BNA, INC.

FEDERAL CONTRACTS

BNA Employee-Owned Since 1947

VOL. 95, NO. 18 PAGES 477 – 508

REPORT

MAY 11, 2011

HIGHLIGHTS

Bill Addresses Total Force Management, Contingency Contracting

The House version of the FY 2012 defense authorization bill contains a number of provisions on total force management. In particular, section 937 would lift the temporary suspension on DOD's initiation of public-private competitions, which was included in the FY 2010 defense authorization act and was to remain in effect until the defense secretary provided a report to Congress on the conduct of such competitions and certified compliance with certain statutory requirements. **Page 481**

BNA Insights: Proposed Rule on OCIs—A New And Refreshing Approach?

On April 26, 2011, a proposed rule was issued to amend the FAR with regard to the treatment of organizational conflicts of interest. The rule has been greatly anticipated; among other things, the Acquisition Advisory Panel noted that the FAR currently does not address the growing need to safeguard against OCIs due to industry consolidation, the large growth in services contracting, and other changes in the procurement landscape. According to attorneys Marcia G. Madsen and David F. Dowd, the proposed rule ''modernizes the concept and approach to OCIs'' with a regulatory regime that is ''more clear, flexible and comprehensive'' but will require additional training and new procedures. **Page 500**

IRS Delays to 2013 Tax Withholding on Contractor Payments

The IRS issues a final rule that would delay implementation of a new 3 percent withholding requirement on payments from government entities to contractors until Jan. 1, 2013, and exempt any payments of less than $10,000. The withholding requirement, created by the Tax Increase Prevention and Reconciliation Act of 2005, mandates withholding by any federal, state, or local entity, and was previously set to go into effect in 2012. **Page 482**

Reformers Press for Obama Executive Order on Contractor Contributions

Campaign reform groups express strong support for a draft executive order from President Obama that would require government contractors to disclose political contributions. The calls supporting the order come amid continuing opposition from business groups and congressional Republicans. **Page 482**

GAO Finds Awardee Improperly Took Exception to Requirement

GAO sustains a protest of a DOD contract award in part because the awardee's proposal improperly took exception to a solicitation requirement to propose a fixed price. GAO also sustains the protest because the record did not permit a meaningful review of the agency's evaluation of offerors' past performance, and because the record did not show that agency reasonably evaluated the qualifications of the awardee's proposed personnel. **Page 497**

ALSO IN THE NEWS

DOD: DOD adopts a final rule that aims to mitigate risks related to personal services. **Page 483**

SMALL BUSINESS: Proposed changes in the size standards used to determine whether scientific, technical, and professional firms are small businesses for purposes of federal contracting preferences draw complaints from witnesses at a House hearing. **Page 484**

DOD: General Electric Co. and Rolls Royce announce they have offered to bear the costs of continuing development of an alternate engine for the F-35 Joint Strike Fighter through FY 2012. **Page 485**

SMALL BUSINESS: VA balks at the severity of penalties called for in a House bill aimed at cracking down on firms that misrepresent themselves as small, veteran-owned concerns in order to take advantage of contracting preferences. **Page 485**

PROPOSAL EVALUATION: GAO determines that the Navy was justified in rejecting a protester's cost proposal for performance of a task order because the proposal took exception to a limitation on subcontracting clause. **Page 497**

 ISSN 0014-9063

BNA
FEDERAL CONTRACTS REPORT

THE BUREAU OF NATIONAL AFFAIRS, INC. 1801 S. BELL STREET, ARLINGTON, VA 22202-4501 (703) 341-3000

Correspondence concerning editorial content should be directed to the managing editor. Telephone: (703) 341-3730. For customer service (8:30 a.m. to 7 p.m. Eastern time, Monday-Friday), call 800-372-1033 toll-free in the United States (including Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, and the metropolitan Washington area) and Canada; outside the United States, call (703) 341-3000, or contact BNA International, Inc., in London, 44 20 7559 4801.

ADVISORY BOARD

FEDERAL CONTRACTS REPORT (ISSN: 0014-9063) is published weekly, except for the first week in January, the first week in June, the week before and the week after Labor Day, and the week after Thanksgiving at the annual subscription rate of $2,431 per year, for a single print copy, by The Bureau of National Affairs, Inc., 1801 S. Bell St., Arlington, VA 22202-4501. **Periodicals Postage Paid at** Arlington, VA and at additional mailing offices. **POSTMASTER:** Send address changes to Federal Contracts Report, BNA Customer Contact Center, 3 Bethesda Metro Ctr Suite 250, Bethesda, MD 20814.

In This Issue

NEWS

LEGISLATIVE & REGULATORY ACTIVITY

INTERNATIONAL NEWS

LEGAL NEWS

BNA INSIGHTS

CALENDAR

TABLE OF CASES

Documents Available

Copies of documents referenced in this issue are available for a fee from BNA PLUS. To order, call 800-372-1033; fax (703) 341-1643; or e-mail bnaplus@bna.com.

FCR ISSN 0014-9063

News

Defense Budget

Total Force Management, Contingency Contracting Addressed in Authorization Bill

A version of the fiscal year 2012 defense authorization bill released May 9 by the chairman of the House Armed Services Committee contains a number of provisions on total force management, including ones addressing the Defense Department's ability to conduct public-private competitions.

Section 937 would lift the temporary suspension on DOD's initiation of public-private competitions, which was included in the FY 2010 defense authorization act and was to remain in effect until the defense secretary provided a report to Congress on the conduct of such competitions and certified compliance with certain statutory requirements.

The FY 2012 bill, released by Rep. Howard P. ''Buck'' McKeon (R-Calif.), would eliminate the compliance certification and lift the suspension 30 days after Congress receives the report. The committee, in the bill summary, said it ''is taking this action to ensure that the report is delivered promptly so that the Department can reinstate the public-private competition process once the reporting requirements are complied with.''

The House Armed Services Committee is scheduled to mark up McKeon's bill (H.R. 1540) on May 11.

''The 2012 defense bill reflects the fact that members of the Armed Services Committee, the broader Congress—and the nation—must make tough choices in order to provide for America's common defense,'' McKeon said in a statement May 9. ''We must examine every aspect of the defense enterprise—not as a target for arbitrary funding reductions as the current administration has proposed—but to find ways that we can accomplish the mission of providing for the common defense more effectively.''

Additional Total Force Management Provisions. A separate section would require a cost analysis and a savings differential before converting certain commercial functions to performance by DOD civilian employees.

The requirement, which would apply only to the conversion of functions that are not inherently governmental, is to be accompanied by notification procedures to inform a contractor of the intent to insource a contract on which it is working. ''Iintent of the notification is to provide fair notice to affected contractors but not to delay or stop an insourcing initiative,'' the bill summary says.

Other sections in the area of total force management would:

- require that the assessment of the appropriate mix of military, civilian, and contractor personnel is aligned with the total force management plan developed in accordance with section 129a, title 10, United States Code;
- move to align the processes for the acquisition of services with the manpower requirements determination process required by section 129a;
- include in the annual defense manpower requirements report an estimate for contractor requirements for support services, as outlined in each military department's service contract inventory, to help improve ''awareness of the Department of Defense requirements being performed by contractors''; and
- codify the requirement that the undersecretary of defense for acquisition, technology, and logistics obtain a written statement from each requiring official regarding decisions to contract for support.

Contingency Operations. In addition, the bill would prohibit DOD from awarding contracts in support of contingency operations in Iraq and Afghanistan to hostile foreign entities.

If DOD determines a contract or subcontract was awarded to such an ''adverse entity,'' the department may void the contract or require the prime contractor to void the subcontract.

The bill defines an adverse entity as ''any foreign entity or foreign individual'' that DOD determines ''is directly engaged in hostilities or is substantially supporting forces that are engaged in hostilities against the United States or its coalition partners in a contingency operation in Iraq or Afghanistan.''

DOD would be required to issue guidance to require that each contingency contract include a clause regarding the prohibition.

In February, Sen. Scott P. Brown (R-Mass.) introduced a bill to require the government to prohibit contracting and subcontracting with enemies of the United States. The bill (S. 341) was introduced in response to recent government reports that found contractors in Afghanistan are paying warlords, including the Taliban, for protection (95 FCR 205, 2/22/11).

In addition to the adverse entity provision, the authorization bill includes other policies regarding contingency contracting in Iraq and Afghanistan.

One section would allow DOD to examine the records of foreign contractors in contingency operations. Foreign governments and their agencies would be exempt, as would be contractors that are precluded by law from making such disclosures.

Another provision would set the simplified acquisition threshold at $1 million and the micro-purchase threshold at $25,000 for defense procurements in support of contingency operations.

H.R. 1540 is available at: http://tinyurl.com/3p3up9r.

Tax Administration

IRS Delays to 2013 Tax Withholding On Government Contractor Payments

The Internal Revenue Service issued final regulations (T.D. 9524) May 5 that would delay the implementation of a new 3 percent withholding requirement on payments from government entities to contractors until Jan. 1, 2013, and exempt any payments of less than $10,000.

The withholding requirement, created by the Tax Increase Prevention and Reconciliation Act of 2005 (Pub. L. No. 109-222), mandates withholding by any federal, state, or local entity, and was previously set to go into effect in 2012.

Under the law, the requirement was originally planned to take effect in 2011, but IRS also delayed that date by a year as it continued to seek public comment on its proposed rules.

IRS said the $10,000 withholding threshold only applies to individuals' payments, not smaller payments that may exceed $10,000 over the course of a year.

However, if a contractor issues a series of bills to a government entity that are each less than $10,000, but the agency pays the contractor in a single lump-sum payment that exceeds that level, the agency would be required to withhold 3 percent of the payment for taxes. The withholding requirement applies to payments for both goods and services.

Exemptions. In the final regulations, IRS said there are a series of exemptions made under the law, including:

- payments otherwise subject to withholding, such as wages;
- payments for retirement benefits, unemployment compensation, or social security;
- payments subject to backup withholding, if the required backup withholding is actually performed;
- payments for real property;
- payment of interest;
- payments to other government entities, foreign governments, tax-exempt organizations, or Indian tribes;
- payments made under confidential or classified contracts, as described in tax code Section 6050M(e)(3);
- payments made by a political subdivision of a state, or instrumentalities of a political subdivision of a state that make annual payments for property of services of less than $100 million;
- public assistance payments made on the basis of need or income;
- payments to employees in connection with service, such as retirement plan contributions, fringe benefits, and expense reimbursements under an accountable plan;
- payments received by nonresident aliens and foreign corporations;
- payments made by Indian tribal governments; and
- payments in emergency or disaster situations.

Government assistance programs based solely on age, such as Medicare, are still subject to the requirements, as are government payments to utilities, despite objections from the industry.

IRS said government payments made by payment card are excepted, pending future guidance.

The final rules are effective May 9, the date they are set to appear in the *Federal Register*. Comments or requests for a public hearing on the proposed rules should be submitted by Aug. 8.

Lawmakers Want Withholding Repealed. The withholding requirement was originally drafted as a way for the federal government to help close a roughly $300 billion per year ''tax gap'' by reducing the number of opportunities that contractors may have to leave income unreported, but several lawmakers believe the requirement needs to be repealed because it puts an additional burden on small businesses.

''The primary goal of this Congress should be removing barriers for job creation by restoring fiscal discipline, lowering taxes, and removing burdensome regulations; getting rid of this unnecessary withholding requirement is in line with those objectives,'' House Small Business Committee Chairman Sam Graves said. ''While the decision to delay this burdensome tax is welcome news, a full repeal of this requirement is needed to help small businesses who contract with the government succeed.''

In March, House Ways and Means Chairman Dave Camp (R-Mich.) announced an intention to pursue a repeal, saying it could be part of a larger bill that could come to the floor later in the year.

Rep. Wally Herger (R-Calif.), chairman of the Ways and Means Health subcommittee, introduced repeal legislation (H.R. 674) Feb. 11; House Small Business Committee ranking member Nydia Velasquez (D-N.Y.) has previously said even a modest 3 percent withholding can have a significant impact on small businesses.

Many industries—including the Federation for American Hospitals—have also been arguing for repeal for years.

PSC Welcomes Decision. The Professional Services Council May 9 welcomed the IRS's move to delay implementation of the ''ill-conceived'' withholding requirement. However, the group also echoed lawmakers' calls for a full repeal.

''The withholding requirement would significantly reduce companies' cash flow at a time when the current economic environment is already squeezing their ability to meet operating expenses,'' PSC Vice President of Government Relations Roger Jordan said in a statement. ''While it's appropriate to focus on how to ensure that any tax liabilities government contractors and other organizations owe are properly collected, other regulations have been implemented in recent years that effectively ensure contractors are meeting their tax obligations.''

