



Department of Energy  
Washington, DC 20585

July 7, 1994

MEMORANDUM TO: Mr. Philip Winter  
General Services Administration (GSA)

THROUGH: Mary Ann Masterson  
Deputy Assistant General Counsel for Procurement and  
Financial Assistance

FROM: Anne Troy  
Office of Procurement and Financial Assistance  
GS 61

SUBJECT: Statutory Exception From The Competition In Contracting  
Act's Full and Open Competition Requirement In Demand  
Side Management Utility Contracts

You asked for assistance in determining whether the language in § 152 of the Energy Policy Act, Public Law 102-458, (EPACT) provides this agency with the authority to "sole source" utility service contracts to obtain demand side management (DSM) services. We conclude that the language contained in § 152 does meet the criteria of one exception to the Competition in Contracting Act of 1984 (CICA). CICA requires, with certain limited exceptions, full and open competition in government contracting. One of the exceptions to that requirement is contained in 41 U.S. C. § 253 (c) (5), which provides that a civilian agency may use other than competitive procedures when "a statute expressly authorizes or requires that the procurement be made . . . from a specified source." See also the Federal Acquisition Regulation, FAR 6.302-5 (a) (2).<sup>1</sup>

Section 152 of EPACT provides as follows:

- (c) UTILITY INCENTIVE PROGRAMS – Agencies are authorized and encouraged to participate in programs to increase energy efficiency and for water conservation or the management of electricity demand

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<sup>1</sup> The Federal Acquisition Regulation requires that contracts awarded using this authority will be supported by a written Justification and Approval (J&A).

conducted by gas, water, or electric utilities and generally available to customers of such utilities.

- (2) Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.
- (3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.

Plain Language. In our opinion, § 152's plain language contains an express authorization for an agency to participate in DSM contracts and permits them to accept any financial incentive or to enter into negotiations regarding these incentive programs. This language appears to provide express authority for an agency to directly approach a utility concerning DSM services, including the capability to award a noncompetitive contract to that utility without the use of full and open competition.

Navy Concurrence. Moreover, of some significance, our opinion is shared by the Naval Facilities Engineering Command (NAVFAC) which, with the other military service departments, relies upon virtually identical language in the FY 93 Defense Authorization Act<sup>2</sup> (attachment 1) to obtain DSM services directly from gas or electric utilities. In a legal opinion (attachment 2) discussing this issue, the counsel from NAVFAC states, “. . . [c]hanges made to 10 U.S.C. 2865 by the FY 93 Defense Authorization Act . . . clearly authorize military departments to obtain DSM services directly from gas or electric utilities. . . . We need only execute a J&A citing 10 U.S.C. 2865 (d) (3) as authority. FAR 6.302-5 provides that full and open competition is not required where a statute expressly provides that an acquisition be made from a specified source, i.e., the servicing gas or electric utility.”

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<sup>2</sup> Public Law 102-484 at section 2801, states:

- (d) The Secretary of Defense shall permit and encourage each military department . . . to participate in programs conducted by any gas or electric utility for the management of electricity demand or for energy conservation.
- (2) The Secretary may authorize any military installation to accept any financial incentive, goods, or service generally available from gas or electric utility, to adopt technologies and practices that the Secretary determines are cost effective for the Federal Government.
- (3) The Secretary of Defense may authorize the Secretary of a military department having jurisdiction over a military installation to enter into agreements with gas or electric utilities to design and implement cost-effective demand and conservation incentive programs (including energy management services, facilities alterations, and the installation and maintenance of energy saving devices and technologies by the utilities) to address the requirements and circumstances of the installation.

Statutory Intent. In a recent telephone conversation with the NAVFAC counsel who authored the attached opinion, he stated that NAVFAC continued to adhere to the above stated position and that a NAVFAC field office, SOUTHWESTDIV, had used the statutory exception to sole source a contract for DSM services from a San Diego utility. The counsel also reminded me that the language contained in EPACT had been purposefully adopted from the language in the Defense Authorization Act for the same reasons that the military services had earlier advocated, *i.e.*, they wanted broad authority to obtain DSM services from utilities without using time-consuming and complex competitive procurement procedures. As the counsel stated to me, the purpose of the language was to facilitate and ease the process. If read any other way, the provisions would serve no purpose since agencies are compelled to use competitive procedures in any case.

General Accounting Office Opinions. Lastly, we rely upon certain General Accounting Office (GAO) opinions which have interpreted the specified source exceptions and permitted agencies to use other than competitive procedures. For instance, in Monterey City Disposal Service, Inc., 85-2 CPD ¶ 261, *aff'd*, B-218624-2, B-218880.2, 85-2 DPD ¶ 306,<sup>3</sup> the Comptroller General concluded that the specified source exception to CICA was applicable where, under the Solid Waste Disposal Act, 42. U.S.C. § 6961, federal agencies were required to comply with local requirements respecting the control and abatement of solid waste “in the same manner, and to the same extent, as any person is subject to such requirements.” In that case, the city of Monterey required that all inhabitants of the city have their solid waste collected by the city’s franchise. The Navy argued that there was no express congressional intent in section 6961 of the Solid Waste Disposal Act to permit sole source contracting. The Comptroller General rejected this argument and appeared to rely primarily on interpreting the plain language of the Solid Waste Disposal Act.

If you have any further questions on this matter, please contact this office at 202-586-1900.

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<sup>3</sup> The GAO opinion was affirmed in Parola V. Weinberger, 848 F.2d 956 (1988).