the use of "restrictive" specifications for ADP 8(a) buys, the reality is that few if any procurements fit neatly and solely into one of the categories cited in FAR Part 10 or in the Federal Information Resources Management Regulation (FIRMR). They are most often hybrids.

In addition to the requirements of the FAR and the FIRMR, Army Regulation (AR) 25-1, The Army Information Resources Management Program, (para. 2-9) provides specific guidance on use of "brand name or equal" specifications. AR 25-3, Army Life Cycle Management of Information Systems, para. 7-4 and Appendix F, addresses requirements for preparation of fully competitive specifications/statements of work and the need to maximize competition in all phases of the acquisition strategy. All of these efforts take place before any competitive or non-competitive 8(a) contracting is even considered. It is difficult to believe that of 39 contracts reviewed 11 were "brand name or equal" as opposed to "plug compatible", since "plug to plug compatible" is a far more common practice in ADP procurements. True "brand name or equal" ADP procurements are rare. To the uninitiated, plug compatible procurements may resemble brand name procurements.

RECOMMENDATIONS FOR CORRECTIVE ACTION (FINDING A)
(Note: Recommendations summarized for sake of brevity)

Recommendation 1. Army and Navy Service Acquisition Executives (SAE) and Director of DISA, should require "Competition Advocates to review the 10 contracts" (awarded prior to the effective date of the Reform Act) "and determine whether...current contract requirements should be terminated and requirements competed under the... Act..."

Army Response. Nonconcur. Retroactive application of the statutory requirements to these acquisitions is not appropriate for the following reasons:

- The Army contracts reviewed were all FY89 and FY90 awards. Given normal procurement administrative lead times, and if there is a continuing need, it is assumed that efforts will begin in the near future to reprocure these items/ services.

- The conference language attached to the statute does not support the recommended action.

- In the case of 8(a) contracts, the prime contractor is, of course, the SBA itself. There is no known rationale to terminate these contracts with another federal agency. If the intent of the recommendation is to forego exercise of options on these existing contracts, this also is not advisable. As a general rule, priced options are only to be included in contracts when there is a reasonable expectation that they will be exercised (See also FAR 17.208 and DFARS 17.208). Accordingly, SBA has already included option requirements in its projected business development planning for these 8(a) contractors. To upset these business plans in order to retroactively implement statute is not justified.

- Moreover, the agencies have previously been criticized when they justifiably failed to exercise unpriced options under 8(a) contracts resulting in the specific language set forth in Section 303(f) of the Reform Act. It must be presumed that a systemic failure to exercise options under Recommendation 1. in order to retroactively implement statute would again result in follow-up legislation.

- Traditionally, statutory requirements are not applied retroactively outside the specified effective date. To do so here, under a congressionally mandated preference program for 8(a) firms, would be interpreted as an unfair double standard targeted at minority firms and could set an undesirable precedent for implementation of future statutory requirements unrelated to the 8(a) program.

Recommendation 2. Recommend that the Army and Navy SAEs "require their... Competition Advocates to approve all Section 8(a) program contract actions that would result in a total contract value of $3.0 million or more for the...8(a) contracts that were not awarded competitively" under 19.805.

Army Response Nonconcur. This recommendation appears to require retroactive application of the statute and is not concurred in for the reasons set forth above. If the intent of the recommendation is to review IDTCs where the actual value may exceed $3 million, notwithstanding a guaranteed minimum below the threshold, we non-concur in this as well. It is unclear what action is expected to be taken based on the review/ approval by the Competition Advocates; e.g., is it intended that the Competition Advocate disregard existing SBA regulations and require recompetition? We must nonconcur in any recommendation to terminate or discontinue options which comply with SBA regulations implementing the Reform Act for the reasons set forth above (under Findings). It is also unclear why the threshold for recommended review would differ from the statutory threshold (i.e. $5.0 million for supplies/ $3.0 million for all other).

Recommendation 3. Recommend "...Staff Director, SADBU, DLA request that" SBA revise 13 CFR 124.311(a)(2) from "the guaranteed minimum value" to "the estimated total lifetime value of the contract".

Army Response. Concur in part. Any recommendation such as the foregoing should be submitted by the Director for Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense for Acquisition; not DLA. Also, since the results of this DoDIG review concentrated only on the area of ADP services and supplies, it may be advisable to limit the recommendation to that arena. It should be clarified that the "estimated total lifetime value" is not a "maximum" usage figure but the "most likely" estimate, normally used for a competitive baseline and selection.

Recommendation 4. Recommend Director for Defense Procurement direct the DAR Council to change the DFARS to require contracting officers to justify in agency offerings to SBA why the proposed procurement cannot be competed under the Reform Act.

Army Response. Nonconcur. FAR already requires competition of 8(a) offers which exceed the thresholds, unless an agency recommends, and the SBA approves, a request to process the action non-competitively (FAR 19.805-1(b)). Accordingly,

inclusion of separate requirements under the DFARS to justify noncompetitive acquisition above the threshold is not considered necessary. If this recommendation is intended to apply to acquisitions below the competitive thresholds, it would serve no useful purpose and would, if required systemically, be in direct conflict with the statutory language which indicates that approval to compete below the threshold is to be granted on a limited basis only.

Recommendation 5. Recommend that the Service Acquisition Executives require Competition Advocates to review specifications for computer acquisitions through the 8(a) program to ensure that the specifications are not restrictive.

Army Response. Concur in part. Concur in the Competition Advocate review of specifications for ADPE acquisition, which are to be solicited on the basis of specific make or model, to ensure compliance with the FIRMR and FAR. This would include actions proposed to be noncompetitive 8(a), above or below the threshold. Nonconcur with any recommendation to require systematic "competition" review of requests below the thresholds set forth in the statute authorizing competition.

FINDING B. WALSH-HEALEY ACT

Procuring activities are not performing reviews for Walsh-Healey in 8(a) contracting. PCOs believed SBA was performing Walsh-Healey reviews required by FAR 22.608 and erroneously believed Walsh-Healey reviews were not required for service type contracts, even when the contract included supplies. 26% of 8(a) contractors that provided ADP equipment were merely brokers, in violation of Walsh-Healey Act and the CICA. Use of brokers adds unnecessary costs to the acquisition.

Army Response. The report does not acknowledge that under 13 CFR 124.313(a) (TAB C), the SBA is required to certify as to the eligibility of the 8(a) firm under Walsh-Healey for each individual contract. Further, the report does not acknowledge that under the Small Business Act (Section 8(b)(7)(B) and (C) (TAB D)), SBA's determinations of the eligibility of a small business under Walsh-Healey is, when decided by SBA in the positive, conclusive (similar to certificates of competency related to responsibility issues).

Accordingly, while contracting officers may not have adequately performed the reviews required by FAR 22.608, it would appear that there is some rationale for confusion. Also, while the report makes much of the need to avoid the

use of brokers, it should be noted that the DoD is considering proposing legislation to eliminate Walsh-Healey for commercial acquisitions (ADP would most likely be considered commercial) and that the Department of Labor has recently issued a final rule significantly revising the definition of regular dealer for ADP systems integrators. It should also be noted that for "regular dealers" of used ADPE and some other commodities there are alternate qualifications, different than those cited in FAR 22.606-2(a).