BY BRETT FERGUSON

Campaign Finance

Reformers Press for Obama Executive Order On Contractor Contributions as GOP Fights It

Campaign reform groups are expressing strong support for a draft executive order from President Obama that would require government contractors to disclose political contributions, but reformers

  FCR ISSN 0014-9063

admit that they do not know when the Obama order might be finalized.

The calls supporting the order came amid continuing opposition from business groups and congressional Republicans. Efforts to fault or block the draft Obama order included a plan by House Republicans on the Oversight and Government Reform Committee, led by Rep. Darrell Issa (R-Calif.), to hold a congressional hearing May 12, which is likely to highlight objections to the order.

Meanwhile, a group of nearly three dozen reform, liberal, and labor groups signed a May 4 letter to Obama backing the proposed order and declaring that it ''attacks the perception and reality of . . . 'pay-to-play' arrangements by shining a light on political spending by contractors.''

The new order is significant because it would require additional reporting of contributions beyond the campaign contributions already reported to the Federal Election Commission. The order would require contractors to report all money given to ''third-party entities'' intended or expected to be used for campaign-related spending—including some contributions now undisclosed.

Some of these entities, including the U.S. Chamber of Commerce and others, have spent millions on political advertising in recent congressional campaigns but have fought to keep their donors secret.

Public Citizen Among Advocates. Signers of the reformers' letter to Obama included the Campaign Legal Center, Common Cause, Democracy 21, and Public Citizen. Among other signers were the Service Employees International Union and numerous state organizations. Public Citizen and Common Cause also reported that they have been circulating online petitions signed by tens of thousands of citizens who support the executive order's goal of greater disclosure of campaign money.

Despite this support, reformers acknowledged that the status of the Obama order remained unclear almost three weeks after it was first circulated among interested groups and two weeks after it was made public through a leak to a conservative blog.

Public Citizen lobbyist Craig Holman told BNA that he believes Obama ''is strongly leaning toward signing the draft order,'' but Holman also said reformers have been given ''no assurances'' about when the order may be finalized.

Business, Republican Opposition. GOP opposition to the Obama draft order was highlighted by plans for a hearing by Issa's committee and by a letter to Obama in late April signed by a group of 27 Republican senators. The letter urged Obama to reconsider the draft order.

The GOP lawmakers, including Senate Minority Leader Mitch McConnell (R-Ky.), Sen. Susan Collins (R-Maine), and others, said the order would have a chilling effect on political contributions, would make the contributions a factor in awarding contracts, and would circumvent the legislative process. ''To ensure that taxpayers receive the best value for federal contracts, government procurements must be conducted in a manner that ensures a fair process,'' the letter said.

The draft order would increase current campaign finance disclosure requirements by requiring companies doing business with the federal government to disclose their political contributions and spending as part of the contracting process. Although ''hard money'' contributions and spending are already disclosed to the FEC, the order would require that entities seeking contracts compile and disclose to contracting agencies all information on campaign contributions by their political action committees and executives.

Most significantly, the draft order would add new requirements for government contractors to disclose other political money not revealed under current rules. A provision of the order would require disclosure of contributions ''made to third-party entities with the intention or reasonable expectation'' that the money would be used to fund independent campaign expenditures or electioneering communications. Tens of millions of dollars in such contributions to entities that do not disclose their donors were used to fund political advertising in the 2010 congressional elections and other, previous campaigns.

Follow-On to DISCLOSE Act. Such spending increased in the last campaign and was widely seen as favoring Republicans, with the Chamber topping the list of reported spending and additional spending coming from relatively new GOP-leaning groups, such as Crossroads GPS, American Future Fund, and others. Democrats have said in recent months that they now intend to establish new Democratic-leaning groups to collect unlimited contributions for spending in the 2012 campaign, including possibly some undisclosed contributions.

The draft executive order would implement some of the principles of disclosure of political spending that were advanced by an ultimately unsuccessful legislative drive in the last Congress. The push for legislation—known as the DISCLOSE Act—came in response to the Supreme Court's 2010 ruling in *Citizens United v. FEC*, which opened new channels for political spending by corporations and unions.

Critics of the executive order have portrayed it as an effort to circumvent the legislative process after the DISCLOSE Act was not passed. However, supporters of the effort noted that the measure was adopted in the House but failed in the Senate after it could not overcome a Republican filibuster. During the final Senate debate on the measure last September, the vote on a motion to cut off debate was 59 in favor and 39 opposed. Supporters fell one vote short of the 60 needed to proceed, with all Republican senators voting in opposition to the motion.

BY KENNETH P. DOYLE

DOD

DOD Adopts Final Rule to Guard Against Unauthorized Personal Services Contracts

The Defense Department is adopting a final rule that aims to mitigate risks related to personal services, according to a *Federal Register* notice published May 5.

The final rule requires statements of work to distinguish between personal services contractors and government employees, and it includes procedures to prevent contracts from being awarded as unauthorized personal services contracts.

Based on public comments, DOD made changes between the final rule and an interim rule that went into

effect Sept. 8, 2010 (75 Fed. Reg. 54,524; 94 FCR 218, 9/14/10). DOD considered comments from five respondents.

For example, the final rule was changed to say agencies must be guided by the characteristics and descriptive elements of personal services contracts at Federal Acquisition Regulation (FAR) 37.104. One respondent said the interim rule provided ''no actual guidance to the agencies as to what the distinction between government employees and contractor employees is or how an agency is to make such a determination,'' the *Federal Register* notice said.

In addition, a respondent said the interim rule did not have ''procedures, guidance, or information focusing on postaward contract administration to prevent actual administration of a contract as an unauthorized personal services contract.'' DOD added a sentence that says: ''In addition, contracting officers and program managers should remain aware of the descriptive elements at FAR 37.104(d) to ensure that a service contract does not inadvertently become administered as a personal-services contract.''

The final rule amends the Defense Federal Acquisition Regulation Supplement and implements section 831 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. No. 110-417).

The final rule (76 Fed. Reg. 25,565), which is effective immediately, is available at: http://tinyurl.com/3bhq3jb.

Small Business

Objections to Proposed Size Standard Change Raised at House Small Business Hearing

Proposed changes in the size standards used to determine whether scientific, technical, and professional firms are small businesses for purposes of federal contracting preferences drew complaints from witnesses at a House hearing May 5.

The hearing by the House Small Business Subcommittee on Economic Growth, Capital Access and Tax focused on a Small Business Administration proposed rule that revises the size standard for 36 industries in the scientific, technical, and professional categories, and establishes common size standards for industries with shared characteristics. The proposed rule, published March 16, is part of SBA's ongoing review of size standards.

During the hearing, representatives of the American Institute of Architects and the American Council of Engineering Companies objected that the proposed increase in the size threshold for architect/engineering (A/E) services to $19 million would designate a disproportionate share of firms in those industries as small. AIA, for instance, estimates that more than 97 percent of architecture firms would fall under the $19 million threshold, compared to 91 percent qualifying as small businesses under the current $4.5 million standard, and warned that such growth would adversely affect small businesses offering A/E services.

In contrast, the American Institute of Certified Public Accountants suggested that the proposed increase in the threshold for accounting services from $8.5 million to $19 million is not large enough to allow small qualified accounting firms to compete against the large firms in the industry. The impact of increasing the threshold to $22.5 million instead would be minimal, according to the group, given industry data showing less than 30 accounting firms falling within $19 million and $22.5 million.

Witnesses asked, and Subcommittee Chairman Joe Walsh (R-Ill.) agreed, that SBA should extend the May 16 deadline for comments on the proposed rule for an additional 60 days.

Walsh issued a statement after the hearing saying the small business community needs more time to respond to the proposed rule. SBA, similarly, ''has more work to do on this proposed rule,'' he said. ''I will be watching this process closely to ensure that the review is not rushed and that any revisions made are in the best interest of American small businesses.''

Separate Standards for Procurement. Roger Jordan, vice president of government relations for the Professional Services Council, told the subcommittee his group recommends that SBA consider creating a completely separate set of size standards to be used for federal procurement. ''The adverse impact on small businesses of a single size standard that covers federal procurement and all other SBA programs is documented in SBA's own methodology,'' he said.

Moreover, the agency ''acknowledges that the disparity between small business federal market share and industry-wide share may be attributed to a variety of reasons, such as extensive administrative and compliance requirements associated with federal procurement, the different skill sets required by federal contracts compared to typical commercial contracting work, and the size of specific contracting requirements of federal customers,'' Jordan added.

SBA, at the least, should give more weight to the impact on federal contracting when determining the proposed standards, according to Jordan. The other four factors SBA evaluates are average firm size, startup costs and entry barriers, industry competition, and distribution of firms by size.

In addition, ''SBA should broaden its evaluation of the federal contracting market to examine if typical contract requirements under a specific category tend to gravitate towards larger contracts,'' Jordan suggested. ''If so, SBA might determine that a higher size standard is warranted. If typical requirements under a specific category seem better suited to small contract awards, then perhaps a small size standard would be more appropriate.''

Changes in Architect/Engineering Standard. While there is a clear consensus among members of the American Institute of Architects that the rule's proposed increase in the size threshold for architecture firms—from $4.5 million to $19 million—is too high, the group is continuing to survey its members in order to recommend alternative changes, Walter Hainsfurther, president of a seven-person architectural firm in Des Plaines, Ill., said.

''The proposed standard is being increased 32 percent, which would encompass not just a majority, but a supermajority of architectural firms,'' he said. ''In short, SBA is asking that firms that have five employees to compete against those that have 50 employees.''

AIA also opposes SBA's proposed grouping of several related fields on grounds that it will ''greatly harm'' the architecture industry, Hainsfurther said.

  FCR ISSN 0014-9063

The proposed combining of architecture, engineering, interior design, landscape architecture, and mapping into the same $19 million limit is based by SBA on ''the consolidation of these employers into multidisciplinary firms,'' he said. However, AIA ''strongly challenges'' the agency's assumption that many architects practice with engineers or individuals who provide other related services.

''Architects are the prototypical small business owners and many do their jobs with few, if any, employees,'' Hainsfurther said. ''Architects create designs with a minimum of equipment, and their largest expense is their employees. Lumping our firms together with those from other professions like engineering will place us at a competitive disadvantage in the marketplace.''

Revised Size Standard for Accounting Firms. Testifying on behalf of the American Institute of Certified Public Accountants, Odysseus Lanier, a partner at McConnell Jones Lanier & Murphy LLP in Houston, called for increasing the proposed threshold from $19 million to $25.5 million for the accounting industry ''to compensate for several other secondary factors that inhibit the ability of accounting rims classified as small to compete for larger contracts in the federal marketplace.''

These factors include:

- changes in federal acquisition policy reducing the number of vendors and increasing the size of federal procurements; and
- use of Sources Sought/Request For Information (RFI) notices by federal agencies to conduct market research as part of an acquisition planning strategy to determine the availability, capabilities, and capacity of qualified small business sources before issuing an RFP.

''Reducing the number of vendors and simultaneously increasing the size of procurements, commonly referred to as contract bundling, requires small businesses to effectively make substantial investments in their business development infrastructure to compete with the larger firms in the industry,'' Lanier said.

The use of Sources Sought/RFI notices provides ''prima facie evidence supporting an increase in the small business size standard to the $25.5 million limit because federal procurement specialists often conduct market research to determine if a potential acquisition should be restricted to small businesses or be available to large businesses in 'full and open competition.' ''

A higher $25.5 million limit is necessary to promote growth of small business accounting firms and ''avoid an arbitrary cutoff in the middle of the market segment where a small business accounting firm would quickly grow beyond a lower defined small business size standard and as a result, be forced to compete (most likely unsuccessfully) with the largest of firms,'' Lanier said. These small business firms are ''essentially caught in the middle and likely unable to obtain any'' federal contracts.

''It is unconscionable to think that firms like ours and others, that have made the appropriate investments to grow their businesses, are required to compete with the titans of our profession for federal contracts rather than our peer accounting and consulting firms because we exceeded an anachronistic small business size standard for our profession.... I strongly believe that it is time to consider leveling the playing field and allowing small accounting firms to provide our value-added services in an expanded federal marketplace by increasing the small business size standard.''

BY DEBORAH BILLINGS

Material from the subcommittee hearing is available at: http://smbiz.house.gov/Calendar/EventSingle.aspx?EventID=238695.

DOD

GE and Rolls Royce Offer to Self-Fund Alternate Engine Development in FY 2012

General Electric Co. and Rolls Royce announced May 5 they have offered to bear the costs of continuing development of an alternate engine for the F-35 Joint Strike Fighter (JSF) through fiscal year 2012.

The Defense Department on April 25 terminated the contract for the F-136 alternate engine, in part because of the program's cost (95 FCR 436, 4/26/11).

