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REPORT

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HIGHLIGHTS

JSF Alternate Engine Not Included In FY 2011 CR Signed by President

The alternate engine for the F-35 Joint Strike Fighter is not funded in a compromise spending package that funds the government for the rest of FY 2011, which President Obama signed into law April 15. The spending measure provides $1.049 trillion in government funding. FY 2011 spending will be $78.5 billion below Obama's budget request and $37.6 below FY 2010 levels, according to congressional documents. **Page 409**

BNA Insights: Using Performance Data for Suspension and Debarment

According to attorneys Marcia G. Madsen, David F. Dowd, and Luke Levasseur, suspension and debarment should be reserved for situations involving unethical or otherwise non-responsible contractors. They say although consideration of past performance data in source selection and the government's suspension and debarment procedures can involve overlapping issues, there are clear distinctions between the concepts and applicable legal rules. However, the Commission on Wartime Contracting recently muddied these distinctions, which ''could result in serious problems for many (if not all) government contractors.'' **Page 423**

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News

Defense Budget

JSF Alternate Engine Funds Not Included In FY 2011 Spending Measure Obama Signed

The alternate engine for the F-35 Joint Strike Fighter (JSF) is not funded in a compromise spending package that funds the government for the rest of fiscal year 2011, which President Obama signed into law April 15.

The spending measure (H.R. 1473) provides $1.049 trillion in government funding. FY 2011 spending will be $78.5 billion below Obama's budget request and $37.6 below FY 2010 levels, according to congressional documents.

In the Defense Department, FY 2011 spending totals $670.8 billion: a $513 billion base budget and $157.8 billion for overseas contingency operations. The base budget is $18.1 billion below the administration's budget request and $5 billion above FY 2010 levels. The overseas contingency operations budget matches the president's request.

The defense budget funds procurement at $102.1 billion.

''Never before has any Congress made dramatic cuts such as those that are in this final legislation,'' Rep. Harold Rogers (R-Ky.), chairman of the House Appropriations Committee and sponsor of H.R. 1473, said in a statement April 12. ''The near $40 billion reduction in non-defense spending is nearly five times larger than any other cut in history, and is the result of this new Republican majority's commitment to bring about real change in the way Washington spends the people's money.''

The government had been funded under short-term continuing resolutions for the past several months, and funding was set to expire April 15.

Congressional leaders April 11 introduced the final CR, which President Obama, House Speaker John A. Boehner (R-Ohio), and Senate Majority Leader Harry Reid (D-Nev.) agreed to April 8 as a government shutdown loomed.

''Although the administration would not have agreed to many of these cuts under better fiscal circumstances, the bill reflects a compromise that will help the federal government live within its means while protecting those investments that will help America compete for new jobs,'' according to a statement of administration policy the White House released April 14.

The House passed the measure April 14 by a vote of 260-167, and the Senate followed suit, 81–19.

House Minority Leader Steny H. Hoyer (D-Md.) supported passage of H.R. 1473 on April 14.

''We must keep the government open, and it is time to move on and address other pressing issues like job creation and the budget for next year,'' Hoyer said in a statement.

DOD Reductions. The measure includes 759 reductions to defense programs that were requested in the FY 2011 budget, according to a summary of the package released by the Senate Appropriations Committee.

''The defense bill is not exempt from budget reductions,'' the summary said. ''These cuts are made as a result of program terminations or delays, changes to policies or programs since submission of the budget in February 2010, inadequate justification, or corrections to poor fiscal discipline in the Department of Defense.''

For example, the law:

- does not include money for the F-136, the alternate engine for the JSF;
- cuts $2.16 billion for the JSF program because of production and testing delays;
- rescinds $2 billion from prior-year funding for more than 50 programs ''primarily due to underexecution, terminations, and schedule delays'';
- cuts $473 million from the Army Manned Ground Vehicle because of a pricing adjustment;
- cuts $457 million for the Non-Line-of-Sight Cannon because of the program's termination; and
- cuts $272 million from the Theater High Altitude Area Defense project because of a year delay in the contract award.

McCain: $540 Billion Was Needed. Sen. John McCain (R-Ariz.), the ranking member of the Senate Armed Services Committee, said April 13 the budget agreement ''contains a gross misallocation of imperative defense resources.''

McCain, who ultimately voted for the bill, recalled a statement Defense Secretary Robert Gates made earlier this year that DOD needs at least $540 billion to operate properly (95 FCR 205, 2/22/11). Including military construction funding, H.R. 1473 provides $530 billion—or $10 billion less than what Gates said was necessary, the senator said.

In addition, McCain said during a Senate floor speech, ''billions in the war-funding accounts—my staff has estimated close to $8 billion—have been allocated by the Appropriations committees for new spending not requested by the administration, or transferred to pay items that were originally requested in the base budget for non-war related expenses.''

The Aerospace Industries Association (AIA) also expressed concern the budget provides less than the $540 billion Gates recommended.

''Indiscriminate cuts inevitably will fall disproportionately on [research and development] and procurement, increasing the risk that the war fighter will not get the best equipment that America can provide,'' Marion C. Blakey, AIA president and chief executive officer, said in a statement April 15.

2 Percent Cut for DHS. The spending measure also provides $41.75 billion for the Department of Homeland Security, which is $700 million (2 percent) below FY 2010 and $1.9 billion below the president's request. Of

that, $2.65 billion is provided for the Federal Emergency Management Agency's Disaster Relief Fund (DRF), which is $1.05 billion above FY 2010 and $700 million above the president's request.

The increase for DRF covers a shortfall in the fund to pay for known costs for past catastrophic disasters—Hurricanes Katrina, Rita, Gustav, and Ike, the Midwest floods of 2008, and the Tennessee floods of 2010.

In the past, on a bipartisan basis, this shortfall was provided as emergency spending, according to a summary of the DHS portion of the CR. By paying for the shortfall within discretionary totals, it was necessary to reduce base funding for DHS by $1.7 billion (4.3 percent) below FY 2010. Much of the reduction is from grants for state and local first responder equipment and training.

The agreement provides $1.08 billion for FEMA Management and Administration, which is $13 million above the FY 2010 level and provides for critical expenditures, such as: 500 additional Advanced Imaging Technology machines; 3,800 positions to staff Advanced Imaging Technology machines; and 800 additional portable Explosives Detection Trace units.

In order to maintain important security enhancements, the Transportation Security Administration's administrative support accounts are reduced by $13.1 million below the FY 2010 level, resulting in a reduction to human resources, information technology, acquisition support, covert testing, and background investigation programs.

The agreement provides $8.864 billion for the Coast Guard, which is $85 million above FY 2010.

For operating expenses, the CR provides $6.9 billion, which is $101.9 million above FY 2010 and, according to the summary, will support more than 42,000 military employees, 250 cutters, 1,800 boats, and 200 aircraft protecting more than 95,000 miles of shoreline. The agreement also provides $254 million to support overseas contingency efforts, including the support of six patrol boats, port security units, and other personnel deployed to the Persian Gulf.

GSA Cut $1 Billion. General Services Administration programs did not fare all that well in the CR, with reductions totalling almost $1 billion—a cut of $986 million, compared with a net level of $652.7 million in FY 2010.

Funding is provided for the first installment of the Integrated Acquisition Environment, a government-wide information system that will improve contract and grant award, management, and training, as well as provide a critical link in fulfilling Federal Funding Accountability and Transparency Act (FFATA) requirements.

H.R. 1473 is available at: http://tinyurl.com/3u6wo7c.

Coast Guard

Coast Guard Faulted for Unrealistic Budget Proposals for Major Acquisitions

Unrealistic budget proposals are exacerbating the problems with cost growth and schedule delays that the Coast Guard faces in managing its major acquisition programs, the Government Accountability Office reported April 13.

In particular, the Coast Guard needs to complete a review of its Deepwater program to clarify the overall cost, schedule, quantities, and mix of assets required and determine trade-offs in light of current fiscal constraints, GAO's John Hutton told the House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation.

The Deepwater fleet recapitalization program, which constitutes 13 of the Coast Guard's 17 major acquisition programs, has exceeded the $24.2 billion baseline approved in May 2007 and is likely to experience continued cost growth problems, he said.

As part of its budget planning, the Coast Guard develops capital investment plans projecting out-year funding levels. Three major programs already breached the baselines included in the plan for fiscal years 2011 through 2015, and Department of Homeland Security acquisition officials have informed the Coast Guard that future breaches are almost inevitable because of decreased funding, according to GAO.

Deepwater Program Trade-Offs. Hutton also pointed out that the Coast Guard has yet to address a July 2010 GAO recommendation to identify trade-offs in Deepwater acquisitions, given that the 2007 baseline was no longer feasible. The Coast Guard's initial fleet mix analysis set costs as high as $64 billion, which is $40 billion more than the baseline approved by DHS.

The Coast Guard has said the analysis results were not feasible because of costs and will not be used to provide recommendations on a baseline for future fleet mix decisions. In addition, a cost-constrained fleet mix analysis is underway.

Coast Guard acquisition officials in an October 2010 strategic plan identified as the most important steps:

- establishing a priority list for major programs based on actual acquisition budgets received in the prior years; and
- making trade-offs between programs to fit within historical budget constraints.

Need for Recapitalization. Vice Admiral John Currier, Coast Guard deputy commandant for mission support, said funding levels in the capital investment plan are subject to change based on adjustments to fiscal guidance, congressional action, changes to the Coast Guard's strategic plan, and direction from DHS leadership.

Currier also said the Coast Guard must recapitalize its fleet of cutters, boats, aircraft, and C4ISR (command, control, communications, computers, intelligence, surveillance, and reconnaissance) systems as the service's major acquisition challenge.

Faced with obsolescence across the aging fleet, the Coast Guard has recognized the need to carefully manage resources and ensure funding is allocated toward the highest priority requirements, he said. An Executive Oversight Council has been established to provide guidance and direction ''to ensure acquisition resources target the highest priority recapitalization needs and are leveraged to best achieve cost, schedule, and performance objectives.''

Testimony and materials related to the hearing are available at: http://tinyurl.com/454fwsq.

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Information Technology

Agencies Need More Flexibility to Manage Information Technology Budgets, Official Says

An administration official April 12 stressed that the success of efforts to improve the way the federal government acquires information technology will, to a large degree, depend on agencies having more flexibility to manage their IT budgets.

Working with Congress to consolidate commodity IT funding under agency chief information officers (CIOs) and develop flexible budget models that align with modular development is part of the Office of Management and Budget's *25 Point Implementation Plan to Reform Federal Information Technology,* unveiled in December 2010 (95 FCR 40, 1/18/11).

''To deploy IT successfully, agencies need the ability to make final decisions on technology solutions at the point of execution, so that the budget process is aligned with the technology cycle,'' Vivek Kundra, chief information officer and OMB administrator for e-government and information technology, told a Senate Homeland Security and Governmental Affairs panel.

The Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security called the hearing to examine President Obama's plan to eliminate wasteful IT spending.

IT Investment Management Act. The hearing was held in advance of introduction of a reform bill, The Information Technology Investment Management Act of 2011, by Sens. Thomas R. Carper (D-Del.) and Scott P. Brown (R-Mass.), the subcommittee chairman and ranking member, joined by Sens. Joseph I. Lieberman (I-Conn.) and Susan M. Collins (R-Maine), the full committee chairman and ranking member.