Recommendation 1. SAEs for Army and Navy should require PCOs to obtain from prospective contractors, for acquisitions subject to the Walsh-Healey Act, certifications stating that the contractor is a manufacturer or dealer.

Army Response. Concur with comment. This is already required by existing regulations. If 15% of the contracts reviewed excluded the requirements of Walsh-Healey certifications because the PCO did not believe such requirements to be applicable in a "service" contract, it would appear more appropriate that the FAR be revised to clarify that the provisions/clauses at 52.222-19 and -20 are to be included in all solicitations which require the delivery of supplies in excess of $10,000, even those which are service contracts. Procurement Executives are not authorized to issue their own contracting procedures/requirements unless they are unique to the Service and approved by the Director of Defense Procurement.

Recommendation 2. SAEs for the Army and Navy should require PCOs to perform an investigation to ensure that the contractor is in compliance with the Walsh-Healey Act.

Army Response. Nonconcur (although the intent of this Recommendation is not clear). Reiteration of existing FAR requirements by SAEs is unnecessary and inappropriate.

If the intent is prospective (i.e., to apply to contracts to be awarded in the future), the recommendation should be restated to indicate that PCOs should be reminded of their responsibilities under FAR 22.608-2; advised that these requirements apply to 8(a) contracts notwithstanding 13 CFR 124.302(a); and that, for 8(a) contracts, questions of eligibility will be processed under 19.809. If, as the report would indicate, there is a wide-spread problem with compliance under the 8(a) program, it may be prudent to include a recommendation that FAR Part 22 be revised to incorporate this clarification.

If the intent is to require the "investigation" of existing contracts, the recommendation should be so clarified; should indicate which contracts should be reviewed; and should indicate that, in the event an apparent violation is discovered, the PCO should refer the violation to the SBA for either a certification of eligibility of it's subcontractor or, if SBA agrees that award has been made to an ineligible contractor, to allow SBA to select a substitute 8(a) subcontractor to complete the requirement. The procedures of FAR 22.608-6(b) do not apply to SBA 8(a) awards.

FINDING C. DELEGATION OF PROCUREMENT AUTHORITY

Four Army contracts were awarded under the Section 8(a) Program without obtaining the required delegation of procurement authority (DPA) from GSA.

Army Response. It is not possible to tell from the report whether solicitations (as opposed to contracts) were actually reviewed since the report cites contract numbers. Contracts resulting from plug compatible solicitations may cite specific make and model when incorporating the equipment proposed by the contractor and accepted by the Government. It should be noted that DSS-W was not an Army contracting activity at the time of these awards, but derived their contracting authority from OSD.

Recommendation 1. We recommend that the Director of the U.S. Army Information Systems Command require Contracting Officers to use noncompetitive thresholds for determining whether a DPA is required for the acquisition of ADP resources when contract requires specific make or model.

Army Response. Concur with comment. This is already a requirement of existing Army, Defense and Federal regulations. Under both FAR and FIRMR, specified (or specific) make and model specifications are considered non-competitive, and non-competitive GSA DPA thresholds apply. The proper Army activity to issue reminders on this matter is the Office of Director of Information Systems (Command, Control, Communications and Computers) (DISC4). This agency reports to the Secretary of the Army and also reports to the Army Acquisition Executive for information resources acquisition matters.

Recommendation 2. Recommend Army revise Army Regulation 25-3 to reflect the Delegation of Procurement Authority thresholds in FIRMR 201-20.305-1, effective April 29, 1991.

Army Response. Concur with comment. Although it is planned to completely and formally revise AR 25-3 commencing in September 1992, the revised thresholds were published to all Army field activities, and specifically the Army information mission area community, by two messages issued by ODISC4 in February and March 1991. The new thresholds were also published specifically to the Army contracting community by Army Acquisition Letter 91-4, dated May 8, 1991.

COMMENTS ON APPENDIX C: COMPARISON OF PROCUREMENT METHODS

This appendix contains errors, noted below, which should be corrected.

Required to Advertise in the CBD: Under 8(a): Correct cite for non-competitive exception 5.202(a)(4). Certain competitive 8(a) buys are synopsized per 5.205(f).

Subject to Vendor Protest: Under 8(a), protests can, and have been, lodged with GAO and the PCO under 8(a) solicitations. The citation provided relates to protests of the "eligibility of a contractor under the 8(a) program" not to the substance of the acquisition.

Reviewed by the Competition Advocate: Under full and open competition (F&OC), the Competition Advocate need not perform a review; the Competition Advocate reviews actions which are **not** F&OC.

Regarded as Competitive for Statistical Purposes: Under 8(a), single source 8(a) actions are not "counted as competitive", they are recorded as "Not Available for Competition" (DFARS 253.204-70(c)(4)(iii)(B)(3)). Competitive 8(a) is recorded as competitive (DFARS 253.204-70(c)(4)(iii)(A)(3)).

APPENDIX D: SUMMARY OF POTENTIAL BENEFITS RESULTING FROM AUDIT

A.1 Nonconcur with described benefits. There is no evidence that the 10 contracts were not awarded in compliance with regulations. Further, while competition of the requirements **could** result in some future non-comparable price differences, there is a strong indication that retroactive application of the statutory requirements would not be in concert with congressional intent.

A.2. Implementation of this recommendation would either be in conflict with congressional language or in direct conflict with SBA rules established in the CFR.

A.3. No objection to amount and/or type of benefit.

A.4. While competition below the threshold may indeed increase economy and efficiency, given the statutory language which highlights that approval to use competition below the threshold should be granted on a limited basis, it would also appear to be in conflict with statute.

A.5. No objection to amount and/or type of benefit.

B. No objection to amount and/or type of benefit.

C.1. and C.2 No objection to amount and/or type of benefit.

CONFERENCE LANGUAGE
P.L. 100-656

ment clarifies that this authority should be used primarily in areas where technical competitions are appropriate or when a large number of contractors exist, such as routine construction projects. The conferees intend that competitions on contracts below the threshold amounts will be used in limited instances.

Competitions in the program shall be conducted by the procuring agencies. The agencies in conjuction with SBA should develop an expedited and efficient procedure for notifying eligible program participants of contract opportunities that will be competed as well as an expedited review and evaluation process for selecting the successful firm. Competitions need not stress price as the dominant factor, but may be based primarily on technical evaluations or other non-price related factors. The conferees intend that the competitions under this program be representative of competitions which are the normal practice in the relevant industries. The conferees also intend that SBA use information indicating weaknesses in a firm's ability to compete for contracts in the program as the basis for directing business assistance to the firm to help overcome its weaknesses.

EFFECTIVE DATE

The conferees further intend that contracts in the final stages of negotiation, as of the effective date of this provision, should be excluded from the competition requirement. For these purposes such negotiations should only include those where SBA has accepted the requirement for the program and a proposal containing price has been submitted to the buying agency.