GE and Rolls Royce said they would not need appropriated funds under their proposal, but they would need DOD to provide access to engines, components, and testing facilities.

Rep. Howard P. ''Buck'' McKeon (R-Calif.), the chairman of the House Armed Services Committee, said May 5 he supported the companies' offer, and he encouraged DOD and other lawmakers to support it also.

''That sort of acquisition reform from the defense industry should be rewarded and applauded at every opportunity, and I thank GE and Rolls Royce for coming to us with a smart, viable solution to a tough problem,'' McKeon said in remarks released by his office.

GE and Rolls Royce said the F-136 is 80 percent complete, and their proposal would preserve the $3 billion the government already has invested in the development of the alternate engine.

''Real acquisition reform requires a contractor commitment to invest, compete, and be measured on the merits of your performance,'' David Joyce, GE Aviation chief executive officer, said in a statement. ''Our proposal accomplishes these important objectives.''

Administration officials have opposed the second engine, and they have recommended President Obama veto legislation that funds the program (93 FCR 203, 6/22/10). Defense Secretary Robert Gates has said it would cost $2.9 billion to develop the alternate engine to the point where it could be competitive.

The JSF primary engine, the F-135, is developed by Pratt & Whitney.

Veterans

VA Balks at Severity of Penalties in Bill To Protect Veteran Contract Set-Asides

The Veterans Affairs Department May 3 balked at the severity of penalties called for in a House bill (H.R. 1657) aimed at cracking down on firms that misrepresent themselves as small, veteran-owned concerns in order to take advantage of contracting preferences.

At issue is the bill's imposition of a mandatory, minimum five-year debarment from VA contracting for any

business determined to have misrepresented its status as a veteran-owned or service-disabled veteran-owned small business (VOSB/SDVOSB). The bill also would require VA to commence a debarment action within 30 days of determining the misrepresentation has occurred and to complete the action within 90 days.

H.R. 1657 is designed to debar companies that have ''fraudulently claimed to be a service disabled veteran owned small businesses from doing business with VA,'' said the bill's sponsor, Rep. Marlin Stutzman (R-Ind.), during a hearing of the House Veterans' Affairs Economic Opportunity Subcommittee, which he chairs.

''For too long, legitimate SDVOSB's have lost contracts to these fraudulent companies, and I hope that the prospect of debarment for five years will be the deterrent we need to stop this despicable practice.''

The bill, which would revise section 8127(g) of Title 38 of the United States Code, was favorably reported by the subcommittee May 5 and is scheduled to be taken up by the full committee May 12.

Due Process Concerns. VA agrees with the intent of H.R. 1657, but does not support it due to questions about the bill's five-year mandatory debarment penalty, Keith M. Wilson , director of education service for VA's Veterans Benefits Administration, told the subcommittee. He specifically questioned whether the penalty ''would be consistent with the general requirement in debarment actions established by the courts to provide appropriate due process, notice, and an opportunity to be heard to businesses prior to a final determination of debarment.''

Wilson also pointed out that there are ''varying degrees of misrepresentation'' of VOSB/SDVOSB status. ''Some may be the result of an 'innocent' mistake, whereas others evince a clear desire to circumvent the VOSB/SDVOSB status requirements by 'seducer' companies or individuals to steer set-aside dollars to non-status firms or persons,'' he said.

Debarring officials need to retain the discretion to make these determinations with respect to any debarment, including its duration, so that they can fashion remedial measures and corrective actions to specific circumstances to prevent the misconduct from recurring, Wilson said. He asked that VA be allowed to work with the subcommittee to come up with ways to protect the contracting program and improve its debarment authority while '' maintaining an equitable debarment process consistent with the requirement for an appropriate level of due process.''

Wilson told the subcommittee that VA shares its focus ''on aggressively protecting the government from disreputable businesses in order that procurement dollars set aside for VOSB/SDVOSBs reach the intended recipients.'' To protect the set-aside process, Wilson said, VA has:

- added misrepresentation of VOSB/SDVOSB status to its acquisition regulations as a specific cause of debarment for a period of up to five years; and
- instituted a separate and distinct debarment committee to review, examine, and refer those who misrepresent themselves to VA's debarring official.

OFCCP

Research Group Says OFCCP Settlements In 2009, 2010 Include More Pay Bias Cases

The vast majority of settlements reached by the Labor Department's Office of Federal Contract Compliance Programs with federal contractors in fiscal years 2009 and 2010 involved alleged race or sex discrimination in hiring for entry-level jobs, but a rising number of settlements also involved allegations of compensation discrimination, a senior consultant of the Center for Corporate Equality (CCE), a Washington, D.C., research organization, said May 4.

Speaking during a CCE webinar, Eric Dunleavy said the organization submitted Freedom of Information Act requests to OFCCP for all voluntary conciliation agreements and formal consent decrees the agency executed with federal contractors that involved systemic discrimination allegations and included monetary remedies in fiscal years 2009 and 2010.

In response to its requests, he said, CCE received information on 69 settlements for fiscal 2009 and 68 settlements for fiscal 2010. Analyses of this data revealed that the settlements most frequently involved federal contractors in the food services, manufacturing, and services sectors. Those results continue trends CCE identified in reports issued last year and in 2009, which analyzed OFCCP settlements in fiscal years 2008 and 2007, respectively.

Dunleavy said it is important to note that fiscal 2009 was ''essentially a year of transition'' at OFCCP between the Bush administration and the Obama administration. Indeed, former OFCCP Director Charles James left the agency in January 2009, and current OFCCP Director Patricia Shiu assumed her position in October 2009. He added that CCE's analysis of fiscal 2010 settlement data is ''hot off the presses,'' given that the organization received the data about two months ago and has conducted preliminary analyses on that information.

CCE's analysis of the settlement data is not intended to criticize OFCCP ''in any way, shape, or form,'' Dunleavy said, but is rather a ''fact-finding mission.'' As such, he noted that CCE is unable to answer the ''why's'' behind the data.

CCE Executive Director Harold Busch, a former career OFCCP official, told BNA May 4 that CCE is still in the process of analyzing all of the settlement data and considering whether to release its analyses in a formal report.

OFCCP Continues Systemic Hiring Focus. Several trends emerged from analyzing the fiscal 2009 and 2010 data, Dunleavy said, including OFCCP's continued focus on systemic discrimination in hiring as opposed to in promotions and terminations, and the agency's use of aggregated data in statistical analyses seeking to identify indicators of adverse impact.

In fiscal 2009, he said, 94 percent of the 69 settlements (65 voluntary conciliation agreements and four consent decrees) involved OFCCP allegations of systemic discrimination in hiring. This follows trends from settlements in fiscal years 2007 and 2008, where more than 90 percent of OFCCP settlements involved systemic hiring bias allegations.

  FCR ISSN 0014-9063

''This is a finding we see year after year,'' Dunleavy said, noting that ''most'' of the hiring settlements involved pattern and practice allegations of intentional discrimination based on race or sex. ''This is the most common type of OFCCP settlement.''

However, Dunleavy said, the percentage of settlements involving systemic hiring discrimination dropped to 84 percent for the 68 settlements (65 voluntary conciliation agreements and three consent decrees) in fiscal 2010.

OFCCP settled no cases involving discrimination in promotions or terminations in fiscal 2009, and settled one promotion/termination case in 2010, he said. The agency also did not reach any settlements related to functional affirmative action plans or corporate management compliance evaluations in either fiscal year, he said.

Also in fiscal 2009, OFCCP settled one case involving allegations of discrimination in employee placement, which Dunleavy said involved a scenario in which males allegedly were placed into more ''attractive and potentially higher paying jobs'' than females. The agency settled a ''couple'' of such cases in fiscal 2010, he added. OFCCP also settled in fiscal 2009 a case involving a disability access issue that CCE had not previously seen in settlements for fiscal years 2007 and 2008.

More Settlements Involve Compensation. In its previous two reports on OFCCP settlement data, CCE found no settlements involving pay bias in fiscal 2008, and approximately three settlements involving compensation discrimination in fiscal 2007.

Two settlements in fiscal 2009 involved compensation discrimination allegations, while 10 settlements in fiscal 2010 involved pay bias claims, Dunleavy said. OFCCP Director Shiu has said in the past that compensation discrimination would be a key priority of OFCCP moving forward.

''So maybe we have reached the point where all of these initiatives relating to pay equity and gender disparity are starting to pay off,'' Dunleavy said. ''This may be the tip of the iceberg.''

In fiscal 2009, OFCCP used a two-standard deviation test in ''over 90 percent of settlements'' to identify statistically significant adverse impact, he said. In fiscal 2010, the test was used in ''100 percent'' of settlements. Dunleavy noted OFCCP rarely used the ''four-fifths rule'' contained in the Uniform Guidelines on Employee Selection Procedures.

Approximately 41 settlements in fiscal 2009 involved females, while 17 involved groups of ''total minorities,'' which include more than one race/ethnic group. Four settlements in fiscal 2009 were for ''non-Hispanic'' groups, while one was for ''non-Pacific Islanders.''

In fiscal 2010, 37 settlements involved females, while 24 involved groups of ''total minorities.'' For the first time, nonminorities, or whites, ''made up their own class'' in three settlements in fiscal 2010, Dunleavy said. One settlement in fiscal 2010 involved a class of veterans, he added.

By job position, 30 settlements in fiscal 2009 involved laborer positions, 14 involved operative positions, such as machinists, and 11 involved service positions, such as in maintenance or housekeeping, Dunleavy said. Approximately four settlements involved professional positions, which is ''fairly uncommon,'' he said. In fiscal 2010, laborer, operative, and service positions again were involved in the ''vast majority'' of OFCCP settlements, he added.

Analyzing fiscal 2009 settlement data by industry, Dunleavy said, CCE found that most of the settlements involved the food services industry (19), followed by manufacturing (15) and shipping (13). He said OFCCP also reached settlements in fiscal 2009 in two new industries: banking (3) and health care (3). For fiscal 2010, settlements in the food services (24) and manufacturing (18) industries continued to be prevalent.

For many of the adverse impact analyses, he said, OFCCP aggregated data in various ways in fiscal 2009 and 2010, including by job, location, protected group, and time. Data aggregation issues are important, he said, given OFCCP's increasing use of the two-standard deviation test to identify adverse impact. The larger the sample size, the more likely even small differences in selection data can result in statistically significant adverse impact, he said.

Dunleavy noted that it typically takes an average of three years from the time OFCCP begins an audit to the formal signing of a voluntary conciliation agreement or consent order. Since many of the settlements from fiscal years 2009 and 2010 ''were initiated a long time ago,'' he said, analyses of that data do not necessarily provide an ''accurate depiction of present-day OFCCP enforcement policy.''

BY JAY-ANNE B. CASUGA

Medicare

OIG: Contractors Failed to Recover $3.4 Million in DME Overpayments

Medicare contractors responsible for processing and paying claims submitted by durable medical equipment (DME) suppliers failed to recover $3.4 million in overpayments for calendar years 2007 and 2008, according to a report from the Department of Health and Human Services Office of Inspector General.

The report, *Review of Medicare Home Health Consolidated Billing for Calendar Years 2007 and 2008* (A-01-10-00505), examined a sample of 107 nonroutine supply items used in home health care, such as surgical dressings and catheters, for which DME Medicare administrative contractors (MACs) made payments to DME suppliers. Because nonroutine supply items are included in Medicare payments to home health agencies, any DME MAC payment to a DME supplier for nonroutine items used during home health care is therefore considered an overpayment.

DME MACs recovered overpayments for 49 of the nonroutine supply items, but failed to recover overpayments for 54 items, worth a total of $24,000, even though the Centers for Medicare & Medicaid Services Common Working File (CWF) consistently generated a post-payment edit that identified the supplier claims as being overpayments.

The remaining four items were not associated with a home health service.

Based on the sample, OIG estimated an overall $3.4 million in overpayments was not recovered.

During 2007 and 2008, DME MACs paid $7.6 million to DME suppliers for 83,865 nonroutine items used during home health services, the report said.

The report provided an example of a failed overpayment recovery, mentioning a DME MAC that paid a supplier $55 for ostomy supplies. Because the ostomy supplies were part of a home health service, they were paid for under the home health agency's claim, and the DME MAC received post-payment notice from the CWF that the payment was an overpayment. The DME MAC, however, never recovered the $55 payment.

Recommendations. The OIG recommended that CMS:

- recover the $24,000 in overpayments identified in the report's sample;
- attempt to recover the remaining estimated overpayments; and
- create procedures to ensure the prompt collection of future overpayments for nonroutine supply items.

CMS agreed with the OIG's recommendations, and said that it intended to recover the $24,000 in identified overpayments. CMS also said that it would take steps to identify additional unrecovered payments, as well as to educate contractors on their responsibilities regarding overpayments.