Carper's bill is intended to prevent IT project failures by requiring agencies to alert Congress when IT investments exceed defined thresholds for measuring cost and performance and prohibit them from committing additional funds to the projects until required corrective actions are taken. The 2009 version of his bill would have required, among other things, that agency CIOs determine when an IT investment project has significantly or grossly deviated from its baseline and report such determinations to agency heads.

Kundra called the bill ''transformational.''

The government budget process forces agencies to specify in detail what they are going to build 24 months before they can start, and the acquisition process ''routinely tacks on another 12 to 18 months,'' Kundra said. ''This multi-year process locks agencies ''into specific technology solutions that are almost by definition out of date by the time the project starts.''

Agencies need the flexibility to respond to changes ''on the ground,'' Kundra said, while Congress has a ''legitimate and important need for oversight, particularly given the history of IT project failures. Consolidating commodity IT funding under agency CIOs and moving to modular contracting—allowing lessons learned from an early cycle in an IT program to inform the detailed plans for the next cycle—will be accompanied by additional transparency on how the funds are spent, he pledged.''

Defense Budget

DOD Budget Requests Funds For Acquisition Workforce, Joint Urgent Operational Needs

The Defense Department's fiscal year 2012 budget request includes $734.1 million for a Defense Acquisition Workforce Fund, which a top defense official said April 13 will be ''critical to revitalizing the acquisition workforce.''

Ashton B. Carter, under secretary of defense for acquisition, technology, and logistics, asked the House Appropriations Subcommittee on Defense to support the fund.

The Pentagon has exempted the acquisition workforce from a mandate that freezes the defense civilian workforce at FY 2010 levels.

DOD's goal is to hire 10,000 acquisition civilians by 2015, and 4,200 of those were hired by the end of FY 2010, Carter said. In all, the acquisition workforce totals about 140,000 people.

''Early in his tenure, Secretary [Robert] Gates launched a major initiative to revitalize the acquisition workforce,'' Carter told the congressional panel. ''This initiative is central to improving outcomes in the defense acquisition system.''

Joint Urgent Operational Needs. Also April 13, Carter said DOD's budget requested a $200 million Joint Urgent Operational Needs (JUON) response fund, divided between the base budget and the overseas contingency operations budget.

The fund would help DOD receive funding for JUONs before reprogramming sources are identified, he said.

''Although this amount is small relative to what we have routinely expended to JUONs, the value of the fund is that the execution can begin before the full reprogramming process is complete,'' Carter said. ''This can save months, and thus save lives and ensure mission success.''

Carter said the reprogramming process is not ideal: ''We have largely succeeded in identifying and moving billions within acquisition and other accounts to respond to JUONs, but significant delay can occur in identifying a source of funds. Moreover, in this time of fiscal constraint, finding an available source of execution year funding, even for an urgent need, is becoming increasingly difficult.''

Carter said Congress could be notified when expenditures are made from the fund.

Alternate Engine. In reiterating DOD's policy on the alternate engine for the F-35 Joint Strike Fighter, Carter said the Pentagon ''remains firmly opposed'' to the project.

DOD announced March 24 it had issued a 90-day stop-work order for the alternate engine (95 FCR 337, 3/29/11).

Before the order was issued, Carter said the department was spending $1 million a day on the engine. He also said developing the second engine (F-136) to the point where it is ready to compete with the primary engine (F-135) would cost an additional $2.9 billion.

''We consider it an unnecessary and extravagant expense, particularly during this period of fiscal constraint,'' Carter said.

Rep. James Moran (D-Va.) argued for competition in the engine program. He also said the second engine debate ''is not a dead issue'' because it has substantial support in Congress.

Carter told Moran he recognizes people will come to different conclusions about the issue, but DOD's position was made on a ''cold, analytical judgment'' that the additional $2.9 billion would not be paid back through head-to-head competition.

''In this case, we can't make the numbers work,'' Carter said. ''Therefore, I can't justify the investment of the second engine.''

The reality is, he said, that DOD can not afford to buy two of everything. In those sole-source cases, the department must add contract incentives.

Better Buying Power. Carter said DOD has made progress in its Better Buying Power initiative and implementing policies that aim to make the defense acquisition process more efficient (94 FCR 267, 9/21/10).

For example, program managers are required to demonstrate affordability for new programs.

Carter said he issued guidance in November 2010 that required affordability to be a requirement at milestone decision points.

The Navy reduced the estimated average procurement cost for the Ohio-class SSBN(X) submarine replacement by 16 percent, with a goal of 27 percent, because of an engineering tradeoff analysis, he said.

''Understanding and controlling future costs from a program's inception is critical to achieving affordability requirements,'' Carter said.

BY JESSICA COOMES

U.S. Budget

OMB Director Lew Expresses Optimism About Reaching Budget Deal by June

Office of Management and Budget Director Jack Lew April 14 expressed optimism that the administration and congressional leaders would come together and develop a plan by Memorial Day to address the nation's long-term debt and deficits.

Lew spoke to reporters the day after President Obama proposed a framework to reduce the debt by $4 trillion over the next 12 years.

''I think what the president laid out yesterday in terms of his meeting with the leaders was a very practical process for how do you get from here to where we need to go,'' Lew said.

''And I think that you'll see that when Congress comes back, beginning of May, from the recess, the vice president will meet with the leaders and lay out the issues that they need to work through—with a pretty tight deadline,'' Lew said.

Prior to delivering his speech, Obama asked the leadership of the House and Senate to appoint four members each to meet with Vice President Joe Biden to develop legislation to implement his proposal.

Late April 14, Senate Majority Leader Harry Reid (D-Nev.) announced he appointed Sens. Daniel K. Inouye (D-Hawaii), chairman of the Senate Appropriations Committee, and Max Baucus (D-Mont.), chairman of the Senate Finance Committee, ''to engage in the bipartisan, bicameral negotiations to be led by Vice President Biden.''

The president set the goal of making progress by Memorial Day and having legislation to vote on by the end of June, Lew said. ''It's a significant challenge,'' he said.

''The more support there is for ideas in the broad center, the better off we'll be,'' Lew said. ''And we very much hope to have the support of the groups that are working to find a sensible middle.''

Obama Meets With Bowles, Simpson. At the White House, Obama and Biden met April 14 with Erskine Bowles and Alan Simpson, the co-chairmen of the president's fiscal commission.

''Yesterday I laid out a plan to cut $4 trillion from our deficit. It is a balanced plan that asks for shared sacrifice in order to provide shared opportunity for all Americans,'' Obama said.

The president said he was pleased to meet with Bowles and Simpson because, ''very frankly, it is the framework that they developed that helps to shape my thinking on these issues,'' he said.

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On April 13, Bowles and Simpson issued a joint statement reacting to the president's proposal.

''We are encouraged that the president has embraced a balanced, comprehensive approach to deficit reduction similar to that outlined in the fiscal commission report,'' they said. ''We believe that only an approach which includes all areas of the budget can reach the broad bipartisan agreement necessary to enact a real and responsible deficit reduction plan.''

''While the president's proposal takes longer to get to the budget reductions we recommended, it does reduce our deficits by $4 trillion over the next 12 years,'' they said.

Now, leaders must work together to pound out a bipartisan agreement, Bowles and Simpson said.

They said they hoped much of this leadership would come from the six senators who have been working on a plan built around the commission's recommendations: Sens. Tom Coburn (R-Okla.), Mike Crapo (R-Idaho), Saxby Chambliss (R-Ga.), Kent Conrad (D-N.D.), Richard J. Durbin (D-Ill.), and Mark R. Warner (D-Va.).

Between the president's plan, the House Republican plan, and the commission's plan, there are plenty of good ideas on the table now, Bowles and Simpson said. ''The era of deficit denial is over,'' they said. ''This is the moment of truth.''

Gang of Six Doing Important Work. Lew said when Obama met with the co-chairmen of the deficit commission, the president was very much appreciative of the work they had done.

The so-called Gang of Six also is doing important work by having bipartisan conversations apart from their caucuses, Lew said. ''It's important that they continue their work and that kind of a bipartisan conversation grows,'' he said.

A deal is realistic, especially considering the agreement on the middle-class tax package last December and the recent agreement on a fiscal year 2011 spending plan for the federal government, Lew said.

''I tend to be an optimist,'' Lew said. ''I tend to also be a realist. I think that we're facing a very real sense of urgency because it's not an acceptable thing to have the world asking questions, is the United States taking its fiscal future seriously?''

The first step in reaching a bipartisan consensus is to agree on the shape of the problem, Lew said. ''If we can agree that the shape of the problem is that we need to be looking at $4 trillion of deficit reduction over the next 10 to 12 years, we've made progress already,'' he said.

Once responsible leaders define a problem, they then take on the burden of finding a solution, Lew said.

''But I think that by Memorial Day we could have significant progress, and we're going to do our very best to have something to vote on at the end of June,'' Lew said.

BY CHERYL BOLEN

Cybersecurity

Telecom Industry Cybersecurity Plan Urges Government to Beef Up Procurement Policies

A proposal unveiled April 14 by leading telecommunications industry groups calls on the federal government to use its acquisition policies to encourage better cybersecurity products from vendors.

Under the proposal, companies would be required to meet threshold security and ''trustworthiness'' guidelines before their products could be considered for procurement. They would also need to incorporate ''strong and effective'' security features into their products.

The plan was submitted to White House Cybersecurity Coordinator Howard Schmidt by the United States Telecom Association, National Cable and Telecommunications Association, and CTIA—The Wireless Association.

''By setting the government's security bar high, agencies will have more secure hardware, software and networks,'' the groups said in their proposal. ''State and local governments, as well as industry, will also benefit by being able to purchase those same innovative technologies.''

The groups also urged the use of tax incentives and other benefits to boost cybersecurity efforts in the private sector, while discouraging ''unfunded technical mandates, rigid response requirements, and command-and-control type governance structures.''

The proposal comes at a time when key members of Congress are calling for the enactment of comprehensive cybersecurity legislation that could involve new requirements for the private sector.

Meanwhile, the Obama administration is expected soon to weigh in with legislative recommendations on the issue.

Cameron Kerry, general counsel for the Department of Commerce, said at an April 6 hearing before the Senate Judiciary Committee that recommendations were being vetted through an interagency process that was winding up.

''I think we're very close—a matter of some weeks away from being able to share proposals with Congress,'' he said.

BY ALEXEI ALEXIS

The industry proposal is available at: http://op.bna.com/der.nsf/r?Open=rtar-8fwtda.

Foreign Contractors

McCaskill Asks DOD for Information On KGL, Contractor She Has Scrutinized

Sen. Claire McCaskill (D-Mo.) is asking the Defense Department for information about a defense contractor's involvement with a company that appears on a government list of blocked firms.

In a letter to Defense Secretary Robert Gates, McCaskill said she received information that shows DOD contractor Kuwait & Gulf Link Transport Co. (KGL) may have interests in an Iranian company, Hafiz Darya Shipping Co. (HDS), which is on the Treasury Department's list of Specially Designated Nationals and Blocked Persons (SDN).

HDS is controlled by Islamic Republic of Iran Shipping Lines (IRISL), which also is on the SDN list for engaging or attempting to engage in activities related to the proliferation of weapons of mass destruction, McCaskill said. KGL previously said it was divesting itself of interests in another company controlled by IRISL, Al Fajr Valfajr, according to McCaskill's letter.