SBA REALS, CASE BY CASE BASIS

Competitions below the threshold should be approved for each solicitation. In determining whether to approve such a request, the Associate Administrator may consider among other factors the following: the contract is in an industrial classification for which program participants' competitive skills may be enhanced because competition is the normal process for making awards in the commercial and federal marketplace (for example, construction where sealed bidding is the usual method for selecting contractors); and, whether the requesting agency has made and will continue to make available a significant number of its contracts to the program on a noncompetitive basis. The conferees would urge the Associate Administrator to deny such a request on a contract opportunity previously offered on a noncompetitive basis if he concludes the request is based on the agency and the firm being unable to reach an agreement on fair market price.

(c) Contract matching

The House bill provided that if an 8(a) requirement is offered to SBA and the buying agency nominates an awardee, or if an 8(a) firm causes the requirement to be offered to SBA, that concern should generally receive that award if—(1) it is a responsible contractor; (2) the award would be in accord with the targets, objectives and goals of its approved business plan; and (3) the award would not exceed the amounts that would trigger a competitive 8(a) award. It also required SBA to equitably allocate contract requirements when there is no nominated 8(a) concern or when there is no concern that caused the buying agency to offer the requirement to SBA.

TAB A

MANAGEMENT COMMENTS: DEPARTMENT OF THE ARMY (cont'd)

97H CASE of Level 1 printed in FULL format.

Protest of Electronic Systems & Associates, Inc.

GSBCA No. 11291-P

General Services Administration Board of Contract Appeals

1991 GSBCA LEXIS 363; 91-3 B.C.A. (CCH) P24,254

August 2, 1991

CONTRACT: [*1]

Solicitation No. N00140-91-B-2140

JUDGES:
EDWIN B. NEILL; Concur: CATHERINE B. HYATT; VINCENT A. LaBELLA

COUNSEL:
Appearance for Protester, Electronic Systems & Associates, Inc. James H. Roberts, III, Esq., Manatt, Phelps & Phillips, Washington, DC

Appearances for Respondent, U.S. Department of the Navy Michael J. Cunningham, Jr., Esq., Diane L. Celotto, Esq., Naval Regional Contracting Center, Philadelphia, PA

Maryann Grodin, Esq., Office of Counsel, Naval Supply Systems Command, Washington, DC

Appearances for Intervenor, Telecommunications Systems, Inc. Thomas J. Touhey, Esq., George W. Stiffler, Esq., Dempsey, Bastianelli, Brown & Touhey, Washington, DC

Appearance for Intervening Agency, Small Business Administration John W. Klein, Esq., Chief Counsel for Special Programs, U.S. Small Business Administration, Washington, DC

OPINIONBY: NEILL

OPINION:
Opinion by Administrative Judge Neill

This protest was filed by Electronic Systems & Associates, Inc. (ESA). It concerns a procurement being conducted by the Navy pursuant to section 8(a) of the Small Business Act. The procurement is for engineering and technical services in support of telecommunications/network design and engineering analysis for various naval [*2] programs and operational commands.

ESA contends that the Navy has violated statute in not competing this procurement. It also contends that the Navy lacks a proper delegation of procurement authority (DPA) for this procurement. A third count in the origina protest has since been withdrawn. Conference Memorandum (July 9, 1991). Telecommunications Systems, Inc. (TCS) n1 and the Small Business Administration (SBA) have both intervened in this case.

TAB B

1991 GSBCA LEXIS 363, *2; 91-3 B.C.A. (CCH) P24,254

n1 Telecommunications Systems, Inc., is referred to in the record with two acronyms, namely "TSI" and "TCS." The company's president has informed the Boar that the preferred acronym is "TCS." When speaking of the company, therefore, w will use "TCS" unless we are making a direct quote from documentation which use "TSI."

On June 18, the Board convened a hearing to determine whether urgent and compelling circumstances significantly affecting the interests of the United States justified denial of protester's request that respondent's DPA be suspended. On June 20, the Board issued a decision granting protester's reques in part. Respondent was permitted to proceed with the award of a contract to TCS and to issue a delivery order [*3] to support information gathering activities of the Joint Task Force (JTF)-Four on drug interdiction. No other delivery orders were to issue under the contract. Electronic Systems & Associates, Inc., GSBCA No. 11291-P (June 20, 1991).

Following the suspension hearing on June 18, protester submitted a motion fc summary relief on both the first and second counts of its protest. Respondent opposed the motion and submitted its own cross motion for summary relief. Shortly after the Board issued its decision regarding suspension, the parties met with the Board and agreed upon an accelerated schedule for developing the record in this case. At that time, they also asked that the Board render its decision on the record without a hearing. Conference Memorandum (June 24, 1991). As a result of the accelerated schedule, the record for this case was closed before any ruling on the pending dispositive motions. Having the benefi now of a complete record, we decide the first count on its merits. As for the second count, it is dismissed for reasons explained below.

Findings of Fact

1. By memorandum dated March 18, 1991, the commanding officer of the Nava Electronic Systems Engineering [*4] Activity (NESEA) requested that the commanding officer of the Naval Regional Contracting Center (NRCC) in Philadelphia award an 8(a) contract for certain automatic data processing resources to TCS. In this regard, NESEA stated:

The requested period of performance is from 1 April 1991 through 31 March 1996 base year plus four options. . . . Minimum guaranteed value of the contract will be $ 955,000, however, the overall estimated value of the contrac will not exceed $ 9,550,000 for the entire period.

Protest File, Exhibit 2.

2. By letter dated April 15, NRCC offered the following requirement to the SBA for use in the SBA 8(a) contracting program:

Engineering and technical services in support of electronic, tactical and communication systems for the Naval Electronic Systems Engineering Activity. This includes but is not limited to the design, development, installation, integration and testing of various communications hardware and software.

Protest File, Exhibit 4. The same letter listed the estimated value of this requirement as follows:

$ 1,910,000.00 per year for five years of which the Government's minimum obligation is 10% of the base year contractual value.

[*5] Id. The letter also stated:

1. The selected 8(a) firm is Telecommunications Systems Inc., 47 Randall Street, Suite 200, Annapolis, MD. 21401.

Id.

3. In its letter of April 15, NRCC enclosed request for quotations (RFQ) number N00140-91-Q-2140 to TCS. Section B of the RFQ has four contract line item numbers (CLINs) for the base year. They cover engineering and technical services (CLIN 0001), travel (CLIN 0002), material (CLIN 0003), and technical data (CLIN 0004). The estimated cost for CLIN 0002, travel, listed as NTE [not to exceed] $ 300,000. A similar limit of $ 955,000 is listed for CLIN 0003, material in support of CLIN 0001. Each of the four option years have the same four CLINs with the same limits for travel and materials in support of the base CLIN for engineering and technical services for that year. Protest File, Exhibit 3.