The OIG report is at: http://oig.hhs.gov/oas/reports/region1/11000505.pdf.

Industrial Base

DOD Official: International Commercial Firms In Industrial Base Have Benefits, Risks

The Defense Department's industrial base in recent decades has been shifting to include more commercial firms, which ''is typically in the best interest of the warfighter and the taxpayer,'' a Pentagon official told a congressional panel May 3.

However, the shift also has risks, according to Frank Kendall, the principal deputy to the under secretary of defense for acquisition, technology, and logistics.

''During the Cold War our industrial base consisted primarily of U.S.-owned and -operated private firms building defense-unique products almost exclusively for the department,'' Kendall said. ''This is clearly no longer the case. We now find ourselves buying products from international commercial and mixed defense and non-defense companies that service many customers—both within and outside of defense markets.''

By making purchases through commercial firms, DOD has access to more innovative products at a lower cost, particularly regarding information technology products, he told the Senate Armed Services Subcommittee on Emerging Threats and Capabilities. The firms also are competitive and allow DOD to purchase technology quickly.

And because commercial firms are global, the foreign competition forces domestic firms to stay competitive, he said.

Also, he said, DOD benefits from additional research and development and investments, ''augmenting our own investments that draw on the U.S. government budget.''

The global aspect also ensures American systems work together with allies' systems.

However, Kendall said, ''the benefits of globalization are tempered by potential risks.''

'Trawling Global Supply Chains.' Foreign entities ''are constantly trawling global supply chains, trying to gain access to critical U.S. technologies and information on U.S. defense systems.''

The country also faces risks related to counterfeit parts and components that ''could slip in through the increasingly complex, global supply chain.''

The government is developing reforms to the country's export control procedures that aim to protect the most valuable technologies, Kendall said, ''while also streamlining the process to make it easier for companies to export parts or systems that are not critical defense capabilities. Improving the U.S. defense industry's ability to export is the necessary and expected flip side to our own increased openness to globalization of the defense supply chain: as foreign firms inject competition into the U.S. market, U.S. firms should gain equivalent advantages in overseas markets.''

Supply chain disruptions from natural disasters also are risks.

''[I]f a disruption occurs at a domestic supplier, the department can use Defense Priorities and Allocation authorities under the Defense Production Act to compel U.S. industry to prioritize DOD critical orders,'' he said. ''Those authorities do not extend overseas, so when disruptions occur at foreign suppliers, the department may have a more difficult time adjusting.''

Additional information from the May 3 hearing is available at: http://tinyurl.com/3ne3q6f.

Small Business

SBIR/STTR Reauthorization Blocked In Senate; Still Moving Through House

Legislation reauthorizing the Small Business Innovation Research and Small Business Technical Transfer programs hit a major roadblock in the Senate May 4, but continued to move in the House.

The Senate voted 52-44 in favor of cloture, which was short of the 60 votes needed to cut off debate on S. 493. In filing the cloture motion late May 2, Senate Majority Leader Harry Reid (D-Nev.) acknowledged that the move probably spelled the end for the bill, which would reauthorize the SBIR and STTR programs, currently set to expire May 31, for eight years.

Meanwhile, however, the House bill, Creating Jobs Through Small Business Innovation Act of 2011 (H.R. 1425), reauthorizing the small business contracting programs was reported favorably May 4 by the Science, Space and Technology Committee, which rejected an amendment to extend the programs for five years instead of three. The committee did, however, approve amendments aimed at:

- identifying individuals convicted of fraud-related crimes or found civilly liable for fraud-related violations involving funding received under the SBIR and STTR programs;
- improving the effectiveness of government and public databases in reducing vulnerabilities in the programs, particularly with respect to federal agencies

  FCR ISSN 0014-9063

funding duplicative proposals and business concerns falsifying information in proposals; and

■ distinguishing small business concerns owned and controlled by people with disabilities.

'Last Chance' for Continuity. Following the cloture vote, Sen. Mary Landrieu ((D-La.), sponsor of the bill and chair of the Small Business and Entrepreneurship Committee, said: ''Today was our last chance to reauthorize these important programs and provide some continuity to the small businesses that depend on them.''

The bill reauthorizing ''the federal government's largest research and development programs for small businesses, passed out of our Committee with nearly unanimous support, but wound up hitting a brick wall when it reached the Senate floor,'' Landrieu said. ''Unfortunately, some Senators chose to stonewall in a self-serving effort to get their way on unrelated issues.''

Reid file the cloture motion following a move by Sen. Olympia Snowe (R-Maine), ranking member of the small business panel and an original sponsor of the bill, to introduce an amendment calling for a periodic review of federal regulations.

Under Snowe's amendment, agencies would be required to determine whether each rule ''overlaps, duplicates, or conflicts'' with other federal, state, or local regulations. Agencies that failed to adequately review such rules would face a cut equal to 1 percent of the annual funding they receive for salaries. Snowe's amendment also would allow small businesses to seek judicial review of regulations at the proposal stage.

Reid said on the Senate floor May 3 that Democrats ''have been more than fair'' in accommodating what he termed ''extraneous amendments'' and that he had hoped to resolve the dispute before the Senate returned from its two-week recess May 2. ''But it appears we are unable to do that,'' the majority leader said. ''I had no choice but to file cloture in order to bring this debate to a close—and that's what I did last night,'' he said.

Three Years Behind Schedule. At last count, there were 187 amendments ''that have nothing to do with this bill,'' Landrieu said on the floor May 3. ''We are three years behind schedule–not six months, not eight months, but three years behind schedule. We have been operating this program—a very good program, one of the best—every three months, sometimes one month, sometimes a bit longer, but people have to guess whether we are going to extend it. That is no way to run an airline or a train or a bus or even a two-seated car, for that matter.''

While the ''door may have shut today for reauthorization of programs that have given us companies that are the envy of the world,'' Landrieu vowed that, ''rest assured at some point, we will find a way to get this done.''

Rep. Sam Graves (R-Mo.), chairman of the House Small Business Committee, issued a statement after the Senate vote, saying that while he was ''disappointed that the Senate failed to move closer to passing such an important program for America's small businesses,'' he expects the bill progressing through the House will pass with broad bipartisan support.

''We will continue our dialogue with the Senate and maintain our commitment to reauthorizing the SBIR and STTR programs. These programs allow small businesses to create jobs through research and development and strengthen the economy, all without any additional federal funding. There is no reason to let today's vote and unrelated issues jeopardize the future of these programs and the innovation and jobs they support,'' Graves said.

Sen. Carl Levin (D-Mich.), chairman of the Senate Armed Services Committee, criticized Senate Republicans for blocking consideration of the bill. The SBIR program, he said, is ''a proven job creator'' and ''has been especially important to our national security'' by allowing the Department of Defense to attain ''valuable new technologies.''

Short-Term Extensions. The SBIR and STTR programs have been running under several short-term extensions since 2008 following expiration of reauthorizing legislation enacted eight years earlier. The last one extended the programs from Jan. 31, 2011, through May 31. The House bill would require a congressional reauthorization after three years, compared with the Senate bill's eight years.

As approved by the House science committee, the SBIR/STTR reauthorization bill differs in two other key aspects from the Senate bill:

■ it would allow for venture capital participation of up to 45 percent for the National Institutes of Health, Department of Energy, and National Science Foundation SBIR/STTR programs and up to 35 percent for the other agencies, compared with the Senate bill's limits of 25 percent and 15 percent for the two groups of agencies, respectively; and

■ it would retain the current requirement that agencies spend 2.5 percent of their research and development budgets on SBIR and 0.3 percent on STTR, as opposed to increases in the Senate bill to 3.5 percent of R&D funding set aside for SBIR and 0.6 percent for STTR.

Both versions would increase the Phase I award maximum to $150,000 from $100,000 and the Phase II maximum to $1 million from $750,000; strengthen agency data collection requirements; and increase agency oversight of the programs to protect against waste, fraud, and abuse.

BY DEBORAH BILLINGS

Information on the committee markup of H.R. 1425 is available at: http://science.house.gov/markup/full-committee-markup-0.

Army

Army Overpaid Boeing for High-Dollar Parts, Had Excess Inventory, IG Reports

The Army did not effectively negotiate prices or perform adequate cost or price analyses for 18 high-dollar parts, and the Pentagon ended up paying Boeing Co. $13 million (131.5 percent) more than was fair, the Defense Department Inspector General reported May 3.

Boeing also submitted cost or pricing data for seven parts that was not current, complete, and accurate, according to an unclassified summary of the report.

For example, the Army paid Boeing $1,679 each for ramp gate roller assemblies, when the part cost less than $8 each through the Defense Logistics Agency

(DLA). Similarly, the Army paid $645 for spur gears; the DLA price was $13.

Boeing reportedly provided refunds to DOD for these two parts. In total, the Army received credits and refunds from Boeing worth $1.6 million, the IG said.

The DOD IG reviewed Army Aviation and Missile Life Cycle Management Command purchases from Boeing to support the Corpus Christi Army Depot.

Excess Inventory. In addition to the contract pricing problems, the report raised issues related to excess inventory. The Army had $242.8 million to $277.8 million worth of excess inventory, which could have been used to satisfy the contract requirements, when it bought the same parts from Boeing.

''[I]nadequate policies and procedures addressing inventory use'' are to blame for the problem, the report said.

The DOD IG recommended the department issue policies that address the inventory and pricing issues.

An unclassified results in brief of the DOD IG report (D-2011-061), ''Excess Inventory and Contract Pricing Problems Jeopardize the Army Contract With Boeing to Support the Corpus Christi Army Depot,'' is available at: http://tinyurl.com/44orlwa.

Research and Development

Obama's 2012 Budget Continues Plan To Double Funding at Science Agencies

A White House official told a House subcommittee May 4 that the top priority for President Obama's fiscal year 2012 budget proposal for science and technology is to continue a plan to double funding for three science agencies: the National Science Foundation, the Department of Energy's Office of Science, and the National Institute of Standards and Technology laboratories.

The fiscal year 2012 request is part of a plan to ''double the budget of the DOE, NIST, and NSF, which support research universities,'' John Holdren, director of the White House Office of Science and Technology Policy, said at a hearing of the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies.

The request increases the agencies' combined budgets by 13 percent from 2011 funding levels to a total of $13.9 billion. Under the proposal, NSF would receive $7.8 billion, a 15 percent increase above its 2011 funding, and DOE's Office of Science would receive $5.4 billion, an 11 percent increase over 2011.

Holdren said the request is consistent with Obama's commitment in April 2009 to devote more than 3 percent of U.S. gross domestic product to research and development.

Maintaining U.S. Lead. ''We want to make sure we maintain the U.S. lead,'' Holdren said. He said the budget would help fund what he called ''the strongest national laboratory system in the world,'' followed by the ''strongest research universities in the world.''

The budget request seeks a $66.8 billion investment in civilian research and development and $79.4 billion for federal research and development, according to Holdren.

The aim of the budget request is to ''build jobs, build sustainable industries, and innovate,'' Holdren said.

Holdren also emphasized the need for developing alternative energy sources.

''We need affordable and reliable energy to fuel our economy, but we need to get it in ways that do not imperil our national security or the environment,'' he said. ''We need to be the leaders in new battery technology, we need to be the leaders in fuel cell technology, and we need to be the leaders in smart grid technology.''

Holdren emphasized that the budget increases will be offset by reductions in lower priority areas.

''We are committed to reducing the deficit even as we prime the pump for research and development,'' he said.

Other Budgetary Concerns. In response to Republican lawmakers' concerns that the United States was cooperating with China on joint research projects in spite of human rights abuses, Holdren said the United States only cooperated in areas in which it had a national interest, such as nuclear safety, in order to prevent nuclear reactor accidents; alternative energy, which would reduce China's pressure on the world oil market; and environmental concerns, in order to lower emissions ''that are affecting our environment as well as theirs.''

The three pillars of the budget besides increased funding for the three science agencies are providing more incentives for private sector investment, boosting innovation in the marketplace, and investing in kindergarten to grade 12 education in science, technology, engineering, and math, in part by sending scientists from national laboratories to visit schools, Holdren said.

BY AVERY FELLOW

Industrial Base

CSIS: Top 5 Defense Contractors Lost Slight Market Share Over Past Decade

The Defense Department's five largest contractors lost 2 percent of the defense contract market share from 1999 to 2009, the Center for Strategic and International Studies (CSIS) reported May 6.

The top companies received 27 percent of DOD contract dollars in 2009, compared with 29 percent a decade earlier.

''Interestingly, the data seem to refute that the same defense firms are gaining an ever-larger share of the market,'' the CSIS report said.

The top five firms—Lockheed Martin Corp., Boeing Co., Northrop Grumman Corp., General Dynamics, and Raytheon Co.—received $103 billion, or 27 percent, of DOD's $383 billion contract spending in 2009.