McCaskill, the chairwoman of the Senate Homeland Security and Governmental Affairs Subcommittee on Contracting Oversight, has scrutinized KGL previously. She has held hearings and introduced legislation related to the 2003 death of Army Lt. Col. Dominic ''Rocky'' Baragona, who was killed in Iraq in a head-on collision with a truck owned and operated by KGL (93 FCR 365, 5/4/10).

Iran Sanctions. In the letter to Gates, McCaskill also asked DOD to explain the steps it has taken to determine whether KGL has complied with the Iran Sanctions Act and the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) (Pub. L. No. 111-195).

The Defense Logistics Agency in February awarded KGL a contract worth $157 million for storage and distribution services, McCaskill said.

''Given KGL's unsatisfactory record of integrity on previous government contracts and the importance of the recent contract award to U.S. military efforts, I have serious concerns regarding KGL's current compliance with United States laws, regulations, and policies related to Iran,'' McCaskill wrote in the letter, which was dated April 8 and released by the senator's office April 13.

GAO Request. Also April 8, McCaskill wrote to Comptroller General Gene Dodaro and asked the Government Accountability Office to review federal agencies' compliance with the CISADA.

The law requires prospective contractors to certify they are not engaged in certain activities in Iran (94 FCR 11, 7/6/10). Specifically, McCaskill asked GAO to look into compliance with the certification requirements as well as how many false certifications have been investigated with the investigations' outcomes.

She also asked how many contractors have been suspended or debarred for engaging in certain activities in Iran and how many certification waivers have been requested and granted.

In addition, McCaskill asked GAO to look into how the requirements are applied to subcontractors.

McCaskill's letter to Gates is available at: http://tinyurl.com/3ku97dx.

McCaskill's letter to Dodaro is available at: http://tinyurl.com/3stwk8q.

Congress

Senate Panel Approves Bill Extending GAO's Jurisdiction Over Civilian TO/DOs

The Senate Homeland Security and Governmental Affairs Committee April 13 marked up a handful of bills related to contracting, including one to extend the Government Accountability Office's jurisdiction over protests of civilian agency task and delivery orders of more than $10 million until Sept. 30, 2016.

S. 498 extends the May 27, 2011, expiration date of the pilot program until Sept. 30, 2016, bringing it in line with Defense Department task and delivery orders of more than $10 million. A companion bill, H.R. 899, was approved by the House Oversight and Government Reform Committee March 10 (95 FCR 281, 3/15/11).

Bid protest authority for TO/DOs is viewed as a means of promoting competition and transparency and avoiding litigation. The bills address concerns over the uncertainty caused by having different protest authority for civilian agency TO/DOs.

The committee also approved S. 300, a bill introduced by Sen. Chuck Grassley (R-Iowa) to require new safeguards and controls on government charge cards used by federal employees and imposition of penalties when the cards are misused (95 FCR 169, 2/15/11). The bill is largely based on GAO's recommendations aimed at preventing improper purchases from GAO, which has reported fraudulent use of the cards has cost the government millions of dollars.

Government purchase cards are designed to save time and money by avoiding the procurement process for the purchase of items valued at or below the $2,500 micropurchase threshold. The bill would require federal agencies to establish certain safeguards and internal controls for government charge card programs and to establish penalties for violations, including dismissal when warranted.

A third bill approved by the committee, S. 762, would create organizational clarity for the Federal Acquisition Institute (FAI), which supports the civilian acquisition workforce. In introducing the bill April 7, Sen. Susan M.

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Collins (R-Maine), ranking member of the committee, said FAI ''has remained largely underutilized due to a lack of organizational clarity, the disproportionate funding compared to its counterpart in the Department of Defense, and its intermittent use by a few federal agencies'' (95 FCR 386, 4/12/11).

S. 762, she said, would require the institute to report to the Office of Federal Procurement Policy (OFPP). The director of FAI would be appointed by the OFPP administrator and would report to the OFPP associate administrator for acquisition workforce. In addition, civilian agency training programs would be required to follow guidelines issued by OFPP, ''which would ensure consistent training standards necessary to develop uniform core competencies,'' Collins said.

In addition to moving the bills, the committee approved the nomination of Rafael Borras to be the Department of Homeland Security's under secretary for management (95 FCR 384, 4/12/11).

Borras has been serving as a recess appointee since March 2010 in a term that runs out at the end of the year. The committee originally approved Borras' appointment in October 2009, but action by the full Senate stalled when a hold was placed on the nomination.

Small Business

SBIR/STTR Reauthorization Bill Approved By House Subcommittee With Amendments

The House Space and Technology Subcommittee on Technology and Innovation April 13 favorably reported to the full committee a bill (H.R. 1425) to reauthorize the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs.

The subcommittee approved an amendment to a provision in the original measure, which would have required participating agencies to complete review of program applications within 90 days, to continue to allow longer review times at the National Institutes of Health and National Science Foundation. Another amendment to require that agencies consider whether a project would result in more American jobs in awarding grants also was approved.

''This legislation requires rigorous evaluation of the programs to ensure that we are getting the greatest return on our taxpayer investment,'' Rep. Benjamin Quayle (R-Ariz), the subcommittee chairman, said. ''Currently, our ability to conduct effective evaluations is hampered by insufficient data collection and a lack of common measurement criteria among participating federal agencies. The legislation before us today would strengthen SBIR and STTR data collection requirements and evaluations, both at the individual agencies and within the management of the entire program at the Small Business Administration. This is particularly necessary in today's budget environment.''

The proposed ''Creating Jobs Through Small Business Innovation Act of 2011'' was introduced by Rep. Renee L. Ellmers (R-N.C.) April 6 to reauthorize the two programs for three years, increase award sizes, and allow companies with majority venture capital funding to participate. The Senate Small Business Committee sent its SBIR/STTR bill (S. 493) to the Senate floor March 9.

In addition to enhanced data collection to make it easier to evaluate the programs, H.R. 1425 as originally introduced would:

- allow for venture capital participation of up to 45 percent for the NIH, Department of Energy, and NSF SBIR/STTR programs and up to 35 percent for the other agencies, compared to the Senate bill's limits of 25 percent and 15 percent for the two groups of agencies, respectively;
- require a congressional reauthorization after three years as opposed to the previous reauthorization of eight years in 2000 and the Senate bill's eight years; and
- increase the Phase I award maximum to $150,000 from $100,000 and the Phase II maximum to $1 million from $750,000.

In addition, H.R. 1425 would standardize some of the application process across agencies to allow for greater ease of use for small businesses. Until amended, it also would have required all participating agencies to complete their review for applicants within 90 days, or 180 days if the SBA granted the agency an extension, to give small businesses some certainty as to when they can expect a determination on their awards.

Time Extension, Minority Outreach Rejected. In the markup of H.R. 1425, subcommittee ranking member Rep. David Wu (D-Ore.) introduced an amendment that would extend the programs for five years rather than three. Wu argued that those participating in the program would appreciate the stability; he also said a five-year period would allow the next evaluation of the SBIR program by the National Research Council (NRC), which will take four years, to be completed before the next reauthorization discussion of the program starts.

Quayle countered that ''five years is too long for the programs to continue without Congress considering adjustments.'' The subcommittee did not approve the amendment, but Wu promised to submit it to the full committee.

Rep. Frederica S. Wilson (D-Fla.) offered an amendment to fund $10 million outreach programs for minorities, women, and disabled veterans, noting that the latest NRC evaluation of the SBIR/STTR programs cited poor participation by these groups.

Quayle said he thought it would be inappropriate at this time to authorize $30 million in grants over the programs' next three years. ''An important aspect of the SBIR/STTR programs,'' Quayle said, ''is that it is revenue neutral, with funding for the programs coming from set-asides of federal agencies' research budgets.''

Quayle instead endorsed a ''revenue-neutral'' amendment by Rep. Ben Ray Luján (D-N.M.) that would require federal agencies to encourage minorities, women, and disabled veterans to participate in the SBIR/STTR programs. Luján's amendment was approved by the subcommittee, and Wilson's was not.

NIH/NSF Peer Review Retained. Quayle introduced the amendment dealing with the bill's requirement that federal agencies complete their review for SBIR/STTR applicants within 90 days. ''I also recognize that there is a rigorous peer review process that exists at some federal agencies, especially at the NIH and NSF, that may take longer than 90 days. Diluting this would be unacceptable. My amendment retains the current peer review process at the NIH and NSF,'' Quayle said.

The subcommittee approved Quayle's amendment and also one by Rep. Daniel Lipinski (D-Ill.) to require that federal agencies consider whether a particular project would result in American jobs in awarding a grant.

''There would be no penalty if this is not done. But an effort should be made to bring jobs to the United States through these programs,'' Lipinski said. ''Too many breakthrough research and development programs have resulted in jobs going overseas.''

While Quayle had reservations about federal agencies' ability to measure whether or not a particular project would result in U.S. jobs, he endorsed Lipinski's amendment.

The subcommittee voted to favorably report the bill as amended to the full committee. Wu said, ''We have passed this legislation in the last two Congresses, and last year we came close to getting it through. I hope that by coming out of the chute fast with this bill that we will get it into law this time.''

BY JOHN T. AQUINO

The text of the bill as originally introduced is available at: http://tinyurl.com/3gt8wrv.

Competition

Bill Would Codify 'Yellow Pages' Test For Deciding When to Use Contractors

Sen. John Thune (R-S.D.) e-introduced the Freedom from Government Competition Act (S. 785), which would require federal agencies to rely on the private sector when providing goods and services that are ''readily available.''

''With our nation's debt well over $14 trillion and our national unemployment hovering near 9 percent, it is important now more than ever that the federal government's policies not only save tax dollars but also foster job creation in the private sector,'' Thune said in a statement. My bill would ensure that taxpayer dollars would not be used by the federal government to unfairly compete with private sector businesses.''

Thune said the bill would codify the ''Yellow Pages'' test, which states that if the federal government is doing something that can be found in the Yellow Pages, the product or service should be subject to market competition ''to ensure better value for the taxpayer.''

Thune's legislation does not mandate the privatization of any federal service and would protect activities that are inherently governmental, such as certain national defense and homeland security functions, prosecutions, foreign policy, and activities that contractually bind the United States.

Co-sponsors of Thune's legislation include Sens. James M. Inhofe (R-Okla.), Pat Roberts (R-Kan.), Johnny Isakson (R-Ga.), and John Barrasso (R-Wyo.).

The bill was referred to the Homeland Security and Governmental Affairs Committee. Thune introduced the same bill in 2009 (91 FCR 484, 6/16/09).

Government Operations

OMB Details Deadlines, Guidelines For Agencies to Follow Plain Writing Law

The Office of Management and Budget issued final guidance April 13 on the Plain Writing Act, which President Obama signed late last year, to establish deadlines for key parts of the law and to provide training and writing guidelines.

The Plain Writing Act (Pub. L. No. 111-274) was signed Oct. 13, 2010, to require all federal agencies to write clearly, so government documents are easier to understand.

Agencies now must follow the Federal Plain Language Guidelines or create their own guidelines, the memo said. By July 13, agencies must assign one or more senior officials to oversee the agencies' implementation of the law. These officials also will be in charge of plain writing training.

Agencies also must create a plain writing website and publish an implementation report by the same date.

All agencies must write new or substantially revised ''covered documents'' in plain writing by Oct. 13, according to the OMB memorandum. These documents include documents that are required in order to receive a federal benefit or service, provide information about a federal benefit or service, or explain how to comply with a requirement the government administers or enforces. Tax forms or benefit applications and handbooks for Medicare or Social Security recipients are included.