4. The option provisions in the RFQ are somewhat unusual in that each is said to be effective as of the date of award. Option I reads:

Engineering and Technical Services as set forth in Section B to accomplish the tasks described in the Statement of Work in Section C from date of award thru 24 months.

Protest File, Exhibit [*6] 3 at 2. The other option provisions have identical language except that option II is effective "from date of award thru 36 months." Similarly, option III is effective "from date of award thru 48 months" and option IV is effective "from date of award thru 60 months." Id. at 3-4.

5. RFQ clause H44 entitled "Minimum and Maximum Quantities" provides in part:

As referred to in paragraph (b) of the "Indefinite Quantities" clause of this contract, the contract minimum quantity is a total of 10% of the base year contractual value worth of orders at the contract unit price(s).

Protest File, Exhibit 3 at 38. The RFQ sets out no separate minimum quantities for the contract options.

6. By letter dated April 21, to NRCC, the SBA formally accepted the NRCC offering of NESEA's requirement "on behalf of Telecommunications Systems, Inc." and authorized NRCC to negotiate directly with TCS. In this letter, the SBA acknowledged the following:

The estimated value of this procurement is $ 1,910,000 each year for five years. Indefinite quantity type contract - guaranteed minimum is 10%.

Protest File, Exhibit 5.

1991 GSBCA LEXIS 363, *6; 91-3 B.C.A. (CCH) P24,254

7. On June 21, following the Board's decision on protester's request for [*7] a suspension of respondent's DPA, the Navy awarded a contract to TCS and issued delivery order 0001. Protest File, Exhibits B, X. At time of award, the estimated value for the contract was $ 1,773,915 for the base period, $ 1,791,675 for the first option period, $ 1,810,895 for the second option period, $ 1,830,321 for the third option period, and $ 1,850,461 for the fourth option period. Id., Exhibit B at 3-7.

8. Clause H44 of the contract, entitled "Minimum and Maximum Quantities," provides in part:

As referred to in paragraph (b) of the "Indefinite Quantities" clause of this contract, the contract minimum quantity is a total of $ 177,391.50 worth of orders at the contract unit price(s).

Protest File, Exhibit B at 49. The contract as awarded, like the RFQ itself, sets out no separate minimum quantities for the contract options.

9. Delivery order 0001 has the following scope:

SCOPE. Under this order, the contractor shall provide the labor hours and materials necessary to validate the design, install a network cable plant, and integrate hardware and software onto the network to provide a functional system.

Protest File, Exhibit X.

Discussion

The Alleged [*8] Failure To Conduct 8(a) Competition

Protester's first count in this protest is that the contracting officer, in issuing the RFP to TCS only, has violated a statutory requirement to compete the procurement among eligible 8(a) firms. The statute in question reads:

A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if -

. . .

(II) the anticipated award of the contract (including options) will exceed $ 5,000,000 in the case of a contract opportunity assigned to standard industrial classification code [SIC code] for manufacturing and $ 3,000,000 (including options) in the case of all other contract opportunities.

15 U.S.C. § 637(a)(1)(D)(i) (1988). This requirement is incorporated into the Federal Acquisition Regulation. See 48 CFR 19.805-1(a) (1990).

It is protester's contention that the estimated life-cycle cost of nearly $ 10,000,000 for this procurement clearly exceeds the statutorily mandated competitive 8(a) threshold (in this case, $ 3,000,000 for a services SIC code). Based upon the uncontroverted estimated cost of the contract and the above-quoted statutory [*9] requirement, ESA contends that NESEA has violated the requirement of the Small Business Act that procurements with this dollar threshold be competed.

1991 GSBCA LEXIS 363, *9; 91-3 B.C.A. (CCH) P24,254

As a preliminary matter, respondent contends that the Board lacks jurisdiction to decide this issue. The determination not to compete this procurement is, according to respondent, a determination of the SBA, not the contracting officer. If an error has been made here, respondent contends that it is not an error of the contracting officer. We are reminded by respondent that, in the past, the Board dismissed for lack of jurisdiction a protest regarding a small disadvantaged business eligibility determination made by the SBA. Respondent's Initial Brief at 6-7.

We disagree. Just how it was determined that TCS would be the only vendor with which the Navy would negotiate is far from clear. Respondent directs our attention to the SBA's letter of April 21 which accepted the offering of NRCC o behalf of TCS. See Finding 6. We cannot ignore the fact, however, that over a month earlier, before the SBA accepted the offering, the NESEA Commander, in seeking the assistance of NRCC for this procurement, asked that the contract be awarded [*10] to TCS. Later, on April 15, NRCC offered the procurement to the SBA and, in doing so, identified TCS as the "selected 8(a) firm." See Findings 1-2.

The determination to compete or not to compete an 8(a) procurement is certainly not reserved to SBA as is a small disadvantaged business eligibility determination. Rather, we read the applicable statute and the implementing regulation as binding on both the SBA and any agency with which it intends to contract under the 8(a) program. If the contracting officer refers an automati data processing equipment (ADPE) procurement to the SBA with the understanding that it will not be competed and this is believed to be in violation of a statutory requirement for competition, then we see no reason why a vendor canno challenge this referral pursuant to the Board's protest jurisdiction. See 40 U.S.C. § 759(f)(1) (1988).

ESA in this case is clearly protesting the action of the Navy not the SBA. See Complaint at 2. The allegation is that the Navy has violated the Small Business Act. We hold, therefore, that we have jurisdiction over this count.

Both respondent and the SBA justify the course of action taken in this procurement [*11] by referring to a regulation issued by the SBA. The regulation implements the statutory provision in question. It reads in pertinent part as follows:

(a) Competitive thresholds. A contract opportunity offered to the 8(a) program for award shall be awarded on the basis of a competition restricted to eligible Program Participants if:

. . .

(2) The anticipated award price of the contract, including options, will exceed $ 5,000,000 for contracts assigned manufacturing Standard Industrial Classification (SIC) codes and $ 3,000,000 for all other contracts. For purposes of indefinite quantity/delivery contracts, the thresholds will be applied to the guaranteed minimum value of the contract.

13 CFR 124.311 (1991).

Because the contract contemplated is of an indefinite quantity type, respondent, joined by the SBA and TCS, contends that the applicable threshold

in this case is the contract's guaranteed minimum, namely 10 percent of the bas year estimate, namely, $ 191,000. n2

n2 We note that the requirement activity (NESEA), in its first correspondenc with NRCC, initially stated the guaranteed minimum at $ 955,000 namely 10 percent of the total estimated value of the contract. See Protest File, Exhibi 2. Subsequent correspondence, however, confirms that this was an error and tha the NESEA and NRCC now understand the minimum to be 10 percent of the base year estimate. See id., Exhibits 4, 5. [*12]

Protester does not deny the applicability of the SBA regulation, but contend that it is "invalid as an improper and unauthorized implementation of the statute." Protester's Final Brief, Appendix 3 at 6. Protester accuses the Navy and the SBA of attempting to rewrite the Small Business Act when they argue tha the "guaranteed minimum value" instead of the "anticipated award price" is the amount to use in determining whether SBA 8(a) competition thresholds have been met. ESA, therefore, asks that we declare the regulation which permits this as inconsistent with statute and null and void with regard to this and all acquisitions of ADP resources under the Brooks Act. Id., Appendix 2 at 2-4.

In Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984), the Supreme Court stated:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrar to the statute. Sometimes the legislative delegation to an agency [*13] on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

See also United States v. Grumman Aerospace Corp., 927 F.2d 575, 578 (Fed. Cir. 1991); New York Guardian Mortgage Corp. v. United States, 916 F.2d 1558, 1559 (Fed. Cir. 1990).

> The SBA regulation challenged by protester is clearly within the congressionally delegated authority of the SBA Administrator to promulgate such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to the Small Business Act. 15 U.S.C. § 634(b)(6) (1988). Furthermore, with regard to the matter at hand, the regulation serves to fill an obvious gap implicitly left by Congress regarding indefinite quantity contracts. These contracts, by their very nature, are not supported, as the definite quantity contract is, by firm requirements. They are prescribed for situations where the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period. [*14] See 48 CFR 16.504(b) (1990).
>
> In this case, we find the SBA's provision to be very much in keeping with the fundamental concept of an indefinite quantity contract, as that term is traditionally understood in Government procurement. In issuing this regulation, the SBA assumes that an "anticipated award" must, first and foremost, be based on actual and known requirements -- whether they be in the base year or the option years -- rather than hypothetical projections. The underlying assumption is both a reasonable and practical interpretation of the statute. The

1991 GSBCA LEXIS 363, *14; 91-3 B.C.A. (CCH) P24,254

resulting regulation, therefore, is not arbitrary, capricious, or manifestly contrary to the statute. Indeed, we agree with respondent, the SBA, and TCS that the regulation effectively settles the matter.

The only minimum requirement we find in the RFQ and the contract is that stated in clause H44. In the RFQ, this was said to be 10 percent of the base year contractual value worth of orders at the contract unit price(s). Since th estimated value of the contract was fixed at $ 1,910,000, we reckon the anticipated minimum requirement to have been $ 191,000. See Findings 2, 6. In the contract, as actually awarded, [*15] the minimum amount came to something less than this figure, namely "$ 177,391.50 worth of orders at the contract unit price(s)." See Finding 8. As already indicated, we do not find either in the RFQ or the actual contract any additional minimum quantity for th options involved. See Findings 5, 8. Clearly, the anticipated minimum quantit for the RFQ and the actual minimum quantity listed in the contract as awarded are within the statutory threshold of $ 3,000,000. n3

n3 Given the language of the option provisions in the RFQ and the apparent absence of any additional minimum requirement for the individual options, we ar convinced that the minimum quantity provision in clause H44 applies to the entire contract period, even as that period may be extended through the exercis of the options. Conceivably, an argument might be made that the guaranteed 10 percent minimum quantity is somehow renewed each time an option is exercised. Even if this interpretation were supportable (and we need not decide whether it is), the total minimum quantities for the base period and the four option periods would be no more than $ 955,000 (using the RFQ figure) or $ 905,726.70 (using the actual contract figures). In neither event, however, would the $ 3,000,000 threshold be met. [*16]

Accordingly, we conclude that the decision not to compete this procurement was in keeping with applicable statute and regulation and that protester's allegation of a violation is incorrect.

The Delegation Of Procurement Authority

The second count of ESA's protest is that respondent in this case has failed to obtain an appropriate DPA. Respondent contends that under the Federal Information Resources Management Regulation (FIRMR) in effect at the time the request for quotations was issued, no DPA was required. Respondent relies on FIRMR § 201-23.104-6 which states that agencies do not require GSA approval to contract for commercial ADP support services. Respondent does admit, however, that in a time and materials contract, such as that intended, if federal information processing (FIP) equipment is being purchased, then a DPA is required. The Navy alleges, however, that it has the necessary blanket DPA.

While respondent has provided a well-documented alternative argument in fav of its having satisfied all applicable DPA requirements, it argues that if protester fails to prevail on the first count of its protest, this remaining count should be dismissed owing to protester's [*17] lack of standing.

The point is well taken. The Brooks Act provides:

(A) the term "protest" means a written objection by an interested party to solicitation by a Federal agency for bids or proposals for a proposed contract for procurement of property or services or a written objection to a proposed

award or award of such a contract; and

(B) the term "interested party" means, with respect to a contract or propose contract described in subparagraph (A), an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

40 U.S.C. § 759(f)(9) (1988).

It having been established with regard to count I that this procurement c be negotiated on a non-competitive basis with TCS, what direct economic interes does protester now have in the procurement in the event that it should prevail on this second issue? If we should conclude that respondent has not satisfied DPA requirements, then presumably respondent would seek from the Administrator whatever authority it might need to support an award to TCS. However, what benefit accrues to protester if respondent were required to pursue this course [*18] of action?

We agree with respondent that, with denial of the first count of this protest, ESA has no remaining direct economic interest in the procurement which is the subject of the protest. Lacking that interest, it lacks standing as an interested party to pursue the second count of its protest. It is well established that only interested parties have standing for purposes of bringing ADPE protests before this Board. United States v. International Business Machines Corp., 892 F.2d 1006 (Fed. Cir. 1990); MCI Telecommunications Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989). Accordingly, we dismiss this second count of ESA's protest for lack of interested party status.

The Alleged Violation of the Board's Suspension Order

In its initial brief, protester has alleged that respondent violated the Board's order partially suspending respondent's DPA. Protester writes:

[T]he Navy misled the Board during the Suspension Hearing by advising the Board that the first delivery order would cover only ADP support services, wher in fact, two-thirds of the value of the delivery order is for ADP equipment as shown in the following June 21, 1991, Navy delivery order file [*19] documentation. . . .

The Board's Suspension ruling of June 20, 1991, only authorized the Navy a limited procurement of services. By procuring $ 420,000 worth of ADP hardware and software from TSI under the first delivery order the Navy has not only acte without an appropriate DPA, but it has violated the Board's Suspension Order.

Protester's Initial Brief at 10-11.

In a special appendix to its reply brief, respondent takes strong objection to this allegation. The Navy contends that the assertion is a "gross impropriety" on protester's part. It asks that we dismiss the allegation, determine that it has acted in compliance with the Board's order, and award it the costs of responding to the allegation. Respondent's Reply Brief, Appendix at 5.

We find no basis for protester's contention. The purpose of the suspension hearing requested by protester was to demonstrate the urgent and compelling

need to issue a single delivery order relating to information gathering activities of the JTF-Four. The statement of work for that delivery order was admitted as an exhibit at the suspension hearing. From a review of the statement and its attachments, one can readily deduce that [*20] ADPE materials would be purchased under it. It calls for the contractor to provide the labor hours and materials necessary to validate the design and install and provide a functional network system. See Finding 9.