In 1999, the same companies received $45 billion, or 29 percent, of the $156 billion DOD spent, which CSIS calculated in 2010 dollars.

Also, most of the next 15 largest firms were not on the list in 1999, the report said.

''Therefore, the consolidation and vertical integration of the industry are not visible in the contract dollars awarded to top contractors,'' CSIS said.

CSIS said it based its research on data in the Federal Procurement Data System.

   ISSN 0014-9063

Contract Spending Increases. Defense contract spending more than doubled from 2001 ($177 billion) to 2010 ($367.6 billion), the report said.

CSIS found that over the past 11 years, DOD contract spending increased by 8.4 percent annually. Meanwhile, non-contract defense spending increased 5.8 percent per year.

However, CSIS spotted a reversal in the past few years.

''Contract spending relative to DOD outlays reversed sharply beginning in 2008, but largely as a result of other DOD outlays increasing rapidly rather than of the comparatively small but sustained decline in contract spending,'' the report said.

Competition, Funding Mechanism. In addition, there is about a 50-50 split between contracts that are awarded competitively and those awarded without competition, CSIS said.

In 2010, $180 billion worth of DOD contracts received multiple offers. However, there was no competition for about $183 billion worth of contracts, a figure that includes $130 billion in non-competed contracts and $53 billion in contracts that were competed but received just one offer.

CSIS also reported that since 1999, the use of fixed-price contracts is growing at a faster annual rate (10.1 percent) than the growth rate for time-and-materials (9.3 percent) and cost-reimbursement contracts (7.3 percent).

''Trends in competition and funding mechanisms were mostly encouraging,'' CSIS said. ''Overall, the majority of DOD contract dollars were awarded on an increasingly competitive basis towards the end of the period analyzed. . . . The share of contract dollars awarded using fixed-price contracts also grew, at a faster rate than cost-based contract awards.''

The report, ''Defense Contract Trends: U.S. Department of Defense Contract Spending and the Supporting Industrial Base,'' is available at: http://tinyurl.com/3lzbk3e.

LEGISLATIVE ACTION

Bill Number	Sponsor	Description	Action	Previous Cite
H.R. 1474	Duncan	To require the federal government to procure from the private sector goods and services necessary for the operations and management of certain government agencies	Introduced 4/12/11; referred to Oversight and Government Reform	None
H.R. 1540	McKeon	To authorize FY 2012 appropriations for DOD and military construction and to prescribe military personnel strength	Introduced 4/14/11; referred to Armed Services	None
H.R. 1657	Stutzman	To impose a mandatory, minimum five-year debarment from VA contracting on firms that misrepresent themselves as small and veteran-owned in order to take advantage of contracting preferences	Introduced 4/15/11; referred to Veterans' Affairs	Obama administration says it cannot support the bill in its present form because of due process concerns. See story in this issue
H.R. 1684	Sutton	To require the use of American iron, steel, and manufactured goods in the construction, alteration, and repair of public water systems and treatment works	Introduced 5/3/11; referred to Energy and Commerce	None
H.R. 1731	Tsongas	To direct the secretary of defense to submit notifications to Congress regarding failure to comply with statutory body armor procurement budget information requirements	Introduced 5/4/11; referred to Armed Services	None
H.R. 1703	Visclosky	To require certain federal agencies to use iron and steel produced in the U.S. in carrying out projects for the construction, alteration, or repair of a public building or public work, and for other purposes; to the Committee on Transportation and Infrastructure, and in addition to the Committees on Homeland Security, and Armed Services.	Introduced 5/3/11; referred to Transportation and Infrastructure, Homeland Security, and Armed Services	None
H.R. 1766	Boustany	To ensure efficiency and fairness in the awarding of federal contracts in connection with natural disaster reconstruction efforts	Introduced 5/4/11; referred to Oversight and Government Reform	None
H.R. 1778	Maloney	To assure quality and best value with respect to federal construction projects by prohibiting ''bid shopping''	Introduced 5/4/11; referred to Oversight and Government Reform	None

  FCR ISSN 0014-9063

LEGISLATIVE ACTION – Continued

Bill Number	Sponsor	Description	Action	Previous Cite
H.R. 1779	Marino	To reduce the number of civil service positions within the executive branch	Introduced 5/4/11; referred to Oversight and Government Reform	None
H.R. 1782	McCotter	To implement recommendations in GAO's 3/1/11 report, ''Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue''	Introduced 5/4/11; referred to Oversight and Government Reform, Appropriations	None
S. 801	Carper	To require executive agency participation in transparency of federal information technology investment projects and governance and performance reviews of all cost overruns for the projects	Introduced 4/12/11; referred to Homeland Security and Governmental Affairs	None

REGULATORY ACTION

Agency	Action	Description	Comment Due Date/ Effective Date; Federal Register Cite	Previous Cite
DOD	Final rule	To amend the Defense Acquisition Regulation Supplement to implement section 831 of the National Defense Authorization Act for Fiscal Year 2009, which required development of guidance on DOD personal services contracts. DATES: Effective Date: May 5, 2011	Effective 5/5/11 (76 Fed. Reg. 25,565, 5/5/11)	Requires statements of work to distinguish between personal services contractors and government employees. See story in this issue
DOD	Final rule	To amend the DFARS to clarify electronic business procedures for placing orders. This final rule adds a new DFARS clause to clarify this process. DATES: Effective date: May 5, 2011	Effective 5/5/11 (76 Fed. Reg. 25,566, 5/6/11)	None

REGULATORY ACTION — Continued

Agency	Action	Description	Comment Due Date/ Effective Date; Federal Register Cite	Previous Cite
DOD	Final rule	To amend the DFARS to codify DOD policy for addressing the serious human health and environmental risks related to the use of hexavalent chromium and prohibit the delivery of items containing more than 0.1 percent by weight hexavalent chromium in any homogeneous material under DOD contracts unless there is no acceptable alternative to the use of hexavalent chromium	Effective 5/5/11 (76 Fed. Reg. 25,569, 5/5/11)	None
FAA	Notice of public meeting	To announce a May 26 public meeting in Cocoa Beach, Fla., to solicit comments and information from the public on FAA's regulatory approach to commercial orbital human spaceflight	Comments due 6/9/11 (76 Fed. Reg. 24,836, 5/3/11)	None
NASA	Proposed rule; request for comments	To revise the NASA FAR Supplement (NFS) to update internal processing procedures related to suspension and debarment and require contracting officers to notify prospective contractors if they are found to be non-responsible, allowing them the opportunity to take corrective action prior to future solicitations	Comments due 7/5/11 (76 Fed. Reg. 25,566, 5/5/11)	None
NASA	Proposed rule; request for comments	To revise the NFS to delete the Space Shuttle services cross-waiver of liability clause, broaden the existing Expendable Launch Vehicle clause to apply to contracts and subcontracts related to a launch of any kind other than one involving the International Space Station (ISS), and broaden the ISS activities cross-waiver of liability clause to include related Space Shuttle activities	Comments due 7/5/11 (76 Fed. Reg. 25,567, 5/5/11)	None

FCR ISSN 0014-9063

International News

Aerospace Industry

U.S. Files Counter-Appeal Against Ruling By WTO Panel on Subsidies for Boeing

The United States has appealed a World Trade Organization dispute panel ruling that found that U.S. federal, state, and municipal agencies provided illegal subsides to the U.S. aircraft producer Boeing Co..

The appeal, filed with the WTO April 28 and circulated by the organization April 29, challenges all the key findings made by the panel against the illegal subsidies, which the panel concluded led to ''significant'' lost sales and depressed sales prices for Boeing's European rival Airbus.

The appeal was expected, even though U.S. officials claim the panel found in favor of the United States on most of the claims made by the European Union against Boeing in the dispute. The EU filed its own appeal April 1, one day after the panel's ruling was made public.

The EU welcomed the ruling as a big win for Airbus, claiming the panel found that Boeing received illegal subsidies amounting to ''at least'' $5.3 billion, mainly in the form of research and development support and tax breaks. The EU nevertheless said it decided to quickly appeal ''technical elements'' of the ruling for ''legal strategic reasons,'' including reducing a growing time gap in the separate WTO proceedings concerning EU subsidies for Airbus.

The Office of the U.S. Trade Representative countered at the time that it ''prevailed'' in the proceedings and that the programs the panel asked the United States to remove were worth only $2.7 billion, a fraction of the $23.7 billion the EU originally claimed Boeing had received in illegal subsidies.

''Each panel finding of WTO-inconsistent subsidization requires a number of steps,'' a USTR spokeswoman said May 3. ''While the United States has not appealed each and every adverse finding made by the Panel, it has appealed one or more findings (or steps) related to each of the Panel's findings that a U.S. program was inconsistent with WTO rules. If the Appellate Body agrees with our submission, it should reverse the Panel's ultimate conclusion that the United States granted WTO-inconsistent subsidies for the production and development of large civil aircraft.''

11 Findings Challenged. In its notice of appeal, the United States said it was challenging 11 of the panel's findings:

- that payments made by the U.S. National Aeronautics and Space Administration (NASA) to Boeing under contracts for the performance of aeronautics research were a ''financial contribution,'' and thus constituted a subsidy, under WTO rules;
- that access to NASA facilities, equipment, and employees provided to Boeing through research contracts and agreements at issue constituted a provision of goods and services constituting a financial contribution;
- that payments made by NASA to Boeing under contracts for the performance of aeronautics research and facilities, equipment, and employees provided to Boeing through research contracts and agreements at issue conferred a subsidy ''benefit'' to Boeing;
- that payments made by the U.S. Department of Defense under certain agreements were a financial contribution;
- that access to DOD facilities provided to Boeing under certain agreements constituted a provision of goods or services;
- that the panel erroneously concluded, without supporting evidence, that it ''does not consider it credible that less than 1 percent of the $45 billion in aeronautics R&D funding that DOD provided to Boeing over the period 1991-2005 had any potential relevance'' to the large civil aircraft market;
- that reductions by the state of Washington in the rates of business and occupancy tax (B&O tax) applicable to the manufacture or making of sales, at retail or wholesale, of commercial aircraft were a financial contribution;
- that the B&O tax reductions granted to the aerospace industry by the state of Washington constituted a ''specific'' subsidy to Boeing, and were therefore actionable under WTO rules;
- that Boeing was granted a disproportionately large amount of tax abatements available through industrial revenue bonds issued by the city of Wichita, Kansas;
- that the effect of the aeronautics research and development subsidies conferred by NASA and DOD was to threaten displacement or impedance of Airbus exports from third country markets, significant lost sales, and price suppression with respect to the 200-300 seat wide-body large civil aircraft product market (including significant price suppression for the A330, original A350, and Airbus 200-300 seat aircraft in the world market);
- that the effect of the Foreign Sales Corporation/Extraterritorial Income subsidies and the Washington state B&O tax subsidies in the 100-200 seat large civil aircraft product market were (i) to significantly suppress Airbus' prices and to cause Airbus to lose significant sales; and (ii) to displace and impede EU exports from third country markets; and that the effect of the FSC/ETI income subsidies, the Washington state B&O tax subsidies, and the city of Everett, Wash., B&O tax subsidies in the 300-400 seat large civil aircraft product market were (i) to significantly suppress Airbus' prices and to cause Airbus to lose significant sales; and (ii) to displace and impede EU exports from third country markets.

EU Appeal. In its March 31 appeal, the EU asked the WTO's Appellate Body to overturn the panel's finding that the Washington state and Everett B&O tax reduc-

tions and tax credits did not constitute a ''prohibited'' export subsidy under WTO rules, and that B&O and other taxes did not constitute ''actionable'' subsidies, and therefore were not illegal, in regard to the global market for 200-300 seat wide-body passenger jets.

In addition, the EU is asking the Appellate Body to overturn the panel's findings that the transfer of intellectual property rights to Boeing under NASA and DOD R&D contracts were not specific subsidies and therefore not illegal. The EU is also asking the Appellate Body to rule that the United States failed to cooperate in providing requested information to the EU regarding targeted U.S. subsidy programs under so-called ''Annex V'' proceedings prior to the panel's initiation of its review.

The Appellate Body normally has 90 days from the initial appeal to issue its ruling, but is expected to take much longer due to the complexity of the case. The Appellate Body is currently wrapping up work on the separate appeals proceedings in the Airbus case, with a ruling due later in May.

BY DANIEL PRUZIN

  FCR ISSN 0014-9063

Legal News

Proposal Evaluation

GAO Sustains Protest, Finds Awardee Improperly Took Exception to Requirement

The Government Accountability Office, in a decision released April 29, sustained a protest of a Department of Defense contract award in part because the awardee's proposal improperly took exception to the solicitation requirement to propose a fixed price (*Matter of Solers Inc.*, GAO, Nos. B-404032.3, B-404032.4, 4/6/11).