Agencies also will be required to publish a report documenting their continued compliance with the law every year on April 13, beginning in 2012.

In November, OMB established the Plain Language Action and Information Network (PLAIN) as the interagency working group to help write plain guidance.

The act is estimated to cost $5 million a year to train government workers to write more clearly. Opponents of the law say the training expenses are a waste of money because the requirement is impossible to enforce.

The OMB memorandum, ''Final Guidance on Implementing the Plain Writing Act of 2010,'' is available at: http://tinyurl.com/4ys44fq.

In Brief

House Panel Approves Bill to Bar Contracts to Tax-Delinquent Contractors

The House Government Reform and Oversight Committee April 13 approved a bill to prohibit the awarding of a contract or grant in excess of the simplified acquisition threshold unless the prospective contractor or grantee certifies in writing to the agency awarding the contract or grant that the contractor or grantee has no seriously delinquent tax debts.

H.R. 829, the proposed Contracting and Tax Accountability Act of 2011, was introduced Feb. 28, 2011, by Rep. Jason Chaffetz (R-Utah). The committee approved

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the bill by voice vote, after agreeing to an amendment from Rep. Jackie Speier (D-Calif.), which would require an agency to notify Congress if a waiver to the law were granted.

The bill defines ''seriously delinquent tax debt'' as an outstanding tax debt for which a notice of lien has been filed in public record. This does not include a debt being paid in a timely manner or a debt with respect to which a collection due process hearing is requested or pending.

LEGISLATIVE ACTION

Bill Number	Sponsor	Description	Action	Previous Cite
H.R. 829	Chaffetz	A bill to prohibit the awarding of a contract or grant in excess of the simplified acquisition threshold unless the prospective contractor or grantee certifies in writing that it has no seriously delinquent tax debts	Approved by Oversight and Government Reform 4/13/11	See story in this issue
H.R. 1425	Ellmers	A bill to reauthorize and improve the SBIR and STTR programs	Introduced 4/7/11; referred to Science, Space, and Technology; Small Business; Armed Services	See story in this issue
H.R. 1473	Rogers	A bill to make appropriations for DOD and the other departments and agencies for FY 2011	Signed by President Obama 4/15/11	See story in this issue
S. 498	Lieberman	A bill to ensure objective, independent review of task and delivery orders	Approved by Homeland Security and Governmental Affairs 4/13/11	See story in this issue
S. 785	Thune	A bill to require that the federal government procure from the private sector the goods and services necessary for the operation and management of certain government agencies	Introduced 4/12/11; referred to Homeland Security and Governmental Affairs	See story in this issue

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Legal News

Fraud and Abuse

Whistleblowers Failed to Allege Evidence Of Fraud at Individual Transaction Level

Case Summary: *A federal court dismisses an FCA lawsuit for lack of specificity.*

Key Takeaway: *''However rotten a government contractor's performance or motives, the relator must identify specific false claims for payment or specific false statements made in order to obtain payment.''—court*

A federal court April 6 dismissed a lawsuit against two companies that supplied home health and respiratory services and durable medical equipment because the qui tam whistleblowers failed to allege evidence of a False Claims Act violation at an individual transaction level (*United States ex rel. Wildhirt v. AARS Forever Inc.*, N.D. Ill., No. 1:09-cv-01215, 4/6/11).

The U.S. District Court for the Northern District of Illinois ruled that the whistleblowers could amend their complaint. But to be successful, the court said, the complaint had to include specific examples of defendants' submittal of false claims for Medicare and Medicaid reimbursement.

The whistleblowers also failed to plead with specificity allegations that the defendants, THH Acquisition (Acquisition) and its predecessor, AARS Forever Inc., violated the Illinois Whistleblower Reward and Protection Act (IWRPA) 740 ILCS 175/1 et seq. by submitting false claims to the state for reimbursement. They fell short, as well, in their allegations that defendants violated anti-retaliation provisions of the FCA and IWRPA by firing them.

Relators Complained Repeatedly. Between 2007 and September 2008, relators Cathy Wildhirt and Nancy McArdle worked as respiratory therapists for AARS and then for Acquisition. They complained repeatedly to their supervisors that defendants were violating their contract with the U.S. Department of Veterans Affairs to provide home health services and durable medical equipment to respiratory patients in Illinois, Wisconsin, and Michigan, the court said. Their complaint alleges defendants were breaching Medicare and Medicaid provisions and placing patients at risk.

McArdle's complaint alleged she had a ''run in'' with Richard Manning, a senior official at Acquisition, on the Friday before Labor Day 2008. McArdle sent a message that she would not return to work on Tuesday because she was distraught over the conversation and that she was uncertain whether she could continue to work under the current conditions. A human resource official told her she would be fired if she did not return to work on Tuesday. She did not report to work and was fired.

Wildhirt also was fired on the same day as McArdle, for alleged job abandonment, despite calling in sick and having a note from a doctor.

Qui tam claims brought under the FCA and the IWRPA are subject to the heightened pleading standards of Federal Rules of Civil Procedure 9(b), the court said. To satisfy this standard, relators must allege the who, what, when, where, and how of the alleged fraud, the court said.

''Relators have failed to satisfy these pleading standards,'' the court said. ''The complaint's principal thrust is that because Defendants violated the VA contract and breached Medicare and Medicaid regulations in so many ways, their performance fell so short that every or nearly every claim they submitted to the federal and state governments was false and fraudulent.''

Seventh Circuit Rejected 'Gestalt' Method. The U.S. Court of Appeals for the Seventh Circuit ''rejected this 'gestalt' method of alleging a qui tam claim, explaining that however rotten a government contractor's performance or motives, the relator must 'identify specific false claims for payment or specific false statements made in order to obtain payment,' '' the court said, citing *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 377 (7th Cir. 2003).

Allegations in the complaint failed to identify specific billings, knowing failures to return overpayments, or intentional overbillings, the court said.

In ruling for the defendant, the court mentioned numerous instances in the complaint where the relators allege vague misconduct rather than specific actions.

''These allegations are all hedged—Relators for some reason are unable or unwilling to straightforwardly allege that Defendants actually overbilled Medicare and Medicaid—and thus are insufficient to allege a false or fraudulent claim,'' the court said.

Retaliatory Claim. Turning to the allegations that the defendants fired the relators as retaliation, the court said the complaint does not allege that the relators, prior to being fired, were investigating facts as a prelude to there lawsuit.

''To the contrary, the complaint alleges that Relators' terminations 'were directly related to the fact that they were regularly trying to provide an adequate level of patient care on behalf of a company [that] seemed not to care at all about providing such care to veterans' ,'' the court said. ''This allegation, if true, shows that Relators are admirable people who were treated poorly by their employer, but it fails to show that they were retaliated against in violation of the FCA or IWRPA. The retaliation claims accordingly are dismissed.''

Kathryn A. Kelly, of the Office of the U.S. Attorney, Chicago, represented the United States. Representing the relators were Dana Marie Pesha of Futterman Howard Ashley Watkins & Weltman P.C., Chicago; William W. Thomas of Behn & Wyetzner Chartered, Chi-

cago; and Gregory Thomas Patrick Condon of Wang, Leonard & Condon, Chicago.

Joseph R. Marconi of Johnson & Bell Ltd., Chicago, represented defendant AARS Forever. Stephen D. Libowsky of SNR Denton LLP, Chicago, represented defendant THH Acquisition.

The ruling is available at: http://op.bna.com/hl.nsf/r?Open=droy-8ftkex.

Cost Accounting Standards

ASBCA: Raytheon's Accounting Change Did Not Increase Government's Costs

Case Summary: *The ASBCA finds that a change in a contractor's accounting practices did not increase costs to the government.*

Key Takeaway: *A price adjustment for a contractor's accounting practice change is meant to protect the government from paying more in the aggregate, and the government may not recover costs greater than the increased aggregate costs on the relevant contracts subject to the price adjustment.*

The Armed Services Board of Contract Appeals, in a decision released April 11, held that a change in a contractor's accounting practices did not increase costs to the government on Cost Accounting Standards (CAS)-covered contracts in effect at the time of the change (*Raytheon Co.*, ASBCA, No. 56701, 3/31/11, *decision released* 4/11/11).

Administrative Judge Monroe E. Freeman, Jr., said a price adjustment is only required for an accounting change when the government pays increased costs in the aggregate, considering all affected contracts. As a result, he granted summary judgment for the contractor.

Raytheon Co. had several fixed- and flexibly-priced government contracts that were subject to CAS. The company had maintained a pension plan for salaried employees. From 1978 to Jan. 1, 2004, Raytheon calculated the plan's actuarial value of assets— used to determine the necessary monetary contributions—using the Long Range Yield Method (LRYM).

In October 2001, Raytheon recommended a change from the LRYM to the 5-Year Smoothed Market Value Method (5YSM) with phase-in. The Defense Contract Management Agency approved the proposed 5YSM with phase-in in April 2003.

However, in October 2008, DCMA asked Raytheon to pay $40.7 million plus interest as a price adjustment for increased costs to the government that allegedly resulted from accounting change.

Accounting Change Resulted in Lower Allocations. The board found no genuine issue of material fact regarding several key points.

First, the board ruled that the change from the LRYM to the 5YSM calculation resulted in lower allocations of RSP pension costs to all of Raytheon's CAS-covered contracts between 2004 and 2007.

In addition, the board said the decrease in flexibly priced contract costs to the government was greater than the increase in the fixed-price contract costs, profits, and flexibly priced contract fees.

In other words, the board said, this case involved an accounting change that increased government costs for some contracts and decreased costs for others, which is expressly addressed in 48 C.F.R. § 9903.306(e).

This provision implements 41 U.S.C. § 422(h)(3), which provides that a price adjustment for a contractor's accounting practice change is meant to protect the government from paying more in the aggregate. It also provides that the government may not recover costs greater than the increased aggregate costs on the relevant contracts subject to the price adjustment.

The $57.2 million reduction in costs to the government substantially exceeded Raytheon's unanticipated $40.7 million profit on the fixed-price contracts. Therefore, the board ruled that Raytheon's accounting practice change did not result in any increased costs to the government.

Paul E. Pompeo and others from Arnold & Porter LLP, Washington, D.C., represented Raytheon Co. E. Michael Chiaparras and Arthur M. Taylor, Defense Contract Management Agency, represented the government.

BY DANIEL SEIDEN

The board's decision is available at: http://op.bna.com/fcr.nsf/r?Open=dsen-8funz9.

Bid Protest

COFC: Offerors in Navy Solicitation Received Sufficient Information to Bid 'Intelligently'

The U.S. Court of Federal Claims April 8 held that the Navy provided sufficient information to bidders in a solicitation for marine husbanding support, including estimated quantities in price schedules (*Glenn Defense Marine (Asia), PTE LTD v. United States,* Fed. Cl., No. 10-844 C, 4/8/11).

Chief Judge Emily C. Hewitt disagreed with Glenn Defense Marine (Asia) PTE LTD's contention that part of the price methodology in the solicitation excluded essential information needed for bidders to intelligently prepare firm-fixed prices.

In another protest by Glenn Defense, the court recently held that a request for proposals allowed the Navy to award multiple contracts, thus rejecting Glenn Defense's claim that it should have received a single contract (95 FCR 270, 3/8/11).

Here, the Navy issued a solicitation for maritime husbanding support for U.S. government ships visiting ports and operating in four regions in the western Pacific and Indian Oceans. The solicitation required each offeror to provide unit prices for all line items on each of the price schedules that were included in the region or regions for which the offeror chose to submit offers, the court said.