The possibility that significant material purchases might be made under the contract (some of which could well be federal information processing equipment) was likewise evident from a review of the RFQ. See Finding 3. A copy of the RFQ was also made available to the Board at the suspension hearing. Indeed, protester, by letter dated June 18, 1991, expressly called this fact to the Board's attention and the Board acknowledged the fact in footnote 4 of its decision regarding suspension.

Protester is incorrect in concluding that our suspension ruling of June 20, 1991, only authorized the Navy a limited procurement of services. Our order authorized the Navy to award a contract to TCS and to issue the delivery order described and discussed during the suspension hearing. This is apparently what the Navy has done. While the level of material purchased under the delivery order is admittedly high, it certainly is not outside the realm of possibility, given the nature [*21] of the task in question. In this regard, we do not believe that respondent intended to mislead or did, in fact, mislead the Board during the suspension hearing.

We decline to dismiss protester's allegation or to award respondent the cc associated with preparing a response to it. We have no hesitancy, however, in stating that, based on the record before us, protester's contention that respondent has violated the suspension order is unsupported. We find no evidence that the Navy has not acted in compliance with the Board's suspension order.

Decision

Count I of this protest is DENIED. Count II is DISMISSED for lack of standing. Our order partially suspending respondent's delegation of prbcuremen authority expires with the issuance of this decision.

...compared to total revenue) Remedial measures, if appropriate, will be imposed during the subsequent program year (e.g., non-compliance with the required business activity target in year one of the transitional stage of program participation would cause remedial measures to be imposed in year two of the transitional stage)

(7) *Attainment of targeted levels.* The program participant must make maximum efforts to maintain and increase its targeted level of non-8(a) revenue during the transitional stage

(8) *Marketing strategy to attain targeted levels.* The program participant must engage in a reasonable marketing strategy that will maximize its potential to achieve the targeted levels of non-8(a) revenue established in the business plan

(9) *Measuring 8(a) support.* In determining whether a Program Participant has reached its approved 8(a) support level during any program year, the base year value of all 8(a) contracts awarded during that program year shall be added to the value of all options and other modifications executed during that year. In the case of an indefinite quantity contract having a guaranteed minimum condition, only the guaranteed minimum dollar amount and tasks orders above that amount actually issued are counted against a concern's approved 8(a) support level. (*See* example in paragraph (b)(6) of this section)

(10) *Reporting and verification of business activity.* Program Participants during the transitional stage shall provide SBA with quarterly and annual financial statements with a breakdown of 8(a) and non-8(a) revenue within 90 days (180 days for audited statements) from the close of the reporting period. The Program Participant shall also provide SBA with a report of all non-8(a) contracts, options and modifications affecting price executed during the program year and any other information as required by SBA within thirty days from the end of the reporting period. At the end of each year of participation in the transitional stage, the BOS assigned to work with the participant shall review the participant's total revenues to determine whether the participant's non-8(a) revenues have met the targets established pursuant to paragraphs (c)(4) and (c)(5) of this section

the receipt of any 8(a) contract during the transitional stage of the program, a Program Participant must certify that it is in compliance with the non-8(a) business activity targets established in its business plan as approved by SBA or that it is in compliance with any remedial measures imposed by SBA pursuant to paragraph (c)(12) of this section, if such remedial measures allow the continued award of 8(a) contracts

(12) *Remedial measures for failure to achieve non-8(a) business activity targets.* SBA is authorized to take appropriate remedial measures with respect to a Program Participant which has failed to attain the minimum required business activity targets as established in paragraphs (c)(4) and (c)(5) of this section. The type of remedial measure used depends in part on the extent to which the Participant failed to obtain and the effort expended in seeking non-8(a) business. These remedial actions include, but are not limited to

(i) Requiring the Program Participant to obtain management and technical assistance or to obtain counseling and/or attend seminars relating to management assistance, business development, financing, marketing, or proposal preparation

(ii) Conditioning the award of future sole source 8(a) contracts on the Participant's taking affirmative steps to expand the dollar volume of its competitive business activity, such as changes in marketing of financing strategies,

(iii) Reducing a Participant's approved level of 8(a) support,

(iv) Reducing, or eliminating, sole source 8(a) contracts,

(v) Program termination pursuant to § 124.209—program termination proceedings will be commenced where a firm makes no efforts to obtain non-8(a) revenues

[¶ 4413.13]

§ 124.313 Certification of SBA's competency.

(a) SBA will certify that it is competent to perform the requirement, as provided by section 8(a)(1)(A) of the Small Business Act, based on its determination that the 8(a) concern with which it intends to subcontract is responsible to perform the requirement. If SBA determines that the concern lacks the integrity, or tenacity and perseverance to perform on a specific 8(a) subcontract, the subcontract will not be awarded to such concern. A Program Participant which has not submitted required financial statements to SBA will be deemed not responsible to receive 8(a) subcontracts. In addition, SBA will also certify whether an 8(a) concern is eligible under the Walsh-Healey Public Contracts Act, 41 U.S.C. 35(a), for each individual 8(a) subcontract

(b) SBA's determination not to award a Program Participant a specific 8(a) subcontract because the concern lacks an element of responsibility, or is ineligible under the Walsh-Healey Public Contracts Act, does not constitute a denial of total 8(a) program participation for the purposes of section 8(a)(9) of the Small Business Act.

(c) A Participant that is determined by SBA not to be responsible to perform a sole source or competitive 8(a) contract may not seek the issuance of a Certificate of Competency pursuant to § 125.5 of this title

[¶ 4413.14]

§ 124.314 Performance of work by the 8(a) concern.

(a) To assure the accomplishment of the purposes of the 8(a) program, each 8(a) subcontractor must perform work equivalent to the following percentages

(1) *Services (except construction).* In the case of an 8(a) contract for professional and/or non-professional services (except construction), at least 50 percent of the cost of contract performance incurred for labor must be expended for employees of the 8(a) concern.

(2) *Supplies (other than procurement from a regular dealer in such supplies).* In the case of an 8(a) contract for supplies, an 8(a) concern that seeks to perform the requirement as a manufacturer must perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials. This requirement does not apply to 8(a) concerns that seek to perform 8(a) supply contracts as regular dealers in such supplies

(3) *General construction.* In the case of an 8(a) general construction contract, the 8(a) concern must perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

tors. In the case of an 8(a) contract for cial trade construction (e.g., electr plumbing, mechanical), the 8(a) cor must perform at least 25 percent of the of the contract, not including the co materials, with its own employees.

(b) The Program Participant must ce in its bid or proposal that it will perforn required percentage of work with its employees. Failure of the concern to pr such a statement will result in the firm l considered ineligible for award.

(c) For purposes of determining whetl Program Participant will perform required percentage of the contract, the to be performed by a subsidiary(ies) o Participant or a concern(s) otherwise ated with the Participant is not counte being performed by the Participant.