GAO also sustained the protest because the record did not permit a meaningful review of the agency's evaluation of offerors' past performance, and because the record did not show that the agency reasonably evaluated the qualifications of the awardee's proposed personnel.

In July 2010, DOD's Defense Information Systems Agency (DISA) issued a request for quotations for support of the Program Executive Office's Mission Assurance and Network Operations Cross Domain Solutions. Solers Inc. was the incumbent for the prior task order for these requirements.

The competition was limited to offerors that held General Services Administration Federal Supply Schedule contracts. The RFQ anticipated issuance of a fixed-price task order for a one-year base period with four one-year options. Offerors had to submit technical and price proposals that demonstrated their ability to meet the requirements of the performance work statement.

The contracting officer awarded the contract to Booz Allen Hamilton Inc. (BAH), finding that protester Solers' technically superior proposal was not worth its 12 percent higher price. The CO also said BAH's proposal was ''technically sufficient'' and that BAH had ''superior'' past performance. Solers filed a protest.

Exception to Fixed Price Requirement. GAO agreed with Solaris that BAH improperly took exception to the material RFQ requirement to propose a fixed price with supporting information.

According to GAO, BAH stated that it had based its price on government-site and contractor-site rates, and that use of the government-site rates permitted the offeror to offer ''a significant discount or savings'' to the agency. BAH said the lower government-site rates ''are offered when the government provides suitable work facilities and related equipment . . . for a period of no less than ninety (90) continuous work days at a government site.''

BAH also said it was able to offer these rates because its overhead rates were lower when its personnel worked full-time at the government site. In addition, BAH's price proposal was conditioned on its staff performing significantly more work at the government site than was contemplated by the solicitation.

Finally, BAH said if the conditions set forth in its price proposal concerning the availability of space at the government site were not met, the higher contractor-site rates might need to be applied.

GAO found that through these statements, BAH conditioned its offered price on a greater use of government facilities than contemplated or authorized by the solicitation. Because BAH's offered price was conditional rather than firm, GAO said, DISA improperly issued the task order based on a proposal that took exception to the solicitation requirement to propose a fixed price.

Past Performance, Personnel Qualifications. DISA said its evaluation of the offerors' past performance was based on: (1) a questionnaire prepared for and interviews conducted with references; (2) information from the past performance information retrieval system; (3) personal knowledge of the evaluators; and (4) information from the offerors' technical proposals relevant to their past performance.

However, GAO could not determine from the record whether the evaluations under both past performance factors were reasonable.

In particular, GAO said, the record did not meaningfully document information provided by the past performance references; failed to support DISA's statement that the PPIRS data were used to evaluate offerors' past performance; did not discuss or otherwise document the personal knowledge used by evaluators in assessing the offerors' past performance; and did not reflect that the agency considered the relevance of offerors' past work.

Finally, GAO found nothing in the record to indicate how the agency determined that BAH met various personnel requirements in the performance work statement.

Patricia H. Wittie, Karla J. Letsche, and Daniel J. Strouse of Wittie, Letsche & Waldo LLP represented Solers. Rand L. Allen, Nicole J. Owren-Wiest, and Tracye Winfrey Howard of Wiley Rein LLP represented Booz Allen Hamilton. JoAnn W. Melesky of DOD represented the agency.

GAO's decision is available at: http://op.bna.com/fcr.nsf/r?Open=jkiy-8ghqh6.

Proposal Evaluation

Navy Reasonably Rejected Proposal for Not Complying With Limitation on Subcontracting

The Government Accountability Office May 4 determined that the Navy was justified in rejecting a protester's cost proposal for performance of a task order because the proposal took exception to a limitation on subcontracting clause (*Matter of Addx Corporation*, GAO, No. B-404888, 5/4/11).

According to GAO, the proposal indicated that about three-fourths of the awardee's personnel costs would be incurred for subcontractor personnel. However, the limitation on subcontracting clause required at least half of personnel costs to be spent on the firm's own employees.

In November 2010, the Naval Surface Warfare Center issued as a small business set-aside a task order proposal request (TOPR) for information technology, modeling, and simulation services.

The underlying contracts stated that the prime contractor had to perform at least 50 percent of the work. The underlying contracts also incorporated by reference Federal Acquisition Regulation clause 52.219-14 (Limitations on Subcontracting), which provides in part that at least 50 percent of the cost of contract performance incurred for personnel had to be expended for the contractor's employees.

To evaluate cost proposals, the TOPR included a table establishing the ''government's best estimate'' of the number of labor hours for the anticipated labor categories. The estimated hours would be used ''to establish the ceiling of the task order,'' but the government could not guarantee the estimated quantities, and ''the definitive level of effort [would] be determined at the task order kick-off meeting and throughout the life of the task order.''

Addx proposed a team consisting of itself as the prime contractor and several subcontractors. Under the proposal, 22 percent of Addx's personnel costs were to be associated with the firm's own employees, while the remaining 78 percent were allocated to costs for the company's subcontractors.

The Navy found Addx's proposal to be technically unsatisfactory because the contractor failed to adhere to the limitation on subcontracting clause.

Addx protested, arguing that the agency had improperly relied on an unstated evaluation factor. Addx further argued that until the agency issued technical instructions that definitively determined the required level of effort under the task order, it could not conclude that the firm would not comply with the limitation on subcontracting clause.

Proposal Technically Unacceptable. GAO denied the protest, finding that where a proposal facially demonstrates that an offeror objects to the subcontracting limitation clause, the proposal is technically unacceptable.

According to GAO, the limitation on subcontracting is a material solicitation term to which a proposal must conform in order to form the basis of an award.

Even though the agency could not determine at the start of the contract the exact percentage of work to be performed by subcontractors, information about Addx's proposed staffing mix was still relevant, GAO said.

GAO noted that Addx's proposal was based on the ''best estimate'' of the government's labor hour requirements. In addition, the cost proposal said the contractor would perform the estimated requirements mostly using a subcontractor workforce.

Given this information, GAO said the Navy reasonably concluded that Addx was not agreeing to expend at least 50 percent of personnel costs for its own employees in performance of the contract.

William Millward represented Addx. Patrick A. Genzler and Michael L. Sterling of Vandeventer Black LLP represented MYMIC LLC, an intervenor. Mitzi S. Phalen represented the Navy.

Proposal Evaluation

GAO Says Firm Should Have Acknowledged Solicitation Amendment, Denies Protest

The Government Accountability Office April 28 found that a contractor's proposal should have acknowledged a solicitation amendment because the amendment contained material terms affecting the legal relationship of the parties involved (*Matter of MG Mako Inc.*, GAO, No. B-404758, 4/28/11).

In particular, GAO said, the amendment described the contractor's obligation to coordinate with a local utility company to minimize electrical outages during contract performance.

As a result, GAO denied the contractor's protest challenging the rejection of its proposal.

In November 2010, the Army issued a request for proposals for maintenance, repair, construction, and design/build services in support of National Guard activities in Southern California. The proposal was issued as a small business set aside and as a multiple award indefinite-delivery/indefinite-quantity contract contemplating the award of multiple task orders. Among other things, the solicitation involved significant electrical work.

Amendment 2 to the solicitation stated that ''[t]he utility work to be done that is labeled as 'by utility' shall be done during the construction period of this project, and the contractor shall coordinate with the utility to schedule this work to minimize electrical outages.''

MG Mako Inc. submitted a proposal that the agency rejected as non-responsive for failure to acknowledge amendment 2.

MG Mako filed a protest, arguing that amendment 2 was not material because it merely clarified existing contract performance requirements and thus did not affect the legal relationship of the parties. The company also said it meant to acknowledge amendment 2 but inadvertently failed to do so.

Amendment Provision was Material. GAO found that the provision in amendment 2 requiring MG Mako to coordinate with the local utility company recognized that the project would involve some power outages by both parties.

Essentially, GAO said, this provision required the contractor to work with the local utility to minimize those outages by, for example, rescheduling MG Mako's outage work to occur during an outage by the utility or asking the local utility to reschedule an outage.

Although MG Mako pointed to a number of other solicitation provisions that referred to coordination with various entities prior to or during electrical work, none of these provisions required the contractor to coordinate with the utility to minimize electrical outages, GAO said.

Because the amendment added such a requirement, GAO said the amendment affected the legal relationship of the parties and therefore was material. As a result, MG Mako's failure to acknowledge it could not be waived as a minor informality.

GAO therefore denied the protest.

  FCR ISSN 0014-9063

Gabriel Reza of MG Mako Inc. represented the protester. Maj. Christine C. Fontenelle represented the Army.

GAO's decision is available at: http://op.bna.com/fcr.nsf/r?Open=jkiy-8gjjum.

Breach of Contract

COFC Dismisses Breach of Contract Claim, Finds Agreement Not Requirements Contract

The U.S. Court of Federal Claims May 3 threw out a lawsuit alleging that the Bureau of Prisons (BOP) improperly terminated the plaintiff's employment contract to perform dental hygienist services for inmates by failing to utilize her services in accordance with the estimated quantity schedule (*Julie G. Horn v. United States,* Fed. Cl., No. 07-655 C, 5/3/11).

Judge Loren A. Smith found that the contract simply contained an estimated range of services and allowed BOP to use an in-house dental hygienist if it so chose.

In October 2005, plaintiff Julie Horn was awarded a BOP contract to provide professional dental hygiene services for inmates at the U.S. Penitentiary and Federal Prison Camp in Marion, Ill. She was contracted to provide a maximum of 1,560 one-hour dental hygiene sessions over the term of the contract at a given unit price.

The contract was expressly designated as a requirements contract under Federal Acquisition Regulation 52.216-21. However, the contract also said the estimated quantities were not BOP's total requirements, but rather were estimates of requirements that exceeded those BOP could fulfill with its own resources.

About one month after the contract award, the BOP dental supervisor told Horn that her services were no longer required and that BOP would be obtaining the services in-house. At that time, Horn had completed 130 one-hour sessions (about 8 percent of the contract estimate) and had been properly paid for each session completed.

Horn submitted a claim to the contracting officer asserting that BOP had terminated her contract, alleging breach of contract, and seeking more than $30,000 in lost wages. The CO issued a final decision denying the claim, stating that Horn's contract had not actually been terminated and that she had been paid for services rendered.

Horn sued in the COFC, and the government moved for summary judgment.

Agreement Not Requirements Contract. According to the court, Horn claimed she was entitled to the difference between the compensation she received for performing 130 dental hygienist sessions and the compensation she would have received had BOP utilized her services in accordance with the maximum quantity indicated under the contract's ''Schedule Of Supplies/Services'' provision.

However, the court said despite the fact that BOP incorporated a FAR provision designating the contract as a ''requirements'' contract, the agreement was not exclusive because BOP never expressed the intent to exclusively use Horn to fulfill all of its dental hygienist needs.

Rather, the contract stated that BOP only intended to use her for the services it could not fulfill in-house, stating, ''the government shall order from the contractor all of that activity's requirements for . . . services specified in the schedule that exceed the quantities that the activity may itself furnish within its own capabilities.''

''Although it appears that both parties entered into the contract with the intent to form a requirements contract, that fact cannot overcome the plain language of the contract,'' Judge Smith said. ''Because the government did not enter into the contract with the intent to utilize Ms. Horn's dental hygienist services exclusively, the court concludes the contract in this matter cannot be interpreted as a requirements contract.''

Agreement Not IQ Contract. Regarding whether the agreement could be viewed as an indefinite quantities contract, the court noted that to be enforceable, such a contract must: (1) specify the period; (2) specify the total minimum and maximum quantity of supplies or services for the government to purchase; and (3) include a statement of work.

In this case, Horn's contract lacked a minimum quantity term. As a result, nothing required the government to take, or limited its demand to, any ascertainable quantity.

''[T]he clear language of the contract merely required the government to utilize Ms. Horn's services to the extent that the BOP could not fulfill its needs in-house,'' the court said. The contract neither required the BOP to order all of its dental hygienist services from Ms. Horn, nor did it contain a minimum quantity purchase term.... Thus, the enforcement of such a contract must fail for lack of mutuality and consideration when viewed as either a requirements contract or an indefinite quantities contract.''

Finally, the court noted that Horn was paid the correct amount for the services she actually performed for BOP.

As a result, the complaint was dismissed.

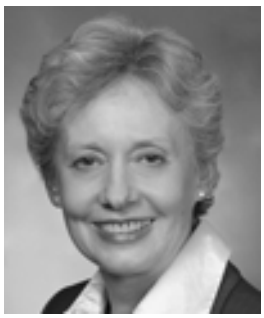
Douglas N. Dorris of Howerton, Dorris & Stone, Marion, Ill., represented Horn. Paul D. Oliver, Tony West, Jeanne E. Davidson, and Kirk Manhardt of the Justice Department represented the government.