In its pre-award protest, Glenn Defense argued the Navy's failure to disclose the quantities of specific items the department would use to calculate price kept offerors from bidding intelligently and prevented fair evaluation of proposals.

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Offerors Could Use Estimated Quantities. The court disagreed, explaining that for line items that contained estimated quantities in the price schedules, offerors could use those quantities to determine their proposed unit prices.

Further, the solicitation provided sufficient information for the agency to evaluate proposals on a common basis because all offerors received the same schedules. Therefore, they all had the same information about estimated quantities upon which to base prices, the court said.

The court added that the Navy would apply each offeror's proposed unit prices to the same actual targeted sample logistical requirements to determine each offeror's total evaluated price. By using the same method for determining each offeror's total evaluated price, the court explained, the Navy was evaluating proposals on a common basis.

For the line items in the price schedules that did not contain quantities, the court said the solicitation provided less but nonetheless sufficient information to allow offerors to bid intelligently.

Unbalanced Pricing Is Post-Award Matter. Finally, the court said the Navy did not violate Federal Acquisition Regulation 15.404-1(b) (unbalanced pricing) because this issue does not apply to pre-award disputes.

For these reasons, the court granted the government's motion for judgment on the administrative record.

David Scott Black and others from Holland & Knight, McLean, Va., represented Glenn Defense Marine (Asia), PTE LTD. David D'Alessandris and others from the Justice Department, Washington, D.C., represented the government with Mark W. Golden and Michael D. Rossiter, U.S. Navy, of counsel.

BY DANIEL SEIDEN

The court's decision is available at: http://op.bna.com/fcr.nsf/r?Open=dsen-8fvntr.

Damages

COFC Denies Air Force Contractor Damages For Unabsorbed Home Office Overhead Costs

The U.S. Court of Federal Claims April 7 held that because an Air Force contractor did not begin performance before a suspension order was issued, it could not recover damages for unabsorbed home office overhead costs (*The Redland Co., Inc. v. United States,* Fed. Cl., No. 08-606 C, 4/7/11).

Judge Lawrence J. Block said the contractor was not entitled to damages under the ''Eichleay'' formula related to unabsorbed home office overhead. He nonetheless granted Redland summary judgment on three of its claims.

The Air Force awarded The Redland Co. Inc. a contract to resurface an aircraft parking area at Homestead Air Reserve Base (HARB) in Florida. However, a work-suspension order from the Air Force delayed the start of performance for nearly four years.

Redland said it should receive compensation for this suspension and for the Air Force's role in substantially delaying the project. The contractor brought a multi-claim complaint against the government seeking $698,939 and moved for summary judgment.

The court agreed with Redland on three counts in the complaint, finding that the government by its own admission had made constructive contract changes that fell outside contract requirements.

However, the court denied Redland's motion as to all other claims, including the claim for unabsorbed home office overhead costs. These indirect costs are among those that are expended for the benefit of the whole business and that a contractor cannot attribute or charge to a particular contract.

Formula Calculates Unabsorbed Home Office Overhead. The court said the Federal Circuit has established the Eichleay formula as the exclusive method for calculating a contractor's unabsorbed home office overhead costs during a period of government-caused delay after the start of performance.

To receive Eichleay damages, a contractor must prove that: (1) there was a government-caused delay; (2) the delay occurred after the start of performance and thus extended the original time of performance, or the contractor finished on time but nonetheless incurred additional, unabsorbed overhead expenses; and (3) the government required the contractor to remain on standby during the period of suspension.

Damages Only Available After Commencing Performance. Redland could not recover Eichleay damages because the contractor did not begin performance before the suspension order was issued, the court held.

The court also said the suspension order did not require Redland to remain on standby during the period of suspension.

Finally, the court denied Redland summary judgment on claims seeking compensation for delayed project completion, as well as claims for milling of additional asphalt; concrete lane replacement; and delay in receiving access to HARB.

Joseph W. Lawrence, II, of Vezina, Lawrence, & Piscetelli, P.A., Fort Lauderdale, Fla., represented The Redland Co. Inc. Austin M. Fulk of the Justice Department, Washington, D.C., represented the government.

BY DANIEL SEIDEN

The court's decision is available at: http://op.bna.com/fcr.nsf/r?Open=dsen-8fwn6d.

HUBZone Program

COFC Upholds HUBZone Decertification; Required Work Location Data Not Provided

The U.S. Court of Federal Claims April 13 upheld the Small Business Administration's decertification of a contractor from the Historically Underutilized Business Zone (HUBZone) because the contractor did not supply the agency with enough relevant information to maintain its HUBZone program eligibility (*RCD Cleaning Service Inc. v. United States,* Fed. Cl., No. 11-13 C, 4/13/11).

Judge Lynn J. Bush deferred to SBA's choice to decertify RCD Cleaning Service Inc., which failed to provide its employees' work locations and denied RCD injunctive relief.

The court recently held SBA properly decertified a HUBZone small business concern for failure to meet the 35-percent employee residency threshold before the contractor made an initial offer and before the time of the award (95 FCR 293, 3/15/11).

In this case, RCD received HUBZone certification in 2006 and recertification in 2009. In 2010, RCD received a HUBZone set-aside contract from the Army for custodial services in Hawaii. Intervenor and incumbent Federal Maintenance Hawaii Inc. (FMH) filed a timely HUBZone status protest alleging that 35 percent of RCD's employees did not live within a HUBZone, as required by the program.

SBA sustained FMH's protest. As a result, the Army terminated RCD's contract and awarded the contract to FMH. After SBA denied RCD's appeal, RCD filed a bid protest.

Protest Challenged SBA Decision, Not Termination. The government argued that the court lacked jurisdiction because this protest, concerning a termination for convenience, should have been brought under the Contract Disputes Act rather than the court's bid protest jurisdiction.

However, the court agreed with RCD that the complaint challenged SBA's decision, not the Army's termination for convenience. The court said it has jurisdiction over awardees' and bid protesters' challenges to SBA's HUBZone determinations.

SBA's Analysis Was Correct Despite Errors. SBA's decertification decision stated that RCD did not meet principal office requirements for the HUBZone program at the time it submitted its offer or at the time of contract award. Further, SBA said RCD did not provide enough information about the work location for each of RCD's employees.

The court said it had to defer to SBA's expertise. The agency's analysis of RCD's submissions contained multiple errors, but because RCD did not provide work location information, the court said it was constrained to find that SBA did not have sufficient information to perform its principal office analysis.

Finally, the court said SBA's rejection of RCD's appeal was reasonable, but a review and overhaul of SBA's boilerplate request for principal office location documentation would assist both the agency and HUBZone contractors.

John R. Tolle and Bryan R. King of Barton, Baker, Thomas & Tolle represented RCD Cleaning Service Inc. Alex P. Hontos and others from the Justice Department, Washington, D.C., represented the government, with Maj. Joseph E. Krill, U.S. Army, Arlington, Va., and Beverly Hazlewood Lewis, Small Business Administration, Washington, D.C., of counsel. David J. Taylor and others from Buchanan Ingersoll & Rooney PC, Washington, D.C., represented intervenor Federal Maintenance Hawaii Inc.

BY DANIEL SEIDEN

The court's decision is available at: http://op.bna.com/fcr.nsf/r?Open=dsen-8fxm2n.

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BNA Insights

Suspension and Debarment

Past Performance/Suspension and Debarment: How Should Performance Data Be Obtained and Used?

BY MARCIA G. MADSEN, DAVID F. DOWD, AND LUKE LEVASSEUR

The federal government possesses a number of tools designed to address poor or unacceptable performance by contractors, and to assure that problems affecting integrity are taken into account with respect to opportunities for future work. Government contracting officials are required to report past performance information on contracts that are being (or have been) performed, and when awarding new contracts, source selection officials are required to collect past performance information regarding offerors and consider it as part of the award decision.

Suspension and debarment procedures are different. Although these sanctions can be imposed for *history of failure to perform* or of unsatisfactory performance of one or more contracts, they are supposed to be reserved for situations involving unethical or otherwise nonresponsible contractors. These are not aspects of standard contract award and administration, but are extraordinary procedures to be employed when significant problems (such as a criminal indictment or conviction) make clear that neither the contracting agency nor any other part of the government should be doing business with a contractor.

Although consideration of ''past performance'' in source selection and the government's ''suspension and debarment'' procedures can involve overlapping issues that arise during performance of contracts for the government, there are clear distinctions between the concepts and applicable legal rules. But crucial differences have recently been muddied in problematic ways by the Commission on Wartime Contracting in Iraq and Afghanistan (''CWC''). Although the CWC's mandate only extends to consideration of changes to contracting rules in the contingency theaters, there is a substantial concern that changes it suggests could bleed over into and affect contracting government-wide—and thus a concern that the CWC's conflation of these issues could result in serious problems for many (if not all) government contractors.

The authors are two partners and a counsel, respectively, practicing Government Contracts law with the Washington, D.C. office of Mayer Brown LLP. The authors appreciate the assistance of Michael P. Daly, an associate with our Firm, in preparation of this article.

Following the issuance of its ''Second Interim Report to Congress,''[1] the CWC held a hearing on February 28, 2011 during which several knowledgeable witnesses testified regarding past performance and suspension/debarment issues. During that hearing, members of the CWC went far beyond the recommendations of their *Interim Report* and made statements demonstrating the substantial danger of conflation with these concepts.[2] For instance, CWC Co-Chairman Christopher Shays, stated:

> [W]e want to increase use of suspension and debarments. We think if you're not going to be suspended or debarred, there's no accountability. What's the point of even recording past performance if you don't act on it?

Hearing at 40. This statement reflects a basic misunderstanding of the different statutory and regulatory requirements that government officials collect and use past performance information when awarding contracts—and that they suspend and debar contractors whose conduct demonstrates a lack of integrity (among other causes).

Failing to distinguish between the different concepts at issue in using past performance in source selection, as opposed to suspension/debarment proceedings, will inevitably result in misunderstandings and errors. Even some of the CWC's draft recommendations, which are more modest than statements made during the February 28 hearing, are based on erroneous understandings of these concepts and would do serious damage to both areas of law—harming both the government and contractors in the process.

In this article, we briefly explain the differences between past performance in source selection and

[1] *At What Risk? Correcting Over-Reliance On Contractors In Contingency Operations* (Feb. 24, 2011) (''*Interim Report*''), available at http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf. The Commission's initial interim report, and four ''special reports'' can be found at http://www.wartimecontracting.gov/index.php/reports.

[2] *Ensuring Contractor Accountability: Past Performance and Suspension & Debarment: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan* (Feb. 28, 2011) (''*Hearing*''), transcript available at http://www.wartimecontracting.gov/docs/hearing2011-02-28_transcript.pdf.

suspension/debarment concepts—and bodies of law. This article then explains problems with several of the CWC's recommendations for change with respect to these differing procedures, as well as the detriments and dangers of conflating these concepts.

I. Use Of Past Performance In Source Selection. The Federal Acquisition Regulation requires that past performance information be collected and used by agencies for different purposes. Two of those uses are new contract award evaluations and responsibility determinations. With respect to the latter, the FAR has long required that a prospective contractor *must ''[h]ave a satisfactory performance record''* in order to be deemed responsible (and thus able to do business with the government). FAR 9.104-1(c) (emphasis added). This is an integral component of the ''present responsibility'' requirement, which mandates that agencies solicit offers from, award contracts to, and consent to subcontracts only with, responsible contractors.