(d) *Indefinite quantity contracts.* (l order to ensure that the required percer of an indefinite quantity 8(a) award is formed by the Program Participant, at point in time the Program Participant have performed the required percenta the total value of the contract to that For a service or supply contract, this doe mean that the Program Participant perform 50% of each task order with its force. But, rather, the Participant is requ to perform 50% of the combined total c task orders to date. The Regional Adm trator or his/her designee may waive requirement where a large amount of sul tracting is essential in the early stag performance before the work to be don the Participant can be performed, prov that there are written assurances from the Participant and the procuring ag that the contract will ultimately comply the requirements of this section

Example. If a Program Participant perfo 90 percent of a $100,000 task order on an i nite quantity service contract with its own force, it would only have to perform 10 perce a second task order for $100,000 because the cern would still have performed 50 percent combined total value of the contract to ($100,000 out of $200,000)

(2) Where there is a guaranteed mini condition in an indefinite quantity award, the required performance of work centage need not be met on the first order. In such a case, however, the per age of work to be subcontracted to concerns by the Program Participant or first task order may not exceed 50 perce

["Small Business Concerns"]

(6) to determine within any industry the concerns, firms, persons, corporations, partnerships, cooperatives, or other business enterprises which are to be designated "small-business concerns" for the purpose of effectuating the provisions of this Act. To carry out this purpose the Administrator, when requested to do so, shall issue in response to each such request an appropriate certificate certifying an individual concern as a "small-business concern" in accordance with the criteria expressed in this Act. Any such certificate shall be subject to revocation when the concern covered thereby ceases to be a "small-business concern". Offices of the Government having procurement or lending powers, or engaging in the disposal of Federal property or allocating materials or supplies, or promulgating regulations affecting the distribution of materials or supplies, shall accept as conclusive the Administration's determination as to which enterprises are to be designated "small-business concerns", as authorized and directed under this paragraph;

[Certification]

(7)(A) To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration

(B) If a Government procurement officer finds that an otherwise qualified small business concern may be ineligible due to the provisions of section 35(a) of title 41, United States Code (the Walsh-Healey Public Contracts Act), he shall notify the Administration in writing of such finding. The Administration shall review such finding and shall either dismiss it and certify the small business concern to be an eligible Government contractor for a specific Government contract or if it concurs in the finding, forward the matter to the Secretary of Labor for final disposition, in which case the Administration may certify the small business concern only if the Secretary of Labor finds the small business concern not to be in violation

(C) In any case in which a small business concern or group of such concerns has been certified by the Administration pursuant to (A) or (B) to be a responsible or eligible Government contractor as to a specific Government contract, the officers of the Government having procurement or property disposal powers are directed to accept such certification as conclusive, and shall let such Government contract to such concern or group of concerns without requiring it to meet any other requirement of responsibility or eligibility. Notwithstanding the first sentence of this subparagraph, the Administration may not establish an exemption from referral or notification or refuse to accept a referral or notification from a Government procurement officer made pursuant to subparagraph (A) or (B) of this paragraph, but nothing in this paragraph shall require the processing of an application for certification if the small business concern to which the referral pertains declines to have the application processed

[Federal Contract Information]

(8) to obtain from any Federal department, establishment, or agency engaged in procurement or in the financing of procurement or production such reports concerning the letting of contracts and subcontracts and the making of loans to business concerns as it may deem pertinent in carrying out its functions under this Act;

(9) to obtain from any Federal department, establishment, or agency engaged in the disposal of Federal property such reports concerning the solicitation of bids, time of sale, or otherwise as it may deem pertinent in carrying out its functions under this Act;

(10) to obtain from suppliers of materials information pertaining to the method of filling orders and the bases for allocating their supply, whenever it appears that any small business is unable to obtain materials from its normal sources;

[Studies and Recommendations]

(11) to make studies and recommendations to the appropriate Federal agencies to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, to insure that a fair proportion of Government contracts for research and development be placed with small-business concerns

TAB D

MANAGEMENT COMMENTS: DEPARTMENT OF THE NAVY

THE ASSISTANT SECRETARY OF THE NAVY
(Research, Development and Acquisition)
WASHINGTON, D C 20350-1000

SEP 04 1992

MEMORANDUM FOR INSPECTOR GENERAL DEPARTMENT OF DEFENSE

Subj: DRAFT AUDIT REPORT ON THE USE OF SMALL BUSINESS ADMINISTRATION SECTION 8(a) CONTRACTORS IN DATA PROCESSING ACQUISITIONS (PROJECT NO. 1FE-1003)

Ref: (a) DoDIG Memorandum of 25 June 1992; same subject

Encl: (1) DoN Response to DoDIG Audit Report 1FE-1003

Enclosed is the Navy response to the subject audit report. We concur with the recommendations.

Gerald A. Cann

Final Report Page No.

Department of the Navy
Response to
DoDIG Draft Audit Report 1FE-1003
"8(a) Contractors in Automatic Data Processing Acquisitions"
25 June 1992

RECOMMENDATIONS FOR CORRECTIVE ACTION

9

Recommendation 1, Page 19:

We recommend that the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development, and Acquisition); Navy Acquisition Executive, Office of the Assistant Secretary of the Navy (Research, Development, and Acquisition); and the Director, Defense Information Systems Agency, require their respective Competition Advocates to review the 10 contracts listed on page 13 of this report that were not awarded competitively under Federal Acquisition Regulation 19.805 and determine whether the current contract requirements should be terminated and requirements competed under the Business Opportunity Development Reform Act of 1988".

DoN Response:

Based on a 30 July 1992 conversation with Mr. F. Jay Lane, DoDIG, it is our understanding that the intent of this recommendation is that the Navy seriously consider competitively resoliciting option quantities on these contracts rather than exercising the options. The DoDIG is not recommending that the contracts be terminated for convenience.

Concur. FAR 17.207(f) requires that, before exercising an option, contracting officers make a written determination that exercising the option is the most advantageous method of fulfilling the Government's need, price and other factors considered. By 15 September 1992, a memorandum will be sent to activities responsible for those contracts listed on page 13 of the audit report that have options remaining to be exercised. The memorandum will require the competition advocate to review any contracting officer's determination to exercise the option before the option is exercised.

9

Recommendation 2, Page 19:

We recommend that the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development and Acquisition); and the Navy Acquisition Executive, Office of the Assistant Secretary of the Navy (Research, Development, and Acquisition), require their respective Competition Advocates to

Final Report Page No.

approve all Section 8(a) Program contract actions that would result in a total contract value of $3 million or more for the Section 8(a) contracts that were not awarded competitively under Federal Acquisition Regulation 19.805".

DoN Response:

Based on a 30 July 1992 conversation with Mr. F. Jay Lane, DoDIG, it is our understanding that this recommendation pertains to prospective contract actions. It does not refer to any of the contracts cited in the report.

Partially Concur. We concur that competition advocates should review contract actions that meet the threshold set forth for competitive 8(a)s in Federal Acquisition Regulation 19.805-1 (a)(2). SECNAVINST 4210.10 already requires that competition advocates review all non-competitive requirements in excess of $25,000 and challenge barriers to competition.