The court's opinion is available at: http://op.bna.com/fcr.nsf/r?Open=jkiy-8gkqja.

BNA Insights

Conflicts of Interest

Proposed Rule Regarding Organizational Conflicts Of Interest: A New And Refreshing Approach?



BY MARCIA G. MADSEN AND DAVID F. DOWD

On April 26, 2011, the Department of Defense, the General Services Administration (''GSA''), and the National Aeronautics and Space Administration (''NASA'') proposed to amend the Federal Acquisition Regulation with regard to the treatment of organizational conflicts of interest (''OCIs'') (''the Proposed Rule''). The Proposed Rule, which has been in the works for some time, was greatly anticipated by government contractors.

The Acquisition Advisory Panel (''AAP''), which was chartered under Section 1423 of the Services Acquisition Reform Act of 2003 in the National Defense Authorization Act for Fiscal Year 2004, recommended in its January 2007 Report that the FAR Council address OCIs. The Report is available at https://www.acquisition.gov/comp/aap/24102_GSA.pdf. In its Report, the AAP noted that due to changes in the procurement landscape, *i.e.*, the large growth in services contracting, the fact that more of the services involved exercise of judgment, consolidation in industry, there was a growing need to safeguard against OCIs but the current regulatory framework in the FAR did not address any of these developments. The AAP noted that the guidance for dealing with OCIs was being provided in bid protest case law – rather than through regulation and policy guidance. The AAP recommended that the FAR Council review existing FAR coverage and, to the extent necessary, create uniform government-wide policy and clauses dealing with OCIs. Through Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), Congress required a review of the OCI provisions in the FAR. Section 841 further required development of appropriate contract clauses, as necessary, as part of the review.

Ms. Madsen and Mr. Dowd are partners at Mayer Brown LLP. Ms. Madsen chaired the Acquisition Advisory Panel.

The Proposed Rule follows on related rulemaking activity. In 2008, the government issued an Advance Notice of Proposed Rulemaking as part of FAR Case 2007-018 to solicit comments regarding whether and how to improve the FAR coverage on OCIs. *See* 73 Fed. Reg. 15962 (March 26, 2008). While the FAR Council was working on its open case, Congress decided to act with respect to DOD. In response to the Weapon Systems Acquisition Reform Act of 2009 (Pub. L. 111-23) (''WSARA''), DOD published a proposed rule last year to address OCIs for major weapons acquisition programs, but DOD's proposed rule also rewrote FAR Subpart 9.5 for DOD. Following the receipt of extensive comments, DOD issued its final rule at the end of 2010, reducing its scope to only address the WSARA requirements.

Although it presents various wrinkles and some important gaps in the current FAR coverage are not fully addressed by it, the Proposed Rule offers the prospect of a more flexible and workable means to address OCIs on the part of Contracting Officers (''COs''). Clearer guidance will have the benefit of fostering predictability, reducing litigation, and reducing overall costs for government and industry.

Comments on the Proposed Rule are due by June 27, 2011.

I. Summary of the Proposed Rule.

A. Overview. In introducing a flexible new framework, the Proposed Rule departs from the current FAR approach in various respects. The Preamble to the Proposed Rule notes:

The fact that the OCI regulations are not primarily based in statute means that revisions to the regulations need not conform with existing case law. Rather, substantive departures from the case law should be considered if such changes will produce an OCI framework

  FCR ISSN 0014-9063

that is clearer, easier to implement, and better suited to protecting the interests of the government.

76 Fed. Reg. at 23238. With that view, the Proposed Rule introduces a comprehensive, flexible framework that seems better suited to the contracting landscape than the approach in the current FAR. The changes are sweeping in some respects and subtle in others. The Proposed Rule changes the definition of OCI. It separates out the treatment of what is viewed as an OCI into a different part of the FAR. It encourages COs to consider and rely upon contractor's internal controls and related safeguards in addressing OCIs.

Cases interpreting the current rule have categorized OCIs in three types. *See*, *e.g.*, *Aetna Gov. Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397, *et al.*, July 27, 1995, 95-2 CPD ¶ 129. The three types are: (i) unfair access to non-public information; (ii) ''biased ground rules;'' and (iii) ''impaired objectivity.'' The current FAR addresses OCIs in Subpart 9.5.

The Proposed Rule changes the definition of OCI. *See* 76 Fed. Reg. at 23243. In doing so, it identifies types of OCIs by the type of conflict rather than the type of task. The Proposed Rule separates OCIs into two categories: (i) conflicts that arise out of judgmental work performed by a contractor (e.g., in giving advice or drafting specifications) and (ii) unequal access to competitively sensitive information. *See* 76 Fed. Reg. at 23243 (proposed amendment to FAR 2.101). The Proposed Rule provides that the former are handled under a new FAR Subpart 3.12 while the latter are addressed in a new, comprehensive, and revolutionary approach to be contained in FAR Subpart 4.4.

The Proposed Rule also distinguishes between OCIs that can impair the ''integrity of the competitive process'' from those that only threaten the ''government's business interests.'' *See* Proposed FAR 3.1203. In the event of the former, the CO ''must take action to substantially reduce or eliminate this risk.'' Proposed FAR 3.1203(b)(2). The government has more flexibility with regard to OCIs that can impair only the government's business interest. *See* Proposed FAR 3.1203(c). With regard to such OCIs, the CO may make an assessment that ''the risk inherent in the conflict is acceptable'' either with or without application of one or more of the methods listed in the Proposed Rule for addressing OCIs. *See* Proposed FAR 3.1201.

B. Differences from 2010 Proposed DFARS Rule. The Proposed Rule follows related rulemaking by DOD. On April 22, 2010, DOD issued a broad-ranging proposed rule to amend the Defense Federal Acquisition Regulation Supplement (''the Proposed DFARS Rule'') with regard to OCIs, including (but not limited to) implementation of WSARA. *See* 75 Fed. Reg. 20954. Section 207 of WSARA addresses the treatment of OCIs in major defense acquisition programs (''MDAPs''). On December 29, 2010, DOD issued a final rule on the topic. *See* 75 Fed. Reg. 81908.

The Proposed DFARS Rule, among other things, would have extended beyond coverage of the MDAPs covered by WSARA and provided for a temporary replacement of OCI coverage in the current FAR with new and more extensive provisions in the proposed DFARS OCI provisions. The generally applicable provisions regarding OCIs would have placed considerable burden on COs and contractors. The Final Rule was more limited in scope, and deferred the treatment of OCIs (apart from MDAPs) to the anticipated FAR rule.

The Proposed DFARS Rule would have required contractors to disclose a breadth of information related to OCIs. A proposed standard DFARS clause stated that the offeror should inform the CO of any ''potential conflicts of interest'' even before preparing its offer. *See* Proposed DFARS 252.203-70XX(d). This clause also would have required that regardless of whether the offeror discloses the existence of an OCI, the offeror must describe any other work performed on contracts and subcontracts within the past five years that is associated with the offer it plans to submit. These obligations could be very burdensome for the contractor and for the government, particularly the requirement to reach back five years.

The Proposed Rule issued on April 26 calls for contractors to disclose relevant information regarding OCIs only when the CO has made an initial determination that an OCI may result and has included certain clauses in the solicitation in that regard. There is no requirement to reach back five years.

II. Analysis of Key Aspects of the Proposed Rule. In a broad statement of the ''policy'' for addressing OCIs, the Proposed Rule provides that agencies must examine and address OCIs ''on a case-by-case basis, because such conflicts arise in various, and often unique, factual settings.'' *See* Proposed FAR 3.1203(b). COs are directed to ''consider both the specific facts and circumstances of the contracting situation and the nature and potential extent of the risks associated with an [OCI] when determining what method or methods of addressing the conflict will be appropriate.'' *Id.*

A. Analysis of Conflicts. Whereas the current FAR (and case law) emphasize that the CO must undertake relevant analysis to identify and address OCIs, the Proposed Rule offers a more comprehensive framework in that regard, including listing various particular steps the CO must undertake.

The Proposed Rule calls for analysis by COs prior to issuance of a solicitations. The CO would be required to review the nature of the work to determine if performance has the potential to create an OCI. *See* Proposed 3.1206-1. In the pre-solicitation phase, the CO should weigh a variety of factors ''to the extent feasible,'' including the following:

(i) The extent to which the contract calls for the contractor to exercise subjective judgment and provide advice.

(ii) The extent and severity of the expected impact of the organizational conflict of interest (for example, whether it is expected to occur only once or twice during performance or to impact performance of the entire contract).

(iii) The extent to which the agency has effective oversight controls to ensure that the contractor's actions are unaffected by an organizational conflict of interest during performance.

Proposed FAR 3.1206-2(b)(1). The Proposed Rule would eliminate the examples in current FAR Subpart 9.5 that are provided to help the CO identify conflicts.

The Proposed Rule includes standard form clauses to be used ''upon determining that contractor performance of the work may give rise to'' OCIs. Proposed FAR 3.1207. In such event, the CO should include Proposed FAR 52.203–XX, Notice of Potential Organiza-

tional Conflict of Interest, and several other clauses concerning disclosure, mitigation, and/or limitations on future contracting. The use of standard clauses should reduce variability in approaches among agencies, thereby reducing the burden on contractors. The Proposed Rule would permit the CO to tailor the clauses. *See* Proposed FAR 3.1207. Because the clauses are to be included upon a determination that the CO has determined performance may give rise to an OCI, if a solicitation omits such clauses, one might infer the CO has determined that performance will not result in an OCI.

The Proposed Rule also calls for analysis during the evaluation of offers. *See* Proposed FAR 3.1206-3. The Proposed Rule would require the CO to consider both ''contractor-provided and other available information'' in determining how to address an OCI. *See* Proposed FAR 3.1206-3(a). Other available information includes both government and non-government sources, such as offeror web sites. *See id.*

B. Techniques for Addressing Conflicts. The Proposed Rule contemplates that OCIs which may impair the integrity of the competition can be addressed through avoidance, limitation on future contracting, and mitigation. *See* Proposed FAR 3.1204-1 to 3.1204-3.

1. Avoidance. In regard to avoidance, the Proposed Rule provides that one way to avoid an OCI may be to draft ''the statement of work to exclude tasks that require contractors to utilize subjective judgment.'' Proposed FAR 3.1204-1(a). Tasks that require ''subjective judgment'' include: ''(1) Making recommendations; (2) Providing analysis, evaluation, planning, or studies; and (3) Preparing statements of work or other requirements and solicitation documents.'' *Id.*

The Proposed Rule also contemplates that another means to avoid an OCI would be to rely on contractors' ''structural barriers, internal corporate controls, or both.'' *See* Proposed FAR 3.1204-1(b). This change departs from what current case law would seem to permit in regard to ''impaired objectivity'' OCIs. It also is a significant departure from the approach adopted by the DOD proposed and final rules, which treated avoidance principally as a limitation on future contracting. The Proposed Rule discusses avoidance in the context of steps that can be taken in advance to avoid an OCI. Under the Proposed Rule, limitations on future contracting are limited in scope, as discussed below.

Finally, the Proposed Rule acknowledges that exclusion of an offeror is another means to avoid an OCI if the CO has ''determined that no less restrictive method for addressing the conflict will adequately protect the government's interest.'' Proposed FAR 3.1204-1(c)(2). The Proposed Rule would require the CO to examine a variety of considerations before taking this step. *See* Proposed FAR 3.1204-1(c)(3).

2. Neutralization. The Proposed Rule refers to the use of limitations on future contracting to address OCIs as ''neutralization.'' *See* Proposed FAR 3.1204-2. Such restrictions would preclude the contractor from serving as the prime contractor or a subcontractor for a particular effort. Any such restriction should be ''restricted to a fixed term of a reasonable duration'' that is sufficient to neutralize the OCI and end on ''a specific date or upon the occurrence of an identifiable event.'' *See id.*

The standard clause includes a flow down provision. *See* Proposed 52.203–YZ. The prime contractor is to ''including this paragraph (b), in subcontracts where the work includes tasks which result in an'' OCI. *Id.* It is unclear how or by whom the flow down provision would be enforced.

3. Mitigation. The Proposed Rule notes that mitigation may become necessary when there is a current need to address an OCI. It states that mitigation may require government action, contractor action, or both. *See* Proposed FAR 3.1204-3(a)(2). The Proposed Rule lists a variety of measures that might be used. *See* Proposed FAR 3.1204-3(c). For example:

Requiring a subcontractor or team member that is conflict-free to perform the conflicted portion of the work on the instant contract.

Requiring the contractor to implement structural or behavioral barriers, internal controls, or both.