A source selection board's or official's consideration of past performance as an evaluation factor in new contract awards is fundamentally different than use of such information in responsibility determinations. Although used previously in 1994, Congress mandated that agencies consider past performance information when selecting contractors for awards valued over a certain dollar value known as the ''simplified acquisition threshold.''[3] FAR 15.305(a)(2) makes clear that ''[t]his comparative assessment of past performance information is separate from the responsibility determination required under Subpart 9.1.'' As an evaluation factor, the currency, relevance, and quality of an offeror's past performance is assessed by the contracting officer or other relevant procurement personnel. Following the stated evaluation criteria regarding past performance, agencies can make highly discretionary assessments, crediting and decrementing offerors based on the quality of their past performance in areas relevant to the award.[4] The superior (or inferior) past performance of an offeror may be the discriminating factor among competing proposals.

To facilitate consideration of past performance when evaluating competing offers for award, the FAR provides for the collection of past performance information during the performance of a contract. FAR 42.1501 states:

> Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to the standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; the contractor's reporting into databases (see subparts 4.14 and 4.15); the contractor's record of integrity and business ethics, and generally, the contractor's business-like concern for the interest of the customer.

The FAR requires agencies to prepare an evaluation of contractor performance for each contract. *See* FAR 42.1502(a). Agencies use databases, such as the Contractor Performance Assessment Reporting System (''CPARS''), to record such information. Once reported, the past performance data is made available throughout the government by means of the Past Performance Information Retrieval System (''PPIRS''). Thus, government procurement officials do not have to rely solely on promises and representations in proposals, and access to relevant past performance information from other agencies arguably provides procurement officials involved in source selection some insight into a contractor's track record and ability to perform the solicited work.

In addition to providing a tool for contracting officers, the knowledge that source selection teams use past performance information in selection decisions should (and does) motivate contractors to be more responsive and to perform better on current contracts. By its nature, however, much past performance information is subjective. Indeed, the use of past performance information in awarding new contracts is necessarily limited in that it only provides support for the government's prediction that future performance will match or exceed that observed in the past. As such, for the government to receive the maximum benefit of past performance information, it is essential that agencies have confidence in the collection and use of this information.

II. Suspension And Debarment. Suspension and debarment are separate, long-standing administrative remedies that enable agencies to exclude contractors or individuals from obtaining any federal contracts for a specified length of time,[5] based on evidence that a contractor lacks integrity.[6] These tools are closely related

[3] *The Federal Acquisition Streamlining Act* (''FASA''), P.L. 103-355 (Oct. 13, 1994), codified the requirements to consider past performance in making contract awards. Significantly, in section 1091 (entitled ''Policy Regarding Consideration of Contractor Past Performance''), Congress found past performance to be a relevant and appropriate factor that executive agencies should consider when making awards. Federal Acquisition Circular 90-26 implemented the FASA requirements into the FAR ''for the use of past performance information in the contractor selection process.''

[4] *See, e.g., Nova Tech.*, B-403461.3; .4, Feb. 28, 2011, 2011 CPD ¶ 51 (denying protest that agency improperly evaluated protestor's past performance); *Emerson Co.*, B-404044, Dec. 29, 2010, 2010 CPD ¶ 304 (denying protest of agency's evaluation of past performance and source selection decision where record showed that evaluation and award decision were reasonable and consistent with the terms of the solicitation); *Staff Tech, Inc.*, B-403035.2; .3, Sept. 20, 2010, 2010 CPD ¶ 233 (denying protest that agency improperly considered, among other things, past performance of company other than awardee in evaluating the awardee's proposal, when record shows that both companies had the same address and telephone number, shared the same program manager and principals).

[5] ''Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years,'' though debarments resulting from violations of the Drug-Free Workplace Act ''may be for a period not to exceed 5 years. FAR 9.406-4. Suspensions are for shorter time periods. *See* FAR 9.407-4.

[6] *See, e.g., United States v. Bizell*, 921 F.2d 263, 267 (10th Cir. 1990) (''It is the intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds.''); *see also Mastercraft Flooring, Inc. v. Donovan*, 589 F. Supp. 258, 263 (D.D.C. 1984) (''Debarment. . . may have a serious economic impact upon a business and may well cause it to fail. It should therefore be used prudently and not, as in this case, with a reckless hand.''); *Roemer v. Hoffman*, 419 F. Supp. 130, 132 (D.D.C. 1976) (explaining

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to the concept of ''present responsibility'' described above.[7]

It is important to understand that, though related, responsibility determinations are different than suspension and debarment proceedings. As previously noted, the FAR mandates that an affirmative determination of contractor responsibility be made by a contracting officer before award of a contract as part of the source selection process. *See* FAR 9.103. To protect the government from non-responsible contractors, a contracting officer must assess offerors' abilities and determine whether they can satisfactorily complete the work (FAR 9.104-1); this is done by examining, among other things, financial soundness, ability to complete the work, and the existence of adequate manufacturing facilities.[8]

A. Policy Behind Suspension And Debarment. Suspensions and debarments are based on the notion that federal agencies should only solicit offers from, and award contracts to, responsible contractors. The FAR makes clear that suspension and debarment are intended to ensure that contractors who have failed to fulfill legal, ethical, or contractual obligations have severely limited future contracting opportunities with the government. However, these *administrative* procedures are not intended to punish bad actors, but rather to protect the United States: ''The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the government's protection *and not for purposes of punishment*.'' FAR 9.402(b) (emphasis added).[9] Such agency actions are within the discretion of agency contracting officials, generally last no longer than three years (*seesupra* note 6), and can be waived by agency heads, depending on agency needs.

B. Effect Of Suspension Or Debarment—Immediate Preclusion From New Work. When a contractor is suspended or debarred, it is ineligible to receive new work, *e.g.*, contracts, orders, exercise of options, and modifications. *See* FAR 9.405. The lesser sanction of suspension can be implemented immediately and with less due process, *i.e.*, without the contractor being afforded an opportunity to challenge the action before it is imposed. *See* FAR 9.407-3(c). In contrast, when a debarment is proposed, contractors have an opportunity to challenge the action before it takes effect, *see* FAR 9.406-3(c), though contractors may be suspended while debarment proceedings are pending.

C. Existing Mechanisms For Addressing Performance Issues. As explained above, suspension and debarment are not tools used to address standard contractor performance problems (though the FAR authorizes suspension and debarment for egregious poor performance of government contracts). Instead, there are standard contract mechanisms for addressing the performance questions and disputes arising between the parties. FAR 9.406-2(b)(1)(i)(B). For instance, the government can encourage good contractor performance with incentive contracts, exercise of options, and use of past performance information in the award process—and it can discourage less than satisfactory performance by refusing to exercise awarded options, making a subsequent award of the work to a different contractor under another contract vehicle, or even terminating for convenience. And if a performance-related dispute arises, Congress has provided a dispute mechanism under the Contract Disputes Act to address such issues.

In contrast, suspension and debarment are to be used only when a compelling need for action exists to protect the public interest. *See* FAR 9.407 (suspensions permitted ''upon adequate evidence [of] any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor''). Notably, contractors are afforded certain due process rights throughout both processes.

A finding of misconduct begins the suspension or debarment analysis. But the analysis does not rest solely on past conduct, as agencies must determine whether the contractor is ''presently responsible,'' *i.e.*, whether the contractor should be eligible for new government work. In making that decision, agencies generally consider the contractor's current situation, *i.e.*, whether remedial measures have been taken within the organization to ensure that proper compliance programs and training are in place such that the government is satisfied that the misconduct is not likely to occur again. In other words, the fact of a past problem should not require that the contractor be debarred.

III. The Government's Attempts To Address Problems With The Collection And Availability Of Past Performance Information. Although few would disagree that there is value in past performance information, collection efforts have, at times, been inadequate or inconsistent. To address perceived collection and availability problems, the FAR was amended in July 2009 to require that agencies submit electronic records of contractor performance to a single, web-based repository—PPIRS, which is described above.

For responsibility determinations, the government has recently attempted to broaden access to information with the Federal Awardee Performance and Integ-

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that the focus in debarment is whether the contractor is presently responsible despite possible past misconduct).

[7] The FAR includes other measures to protect the government's interests. For example, a standard FAR clause (FAR 52.203-13) requires contractors to maintain a code of business ethics and conduct and to make disclosures to the government when the contractor has ''credible evidence'' of the violations of certain laws in connection with the award, performance, or closeout of the contract or subcontract, including the civil False Claims Act. That clause must be included in all contracts that are expected to exceed $5 million and have a performance period of 120 days or more, including contracts performed overseas. *See* FAR 3.1004. The clause provides a substantial safeguard for the government and reduces the burden of identifying relevant matters. Contractors must comply with the clause and are at risk of a termination for default (and suspension or debarment) for a knowing failure to comply. *See*, *e.g.*, FAR 9.407-2(a)(8).

[8] *See, e.g., LORS Med. Corp.*, B-259829.2, Apr. 25, 1995, 95-1 CPD ¶ 222 (bidder responsibility may be satisfied any time prior to award). A contractor can be found ''non-responsible'' in connection with a given proposal effort even if it does not pose a risk to the government that would result in a suspension or debarment.

[9] A group of statutory debarments and suspensions does exist to punish certain types of conduct, *e.g.*, violations of the Davis-Bacon Act, 40 U.S.C. § 3144, the Drug-Free Workplace Act of 1988, 41 U.S.C. § 701(d). Unlike administrative debarments and suspensions, these sanctions are mandatory.

rity Information System (''FAPIIS''). FAPIIS was envisioned to be a ''one-stop source for a comprehensive range of data, such as information on suspensions and debarments, contract terminations, and contractor disclosure of adverse criminal, civil, and administrative actions.''[10] Contracting officers must review FAPIIS information prior to contract award to ''determin[e] if the contractor is presently responsible, and they must document the contract file to indicate what action was taken as a result of the information in FAPIIS and what role that information played in any responsibility determination.''[11]

Like earlier initiatives, such as the December 2000 ''blacklisting rule,''[12] FAPIIS requires consideration of a breadth of information concerning a contractor's responsibility, *i.e.*, ''information in FAPIIS'' as well as information linked to FAPIIS (such as past performance records in PPIRS). *See* FAR 9.105-1(c); *see* FAR 9.104-6(b). FAPIIS does not mandate certain outcomes; thus, government actions such as fines do not necessarily render a contractor non-responsible. Instead the system seeks to foster well-informed responsibility determinations.

Although it is included with the FAR provisions related to responsibility determinations (Subpart 9.1), FAPIIS presents a risk of collapsing the distinctions between the past performance and responsibility/suspension and debarment regimes. In short, contracting officers considering FAPIIS information regarding past performance records to determine responsibility in a source selection could easily rely on irrelevant or inaccurate past performance information in limiting the pool of eligible contractors. Although the FAR specifically cautions against such reliance, *see* FAR 9.104-6(b) (requiring determination of weight and relevance of FAPIIS and other information), the risk that these issues will be blurred is substantial.

IV. Changes to These Rules Without Focusing on the Distinctions Above Could Drastically Affect the Government and Contractors. After their review to date, it is clear that the members of the CWC appear to have determined that the past performance and suspension/debarment systems are not working well in the contingency operations theater. The commissioners assert:

> Despite a more mature contracting environment . . ., federal agencies such as DoD, State, and USAID still do not consistently emphasize competitive contracting practices. In fact, some of the agencies' procurement policies and acquisition strategies have hampered competition and favored incumbent contractors regardless of the incumbent's past performance.