We do not concur, however, that the Navy should necessarily use a criteria, other than that currently set forth in the Small Business Administration's (SBA) regulation, to determine when the threshold is met.

10 Recommendation 3 on page 20 of this draft audit report asks that the Staff Director, Small and Disadvantaged Business Utilization, Defense Logistics Agency (DLA) raise this issue with SBA. We believe the Navy should wait until DLA has explored this issue before issuing any guidance.

10 **Recommendation 5, Page 20:**

We recommend that the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development and Acquisition); and the Navy Acquisition Executive, Office of the Assistant Secretary of the Navy (Research, Development and Acquisition), require their respective Competition Advocates to review specifications for computer acquisitions through the Section 8(a) Program to ensure that the specifications are not restrictive.

DoN Response:

Concur. SECNAVINST 4210.10 requires that competition advocates review specifications to ensure that they are not restrictive. By 31 October 1992, competition advocates will be reminded of this responsibility. Contracting activities will be advised that they should involve their competition advocates in the agency's evaluation of the 8(a) requirement so that barriers to competition can be identified and, if possible, eliminated before an agency offering is made to the Small Business Administration.

Final Report Page No.

25

Recommendations 1 and 2, Pages 30 and 31, Respectively:

We recommend that the Army Acquisition Executive, Office of the Assistant Secretary of the Army (Research, Development, and Acquisition): and the Navy Acquisition Executive, Office of the Assistant Secretary of the Navy (Research, Development and Acquisition), require their respective Contracting Officers to:

1. Obtain from prospective contractors, for acquisitions subject to the Walsh-Healey Act, certifications stating that the contractor is a manufacturer or regular dealer of the supplies offered in compliance with Federal Acquisition Regulation 22.608.

2. Perform an investigation to ensure that the contractor is in compliance with the Walsh-Healey Act in accordance with Federal Acquisition Regulation 22.608.

DoN Response:

Concur. The Navy concurs that contracting officers must obtain certifications when the act applies and must challenge the certifications when the circumstances set forth in FAR 22.608-2 are present. In September 1992, the DAR Council is scheduled to report on FAR Case 92-036, Walsh-Healey Definitions. Shortly thereafter, ASN (RDA) (APIA) will provide guidance regarding the change to Navy contracting activities. In this guidance, we will remind the activities of the contracting officer responsibilities described in FAR 22.6, "Walsh-Healey Public Contracts Act".

MANAGEMENT COMMENTS: DEFENSE INFORMATION SYSTEMS AGENCY

DEFENSE INFORMATION SYSTEMS AGENCY
701 S. COURT HOUSE ROAD
ARLINGTON, VA 22204-2199

REPLY TO CM

21 AUG 1992

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE
ATTN: Director, Financial Management Directorate

SUBJECT: Draft Audit Report on the Use of Small Business Administration Section 8(a) Contractors in Automatic Data Processing Acquisitions (Project No. 1FE-1003)

Reference: DoDIG Memo, subject as above, 25 Jun 92

As requested by the reference, the Defense Information Systems Agency has reviewed the subject audit report. Comments are provided at the enclosure. The point of contact for this action is Ms. Sandi Leicht, Organization Effectiveness and Controls Division (CM), 692-2172.

FOR THE DIRECTOR:

1 Enclosure a/s

GEORGE J. HOFFMAN
Comptroller

DISAJ 178 92

Final Report Page No.

DISA COMMENTS ON DRAFT AUDIT REPORT
USE OF SMALL BUSINESS ADMINISTRATION SECTION 8(A) CONTRACTORS
IN AUTOMATIC DATA PROCESSING ACQUISITIONS
(PROJECT NO. 1FE-1003)

1. Finding A. - Competition, recommendation 1.: Nonconcur. The recommendation requires the Competition Advocate to review contracts contained in the report that were not awarded competitively under the Federal Acquisition Regulation 19.805 and determine whether the current contract requirements should be terminated and requirements competed under the Business Opportunity Development Reform Act of 1988. As stated in the audit report, DISA contract DCA10090C0024 was exempt from the Reform Act since it had been accepted for the Section 8(a) Program prior to 1 October 1989. Further review of the contract revealed the following:

a. The contract in questio. is completed; it expired 26 November 1990, and no modifications were adde. .

b. The scope of work consis d only of design and installation of the Local Area Network (LAN).

c. There was no direct follow-on contract; the related efforts followed the competitive process.

2. The audit report's Comparison of Procurement Methods (Appendix C) is erroneous as applied to DISA. The question, "reviewed by the Competition Advocate" is answered "no" for the Small Business Administration Section 8(a) Program. The DISA acquisition process provides for a formal, rigorous review at three different points. The Activity Competition Advocate serves a key role in (1) the Advanced Acquisition Plan which is an annual review of the next fiscal years projected contract requirements, (2) the Acquisition Review Council (ARC), chaired by the Vice Director, DISA, in which individual acquisition plans of all O&M packages in excess of one million dollars are reviewed, and (3) the Directorate Acquisition Review Panel (DARP) in which the full purchase request package is reviewed and finalized.

9

3. Page 18, paragraph 2.: Nonconcur. The finding states that the Competition Advocate's responsibilities should include identifying opportunities for competition under the Reform Act as well as identifying restrictive specifications for noncompetitive acquisitions under the Section 8(a) Program. This change in procedures would impede the acquisition process. The proposed change is written with the understanding that all Competition Advocates are technically qualified to identify restrictive specifications. This is not always the case. Under the Small Business Program, small business specialists perform this function. The Small Business Office at DISA performs this review to identify restrictive specifications. Having the Competition Advocate involved in the small business realm suggests a conflict of interest.

Enclosure

Final Report Page No.

DISA COMMENTS ON DRAFT AUDIT REPORT
USE OF SMALL BUSINESS ADMINISTRATION SECTION 8(A) CONTRACTORS
IN AUTOMATIC DATA PROCESSING ACQUISITIONS
(PROJECT NO. 1FE-1003)
(CONTINUED)

10

4. Page 20, paragraph 4.: Nonconcur. The recommendation addressed to the Director of Defense Procurement, Office of the Under Secretary of Defense for Acquisition, states that the Defense Federal Acquisition Regulation Supplement Section 219.8 be changed to require that contracting officers to justify (in the agency offering) why a proposed procurement cannot be competed under the Business Opportunity Development Reform Act of 1988. The Office of the Small and Disadvantaged Business Utilization does not agree with the proposed change if approval higher than the Contracting Officer is required. Some Agency acquisitions issued to Section 8(a) contractors are urgent. The ability to utilize the Section 8(a) process to make timely sole source awards has been essential in meeting Agency requirements. If these actions are held up for approval of "why the procurement cannot be competed," the DISA mission could be jeopardized.

LIST OF AUDIT TEAM MEMBERS

Nancy L. Hendricks	Director, Financial Management
F. Jay Lane	Program Director
Kent E. Shaw	Project Manager
Robert A. Harris	Auditor
Melissa Fast	Auditor
Rhonda Mead	Auditor
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