Interim Report at 41; *see id.* at 42-48.

In response to those problems, the CWC is recommending several changes to the contingency contracting system. Some of these proposals may have merit in the unique case of contingency contracting. However, several suggested changes would discard tried and true contract administration and award procedures that serve the government and contractors well throughout the procurement system, and would replace them with a system in which more punitive measures would be taken against contractors, with much less due process—and a higher probability of error. The CWC's proposed changes are technically limited to the contingency operations situation. That said, there appears to be a real prospect that similar changes could be in the offing for some non-contingency contracts as well. Some accountability advocacy groups have called for broader exclusion of contractors based on their past performance records or involvement in alleged violations of the civil False Claims Act. Such potential changes would obviously pose a significant risk for contractors and would be harmful to the procurement system as a whole.

The CWC's *Interim Report* describes 32 recommendations for legislative and policy reform. Relevant here are several that focus on debarments and suspensions as seemingly punitive weapons to be more readily wielded against contractors. Although the *Interim Report* mentions the shortcomings of government oversight, it also suggests that there is enough blame to go around and that contractor malfeasance also contributed to waste, fraud, and abuse in contingency operations.

The CWC's *Interim Report* provides six different recommendations related to past performance, and suspension/debarment issues. The most significant of these (with the Commission's numbering) would:

- 20. Allow contractors to respond to, but not appeal, agency performance assessments. Contracting officers would decide past performance issues without review currently allowed, and could release their reviews without contractor input
- 24. Increase use of suspensions and debarments. Would remove discretion from contracting officers anytime a contract-related indictment is issued
- 25. Revise regulations to lower procedural barriers to contingency suspensions and debarments. Would dramatically reduce process to which contractors are allowed and allow these decision makers to ignore or act without submissions from contractors.

Interim Report at 47-52.

In addition to the troubling nature of some of the recommendations in the *Interim Report* (such as the removal of due process with respect to suspensions and debarments in contingency operations), several Commissioners made stronger statements during the *Hearing* a few days later (on February 28), asking questions and otherwise asserting that the suspension and debarment procedures were dramatically under-used. Some commissioners indicated that, in addition to the *Report's* recommendation of automatic suspension or debarment in the event of criminal indictment, poor past performance could or should have similar consequences.

Statements made during the CWC *Hearing* should be viewed in context. The Commission's jurisdiction covers the approximately $200 billion that has been spent on contracts and grants since 2002 to support military, reconstruction, and other U.S. operations in Iraq and Afghanistan—and its members have expressed a belief that tens of billions of those contract dollars were

[10] Statement of The Honorable Daniel I. Gordon, Administrator for Federal Procurement Policy, Office of Management and Budget, before the CWC at the Feb. 28, 2011 Hearing, at 7-8, *available at* http://www.wartimecontracting.gov/docs/hearing2011-02-28_testimony-Gordon.pdf. Some of the data required to be reported for FAPIIS is of the nature of normal disputes that any business faces, *e.g.*, employment actions, environmental liabilities and damages, etc. It is not clear that collection of this information is really of assistance in differentiating one company from another.

[11] *Id.* at 8.

[12] *See* 65 Fed. Reg. 80256 (Dec. 20, 2000).

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wasted. Some Commissioners apparently are frustrated that contractors who have performed poorly continue to receive additional work. For example, Mr. Shays stated:

■ ''Our concerns are that past performance data is often not being properly recorded or explained, and that barriers exist to the effective use of suspensions and debarments.'' (*Hearing* at 1.)

■ ''So the bottom line for me is and I think my colleagues is that 90 percent of past performance are basically ignored. Maybe more are ignored, maybe a little less. The second is that contractors can claim good performance and there's nothing to dispute it because 90 percent isn't recorded. The third point is we focus on the 10 percent where performance is recorded, and even then we don't use it to ultimately suspend or debar or just simply not move forward with that contractor, at least not give them as many points.'' (*Id.* at 63.)

■ ''And then we so often renew contracts when performance is bad. We give new contracts to former bad performers. That's what happens. And we rarely use suspension or debarment. And it's not punishment. It's just we don't want them to do the work for existing or new contracts. We basically ignore this important tool. That's the bottom line to this hearing.'' (*Id.* at 64.)

Dan Gordon, the Administrator of the Office of Federal Procurement Policy, testified during the *Hearing* and attempted to explain the distinctions between suspension and debarment on the one hand, and past performance on the other. In response to questioning, Mr. Gordon testified:

> I do think that there were things said in the first panel discussion that were somewhat problematic, assuming that these reports would solve all sorts of problems and in the absence of these reports we have nothing happening. Both are problematic. The reports, first of all, wouldn't lead to suspension or debarment. These are past-performance issues. Not things that are like termination or termination for default. And, secondly, past-performance assessments take place all the time. They're required. We may not have a very good database, we're trying to put it together, but when I talk to people on the front line, they tell me that, yes, they do past-performance assessments. They're required to. They do it by contacting agency points of contact.

Id. at 77. It was not clear to what extent Mr. Gordon's explanation was accepted by the Commissioners.

V. CWC Recommendations—Potential Upheaval And Unintended Consequences Although well-intentioned, many of the CWC's recommendations would remove or minimize the effectiveness of well-considered contract administration tools and replace them with blunt instruments not designed for the task at hand. As noted above, the recommendations would presumably (and importantly) be limited to the context in which they are made, *i.e.*, contingency operations. But contractors should be concerned about the possibility of extension beyond that theater because many of the concerns motivating the CWC are not issues that would necessarily remain confined to the contingency operations—and could result in drastic and problematic changes to the existing acquisition system.

A. Truncating Past Performance Assessments And/Or Mandating Suspension Or Debarment May Result In A Variety Of Unintended Consequences And Harm To The Government In the context of contingency contracting (which, admittedly, has limited involvement of U.S.-based contractors relative to general government procurement), the Commission confuses past performance, and the ethics and integrity considerations that underlie suspension and debarment. Any conflation of past performance and suspension and debarment—or mandate for ''automatic'' suspension and debarment based on either a company's past performance record or its activities that have not resulted in indictments or convictions—would be contrary to the government's interests in a variety of respects.

In addition, efforts to reduce the level of scrutiny applied to draft performance assessments raise a variety of concerns. These issues would be particularly acute if past performance served as a basis for a determination to suspend or debar a contractor. As more reliance is placed on past performance assessments, it is even more critical that such assessments are prepared fairly and accurately, and with due safeguards to avoid prejudicial errors.

1. Past Performance—Solid Basis To Inform Likely Future Performance When Accurate And Relevant To The Contract At Issue. The basis for requiring use of past performance as an evaluation criterion is the belief that performance on prior efforts is probative of a contractor's likely performance on a new contract. By contrast, as discussed above, responsibility determinations and suspension and debarment focus on a contractor's record of business ethics and integrity. As reflected in the FAR's distinction between the different procedures, a contractor of unquestionable integrity could be a poor performer on certain types of efforts. Conversely, a contractor that consistently performs well on contracts in terms of schedule and cost performance could have a troubling lack of business ethics. Recognition of these various possibilities underlies the FAR's current approach.

Increasing the reliance on past performance considerations apart from the evaluations for particular contracts to reach broader matters such as suspension or debarment decisions both (i) deviates from and thereby diminishes the predictive value of past performance information and (ii) increases the risks and harms possibly resulting from any erroneous data in the assessment.

2. The Government's Interest In Accurate Assessments. Past performance data is most useful when it is (i) current and accurate and (ii) relevant to a contemplated new effort. As FAR 15.305a)(2)(i) makes clear:

> Past performance information is one indicator of an offeror's ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This comparative assessment of past performance information is separate from the responsibility determination required under Subpart 9.1.

Id.

No one could reasonably dispute that the government has a clear interest in ensuring the accuracy of any information on which it relies in making contract award decisions. Nor could anyone dispute that government officials occasionally make mistakes or overlook important information when they compile past performance records. For example, in a variety of cases, agencies even have failed to take into account information that is

''close at hand.''[13] Concern about accuracy is a critical reason for enabling a contractor to respond to a draft past performance assessment prepared by an agency. *See* FAR 42.1503(b). Requiring that the government's (potentially erroneous) past performance record be used to suspend or debar contractors would exacerbate the harm—particularly if contractor rights to contest a draft past performance assessment before it is relied on by procuring agencies (and, therein, to correct an erroneous assessment) are reduced.

CWC Recommendation No. 20 would deny a contractor (in the context of contingency operations) the right to appeal a performance assessment above the level of the same contracting officer that was involved in the poor performance assessment in the first instance. This change in approach would deprive the contractor of the more objective assessment that can be obtained from an official who did not oversee (or was not otherwise involved with) the contract performance at issue.

Review at a level above the contracting officer protects the government—including other agencies—from the erroneous analyses of a particular contracting officer on a particular contract. Removing such review would increase the probability that an inaccurate performance assessment would become final and that such inaccuracies will mislead another agency (or a different selection official at the same agency) with respect to the actual quality of a contractor's prior performance. As a result, that other agency or official may elect to award to a different contractor based on the mistaken belief about the likely performance of the contractor at issue. Such errors may deprive the government of the benefit of competition for a particular requirement and cause the government to forego a higher quality approach or lower price (or both).

3. Relevancy Makes Past Performance Information Useful In addition to accuracy, the relevancy of the information relied on is critical. The FAR requires a source selection authority to ''determine the relevance of similar past performance information'' because the predictive value of past performance is dependent upon its relevance to the contract being evaluated.[14] Company ABC may have performed very poorly on a contract to construct a school, but may have a very solid record of performance on road construction efforts. Unless relevancy is reasonably taken into account, an agency may rely unduly on information that does not reflect the nature of the work and what is reasonably likely to occur in future contract performance. Indeed, one problem with greater government reliance on data that may be placed in FAPIIS is that it may lead contracting officers to take more action on matters that are far afield from a contractor's performance on a particular project.

4. Due Process In Suspension And Debarment CWC Recommendation No. 25 would reduce ''barriers'' to suspension and debarment in the context of contingency operation as a means to encourage greater use of those remedies. The recommendation to reduce contractors' due process rights is troubling and unnecessary. The FAR reflects certain basic procedures that safeguard due process while also enabling protection of the government's interests. For example, a contractor may challenge a proposed debarment and in that regard is entitled to submit evidence challenging the alleged facts on which the government action is based—and have a hearing to address and resolve factual disputes. This process is critical because, in light of the severity of the effects of a debarment, it is imperative—and in all parties' interests—that the facts are fairly adjudicated.

Moreover, affording contractors basic due process with current procedures does not pose any reasonable jeopardy to the government's interests. The FAR enables the government to suspend a contractor—and thus render it ineligible for contracts—while a debarment is pending. Suspensions take immediate effect. Although the contractor is entitled to contest a suspension, the right does not extend to an opportunity to contest it before it is implemented.

The CWC's *Interim Report* states that agency officials cite the ''complexity'' of the suspension and debarment process as a reason for not using such tools. The possibility that a contractor proposed for debarment might request a hearing is cited, as is the difficulty of finding and presenting witnesses in a contingency situation.[15] These statements appear to reflect a misunderstanding of current procedures.

As noted above, the government can suspend immediately if it has concerns about fraud, waste or abuse. For the agency to take such action, it should have clearly identified the facts of concern. The contractor should have the opportunity to make an evidentiary submission in its defense, though a formal hearing is not mandated. The concern is that the agency not make an arbitrary decision based on limited knowledge without a response from the contractor. That response can take many forms—and need not be ''complex'' or unduly time consuming.[16] Indeed, if there is no factual dispute, the agency should (in the interest of fairness), but is not required to, hear further from the contractor.[17] This is an agency management issue; it is not a sufficient reason for the government to ignore fundamental fairness.[18]

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[13] *See*, *e.g.*, *Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Associates, Joint Venture*, B-401679.4, *et al.*, Mar. 10, 2010, 2010 CPD ¶ 77.

[14] FAR 15.305(a)(2)(ii); *see*, *e.g.*, *ASRC Research & Technology Solutions, LLC*, B-400217; .2, Aug. 21, 2008, 2008 CPD ¶ 202 (protest sustained where agency did not consider the relevance of the awardee's past performance references).

[15] *Interim Report* at 50.

[16] *See* FAR 9.407-3 (providing that agencies shall establish procedures that are ''as informal as practicable consistent with principles of fundamental fairness''). Such procedures are required to provide the contractor an opportunity (after the imposition of suspension) to submit information and argument in opposition to the submission. When a suspension is not based on an indictment, a hearing is necessary only if it is found that the contractor's submission raises a genuine dispute over material facts—in which case the government should want to know the true state of affairs.

[17] *See Brodie v. HHS*, 715 F. Supp. 2d 74, 80-81 (D.D.C. 2010).

[18] *See Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 6 (D.C. Cir. 1998) (''Suspending a contractor is a serious matter . . . . An agency may not impose even a temporary suspension without providing the 'core requirements' of due process: adequate notice and a meaningful hearing.''). Without allowing the contractor to make a submission and presentation, in the event of a factual dispute, the CWC's proposal could make it impossible for the courts to fulfill their ''role [of] review[ing] the whole administrative record to determine whether there was a rational basis for the **agency's** action.'' *Caiola v Carroll*, 851 F.2d 395, 398 (D.C. Cir. 1988).

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In sum, the government's interests are fully and amply protected by the suspension and debarment proceedings set forth in the FAR and are not impeded by the basic due process procedures therein. Efforts to reduce contractors' due process rights are unnecessary.

5. Automatic Suspension And Debarment As the testimony and the CWC's questions during the February 28, 2011 *Hearing* reflect, there are some who believe that suspension and debarment procedures are not being used sufficiently. To bolster use, some urge that these processes become mandatory or automatic for certain types of prior conduct, such as poor performance or terminations for default. Although more limited in reach than the suggestions at the hearing, CWC Recommendation Nos. 24 and 25 reflect problematic views in this regard. CWC Recommendation No. 24, for example, calls for making suspension or debarment mandatory for certain contract-related indictments—and would thus eliminate discretion to consider the contractor's remedial efforts to address past problems and the success of such efforts. Even if suspensions and debarments were being effected in insufficient numbers (though it is unclear how this is purportedly being measured), removing discretion of suspension and debarment officials is not the answer.

By way of background, the FAR provides broad discretion and makes clear that the existence of a cause for debarment (or suspension) does not necessitate a debarment (or suspension). *See* FAR Subparts 4.6, 4.7; 9.407-6-1(a); 9.407-1(b)(2). In this regard, the FAR approach is somewhat analogous to the treatment of organizational conflicts of interest (''OCIs'') in that the FAR provides for analysis and consideration of certain information and sets forth procedures to address them but does not mandate that any particular approach be taken by contracting officials. *See* FAR Subpart 9.5.

The discretion embodied in the current FAR enables government officials to craft the reasoned approach to fit particular circumstances. An agency may determine that notwithstanding past conduct or omissions, it is in the government's interest to permit a company to continue to obtain contracts based on actions already taken to remedy the underlying problem or concern. Often these determinations are predicated on the contractor's strict compliance with the terms of an administrative agreement. These agreements may be entered into in lieu of a suspension or (as in the recent case of GTSI) be accompanied by the lifting of a prior suspension order. Administrative agreements enable the government to exercise an extensive degree of oversight regarding the continued operations and integrity of the contractor through such measures as the appointment of a monitor that reports directly to the government at the contractor's expense. Such agreements typically provide that any noncompliance may result in the imposition of a suspension and thus do not constrain the government's ability to take appropriate action quickly if the facts so warrant. Mandatory or automatic causes for suspension or debarment, on the other hand, curtail government discretion and flexibility.

DoD is similarly concerned about such proposals. Ashton Carter, the Undersecretary of Defense for Acquisition, Technology and Logistics, recently testified at a March 28, 2011 hearing of the CWC and disagreed with the Commission's recommendations, ''noting suspension and debarment officials need the flexibility and discretion to judge each case on its own facts and circumstances.''[19] He testified that ''[t]here is a potential unintended consequence of turning suspensions and debarments from tools to protect the government's interest into tools that automatically punish contractors. . . . Such an approach may have a chilling effect on contractor cooperation in identifying and fixing real problems, including those that affect the health and safety of our personnel.'' *Id.*

In sum, mandatory suspensions or debarments based on performance on prior activities or contract performance may result in the exclusion of contractors who may be among the most qualified for a contract that an agency seeks to award. Mandatory suspension and debarments also will result in less competition. By requiring that agencies reduce barriers to competition, the Competition in Contracting Act reflects the understanding that competition yields better prices and greater value for the government.

B. Conflation Would Cause Undue Harm To Industry To the extent new statutes or regulations conflate past performance issues and the suspension and debarment mechanisms—and potentially remove procedural protections that currently apply in the suspension and debarment process—contractors are likely to suffer grievously. In short, contractors' ability to complete work on current contracts and to compete for additional work could be dramatically reduced or eliminated without any opportunity to present contrary evidence, or to explain why the contracting agency should exercise discretion and not impose a draconian sanction. There is no reason for the financial and reputational damage that will result from an erroneous assessment to occur without providing the contractor a meaningful opportunity to be heard.

No one can reasonably dispute that contracting officers make mistakes. In the case of past performance assessments, erroneous evaluations can have substantial effect on future prospects. At a bare minimum, the evaluating official should be required to evaluate the response and information provided by the contractor, so that accurate information can be kept in the agency's records and provided to other procurement officials considering proposals by the contractor . The same is true in the suspension and debarment contexts, where the ramifications of an erroneous decision can be much greater.

VI. Conclusion The government currently has a multiplicity of tools available to avoid contracting with companies that have poor performance records or questionable records of business ethics and integrity, ranging (as appropriate and applicable) from consideration of past performance in contract evaluations to declining to exercise contract options to responsibility determinations to (with appropriate consideration of due process) the severe steps of suspension and debarment. Before more tools are added or the government's discretion to wield the current tools is constrained, one must ascertain the real need for doing so and balance it against the harms posed by such changes. In light of the many

[19] Robert Brodsky, *Pentagon Resists Automatic Suspension of Indicted Contractors*, Gov. Exec., Mar. 28, 2011, http://www.govexec.com/dailyfed/0311/032811rb1.htm.

ways in which the government's interests can be safeguarded today, new tools are unnecessary.

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Calendar

The calendar is a complimentary service to FCR subscribers. Submissions may be faxed to: (703) 341-1687; telephone submissions will not be accepted. The FCR editor reserves the right to determine whether to include an item in the calendar.

CONFERENCES, SEMINARS, MEETINGS

Date	Sponsor	Topic	Location	Contact
April 27	Section of Public Contract Law Procurement Fraud Committee	The Procurement Fraud Committee and the Contract Claims and Disputes Resolution Committee of the Section of Public Contract Law of the American Bar Association will hold a joint meeting *Topics include:* implied certifications under the False Claims Act, March 11, 2011 draft Administrative Conference of the United States (ACUS), whether to submit comments on the proposed DFARS Hotline Display Rule, 7 Fed. Reg. 13327 (March 11, 2011) *Speakers include:*Michael Granston, (DOJ); Rob Vogel, Vogel, Slade & Goldstein; and Susan Levy, Daniel Winters of Jenner & Block LLP	Washington, D.C.	Veronica Makell, vmakell@akingump.com or (202) 887-4288
May 10-12	GSA Training Conference and Expo 2011	Inspire. Innovate. Interact. These words are the essence of the GSA Training Conference and Expo 2011. This conference will provide a wide spectrum of training to enhance your job performance and enrich your personal knowledge as acquisition professionals and program managers from federal, state and local government, and the military. Our vendor exhibition is unparalleled; presenting innovations from hundreds of suppliers showcasing their latest products, technologies and systems. *Keynote Speaker:*Apple Computer, Inc., co-founder Steve Wozniak	San Diego	expo@gsa.gov, (888) 243-0706
July 19-21	GSA	FOSE 2011 Conference & Exposition: ''Technology for the Missions of Government''. The FOSE Conference & Exposition will bring together top experts and thought leaders to address some of the most pressing issues facing federal agencies and the broader government technology community *Topics include:* enabling the mobile workforce, cybersecurity and information assurance, next generation infrastructure strategies, defense innovations, and the Federal IT agenda for 2012 and beyond	Washington, D.C.	Suzanne Young, 703.876.5103 syoung@1105media.com

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A monthly update of the Federal Contracts Report Index Summary, including a Table of Cases, is available at:
http://www.bna.com/current/fcr

INTERNET SOURCES

Listed below are Web sites that may be of interest to readers of Federal Contracts Report.

ABA Section of Public Contract Law
http://www.abanet.org/contract/

Acquisition Reform Network
http://www.acqnet.gov

Centers for Medicare & Medicaid Services (CMS)
http://www.cms.hhs.gov/default.asp

Chief Information Officers Council
http://www.cio.gov/

Congressional Budget Office
http://www.cbo.gov

Congressional Record via GPO Access
http://www.access.gpo.gov/su_docs/aces/aces150.html

Defense Industry Initiative on Business Ethics and Conduct (DII)
http://www.dii.org

Defense Procurement and Acquisition Policy
http://www.acq.osd.mil/dpap/

Department of Health and Human Services IG
http://oig.hhs.gov/

European Commission
http://europa.eu.int/comm/competition/index_en.html

FedBizOpps (Governmentwide Point of Entry)
http://www.fedbizopps.gov

Federal Alternative Dispute Resolution
http://www.adr.gov

Federal Procurement Data System
http://www.fpds.gov/

Federal Register
http://www.access.gpo.gov/su_docs/aces/aces140.html

Federal Web Locator
http://www.infoctr.edu/fwl/

Government Accountability Office
http://www.gao.gov

General Services Administration
http://gsa.gov

Government Printing Office
http://www.access.gpo.gov/su_docs/db2.html

Iraq Investment and Reconstruction Task Force
http://www.export.gov/iraq/

Justice Department
http://www.usdoj.gov

NASA Acquisition Internet Service
http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi

Small Business Administration
http://www.sbaonline.sba.gov/

Taxpayers Against Fraud—False Claims Act Legal Center
http://www.taf.org

U.S. Code
http://uscode.house.gov/usc.htm

U.S. Code of Federal Regulations
http://www.access.gpo.gov/nara/cfr/index.html

U.S. Court of Appeals for the Federal Circuit
http://www.fedcir.gov

U.S. Court of Federal Claims
http://www.uscfc.uscourts.gov/

U.S. House of Representatives
http://www.house.gov

U.S. Senate
http://www.senate.gov

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http://www.whitehouse.gov

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