See id. In regard to the second example provided above, the Proposed Rule states that the ''choice of specific barriers or controls should be based on an analysis of the facts and circumstances of each case.'' *See* Proposed FAR 3.1204-3(c)(2). The Proposed Rule lists, as examples, such methods as: (i) ''[a]n agreement that the contractor's board of directors will adopt a binding resolution prohibiting certain directors, officers, or employees, or parts of the company from any involvement with contract performance'' and (ii) ''[c]reation of a corporate organizational conflict of interest compliance official at a senior level to oversee implementation of any mitigation plan.'' *Id.* The Proposed Rule notes that firewalls will often be necessary but a firewall that ''serves only to limit the sharing of information'' generally is not effective in addressing an OCI. *See id.*

Depending on the particular facts (e.g., the complexity of the procurement, compliance obligations with regard to subcontractor performance, etc.), one or more of these methods may be challenging in practice. The Proposed Rule does not provide guidance with regard to the nuances of analyzing the circumstances that may call for such approaches or for applying such methods in particular instances, which may prove problematic for COs.

In regard to analysis of mitigation plans, the Proposed Rule provides that the CO shall analyze:

the feasibility of mitigation of the organizational conflict of interest, including both the expected effectiveness of the conflicted entity's proposed mitigation plan and the government's ability to monitor and enforce the provisions of the plan.

Proposed FAR 3.1206-3(b)(2). Mitigation plans are to be incorporated into the contract. *See* Proposed FAR 52.203–YY.

In sum, more guidance on mitigation techniques may be helpful, but the Proposed Rule provides a well-considered framework for mitigation.

C. New Approach To Competitively Sensitive Information. The Proposed Rule takes the position that unequal access to nonpublic information/competitive advantage is often unrelated to OCIs, but poses the risk that an unfair competitive advantage will taint the competitive acquisition process. *See* 76 Fed. Reg. at 23238. On this basis, the issue of access to nonpublic information is removed from the domain of OCI to be treated separately in a new Subpart 4.4 – Safeguarding Information Within Industry. The new framework for addressing access to nonpublic information and the potential for competitive advantage is comprehensive and arguably

  FCR ISSN 0014-9063

revolutionary in several respects. The Preamble explains that at the root of the reason for change is the extent to which agencies have contractors performing functions that require access to third-party data and sensitive government information, and the need for a uniform, governmentwide policy to provide ''preventive protection'' for sensitive nonpublic information. The Preamble expresses the view that if such protection is established, the number of situations where unequal access to information will taint a competition can be minimized. 76 Fed. Reg. at 23240.

1. Definition. ''Nonpublic information'' is defined to mean information that belongs to the government or to a third-party that is not generally made available, that is, information that cannot be released under the Freedom of Information Act (5 U.S.C. § 552 (''FOIA'')) (or is protected by the Trade Secrets Act 18 U.S.C. § 1905 which has been determined by the courts to be coextensive with FOIA Exemption 4, see *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 305 (D.C. Cir. 1999)) or information for which a determination has not yet been made regarding ability to release. *See* 76 Fed. Reg. at 23243 (proposed addition to FAR 2.101).

This new regime addresses a concern highlighted in the AAP Panel Report that agencies have varying approaches to protection of nonpublic information – typically through some form of non-disclosure agreement (''NDA''), the enforceability of which is unclear.

2. Implementation – The Access Clause. The key to the new framework is the Access Clause (Proposed FAR 52.204-XX) that is intended to obligate contractors and subcontractors contractually at every tier to protect all nonpublic information to which they are given access as part of contract performance. The access clause is required to be used in every contract when the contractor (or its subcontractors ''may'' have access to nonpublic information. [1] Proposed FAR 4.401-4(a)(1). There are two alternate clauses proposed: (i) for circumstances where the CO determines that to protect nonpublic information in the government's possession, there may be a need to execute confidentiality (nondisclosure) agreements between the contractor and one or more third-parties; and (ii) for circumstances when the contractor may require access to a third-party's information or facilities that are not in the government's possession.

a. Restrictions. The access clause restrictions are intended to protect both the government and third-party owners of nonpublic information from unauthorized disclosure or use. Contractors are required by the clause to: (i) utilize the nonpublic information only for purposed of performing the contract and for no other purpose; (ii) safeguard the nonpublic information from unauthorized disclosure or use; (iii) limit access to the nonpublic information to only those persons with a ''need to know''; (iv) inform individuals with access about their obligations; (v) obtain an NDA from each employee or other individual who ''may'' have access to the nonpublic information (such agreement is required to include items i through iv of this clause); (vi) provide a copy of the NDA to the CO upon request; and (vii) report any violations of the clause to the CO. Proposed FAR 52.204-XX (b)(2).

Taken as a whole, this bundle of obligations imposes both substantial new burdens on contractors supporting the government and affords substantial new protections to owners of proprietary information. Additionally, several aspects of the Access Clause are extremely significant and address concerns that contractors and government have had for years about handling proprietary and confidential information. Limiting access to individuals with a ''need to know'' is not an unusual concept in the classified world, but the Proposed Rule takes that concept to another dimension – it will apply in a very large number of services contracts. Further, a requirement to obtain an NDA from each employee or person involved in performance is a tough new obligation. While contractors and agencies use NDAs in various forms today, there is no requirement to do so and no prescribed set of terms. It also is notable that contractors will be required to self-report any violations. Furthermore, contractors clearly will need new and comprehensive training for their employees regarding these requirements. Of course, this entire regime flows down to all subcontractors who may need access to the nonpublic information. Proposed FAR 52.204-XX(f).

b. Enforcement. In addition to these requirements, the Proposed Rule provides revolutionary remedies to the government and to third-party owners of information to enforce these obligations under subsection (b). The contractor is required by the clause to ***indemnify*** the government, its agents and employees from ''every claim and liability . . . arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure'' of the nonpublic information to which the contractor (or subcontractor) has been provided access. Proposed FAR 52.204-XX(b)(1)(i).

In a highly unusual move, the Proposed Rule also provides that third-party owners of nonpublic information that has been provided to the contractor are ***third-party beneficiaries*** with respect to the terms of this clause with the right of direct action against the contractor for damages arising out of a violation of the clause or to otherwise enforce its terms. Proposed FAR 52.204-XX(b)(1)(ii).

The clause does provide exceptions such that the contractor receiving nonpublic information for use in performance of a contract can attempt to avoid the requirements of paragraph (b) if the contractor can demonstrate that the information: (i) was already in the public domain at the time the contractor received it; (ii) was published or otherwise placed in the public domain through no fault of the contractor; (iii) was already lawfully in the contractor's possession and not obtained from the government or under another government contract; (iv) was received by the contractor from another party who had authority to release it and did not require the contractor to hold the information in confidence; (v) is available or becomes available on an unre-

[1] The Proposed Rule also sets forth a new Release of Nonpublic Information clause (Proposed FAR 52.204-YY) that is to be included in all solicitations and contracts. This clause simply provides that a contractor owning nonpublic information (and its subcontractors) agrees that the government may release, in appropriate circumstances, to its contractors and their subcontractors and employees the nonpublic information that the contractor has provided to assist in the performance of agency functions, provided that the government's support services contractor is performing under a contract that contains the Access Clause at Proposed FAR 52.204-XX.

stricted basis from the owner or a party acting under the owner's control; (vi) is independently developed by or for the contractor and the contractor can prove such independent development; (vii) became available to the contractor from another source by lawful inspection or analysis of the products or another authorized party; or (viii) is provided to a third-party by the contractor with the prior written approval of the owner. Proposed FAR 52.204-XX(c). Contractors also may release nonpublic information pursuant to court order with prior notice to the information owner and an opportunity for the owner to oppose release.

The Access Clause is expressly subordinate to all other contract clauses that address the access, use, handling and disclosure of information (*e.g.* data rights clauses) and any inconsistencies are to be resolved in favor of the other clause.

3. Steps For COs To Consider and Resolve Access to Information Issues.

a. Determining Whether Access To Nonpublic Information Poses A Potential Risk To The Integrity Of The Competitive Process. The Proposed Rule provides a framework for COs to use in determining whether a particular set of acts and circumstances involving an offeror's access to nonpublic information must be resolved. COs are required to consider the source of the information, *i.e.*, whether the access to the nonpublic information was provided by the government, either directly through performance on another contract or indirectly through a former government employee or contractor/subcontractor employee who received that information from the government. Proposed FAR 4.402-3(a). The Proposed Rule explains that an offeror may obtain information through market research or through private business relationships and such situations do not require government efforts to address the information.

The Proposed Rule also points out that where nonpublic information, even if provided by the government, is available to all potential offerors, an offeror's access is not unfair and does not require resolution. It also notes that if the information is not competitively useful to an offeror, then the access does not confer an unfair competitive advantage and need not be addressed. *See* Proposed FAR 4.402-3(b)(c). Although seemingly straightforward, questions of the nature addressed by the Proposed Rule have caused confusion about whether unfair competition issues exist that taint a competition.

The Proposed Rule is helpful in explaining, as part of its statement of policy for the new FAR Subpart 4.4, that natural advantages obtained by incumbent contractors as a result of their experience, insight and expertise do not represent an unfair competitive advantage. This position, while expressed in GAO cases (*see e.g.*,*MASAI Technologies Corp.*, B-298880.3; .4, Sept. 10, 2007, 2007 CPD ¶ 179) has proven difficult to apply in practice. The clear statement in the Proposed Rule and the encouragement for agencies to analyze the facts should help agencies distinguish these natural advantages of incumbency from situations where the incumbent contractor also had access to nonpublic information that could provide an unfair competitive advantage in a future competition. Proposed FAR 4.402-2(c).

The Proposed Rule also sets forth the steps a CO must follow in exercising his/her responsibilities for safeguarding information. Proposed FAR 4.402-4. COs are directed to consider these issues at the acquisition planning stage by examining with the contracting activity and the requiring activity whether any prospective offerors may have had government-provided access to nonpublic information that may be relevant to the acquisition. This approach is consistent with the view expressed in the preamble that addressing access to information issues early helps protect the integrity of the acquisition process. 76 Fed. Reg. 23240.

In this same vein, COs are directed that in the initial announcement of an acquisition they must request offerors to indicate as early as possible if they currently have or had previously government-provided access to nonpublic information. For contract actions, this notice is to be included in the ''sources sought'' notice. For Task and Delivery Order type vehicles (including the Federal Supply Schedules), such a statement is to be included in the first announcement or in the request for quote.

Additionally, COs are directed to include a provision in the solicitation that requires offerors to disclose whether they are aware of anyone in their corporate organization, including affiliates, who has obtained access to nonpublic information that could affect the acquisition from government sources. Obviously, contractors will need to exercise appropriate due diligence before making any such representation.

b. Analysis and Resolution. COs are directed that if they become aware that that one or more offerors have had access to nonpublic government-provided information, they ''shall determine'' whether resolution is required – consistent with the principles stated in Proposed FAR 4.402-3, *e.g.*, COs must determine if the offeror has had access to government-provided nonpublic information that results in a competitive advantage which is unfair. Proposed FAR 4.402-4(b).

The Proposed Rule provides that unfair competitive advantages resulting from unequal access to nonpublic information may be resolved by a variety of approaches including information sharing, mitigation through use of a firewall, or even exclusion (or a combination of approaches). Proposed FAR 4.402-4(c). Steps are provided for the COs to consider each potential type of resolution. With respect to information sharing, the Proposed Rule points out that this approach, whether through a solicitation amendment or posting of the information, is available when the information is government-provided, but will require appropriate permission (and protections) if the information is contractor-owned. The Proposed Rule also notes that, to be effective, this approach needs to be undertaken early enough in the process so that offerors have adequate time to use the information.

Regarding the use of a firewall, the Proposed Rule discusses the use of such a barrier in circumstances where only some of a contractor's employees have had access to the information and can be screened from the competition. The protections set out in the Access Clause will constitute an adequate firewall if the nonpublic information at issue was gained through performance of a contract that included the Access Clause.

Potential offerors also can propose a firewall and the Proposed Rule suggests some possible approaches that offerors and COs should consider, such as: (i) organizational and /or physical separation; (ii) physical barriers such as facility and workplace access restrictions; and

  FCR ISSN 0014-9063

(iii) information system access restrictions; independent compensation systems; and individual and organizational NDAs. If an offeror takes this approach, it must represent in its proposal that there has been no breach of the firewall, or must explain any breach that occurred. Again, a contractor will need to make appropriate internal inquiries before making any representation that a firewall has not been breached.

The Proposed Rule explains that this same approach should be used for placing orders under multiple-award contract vehicles.

Disqualification of an offeror is required if the agency determines that: (i) the offeror has had unequal, government-provided access to nonpublic information; (ii) the information would provide an unfair competitive advantage; and (iii) neither information sharing nor a firewall can protect the integrity of the competition. Proposed FAR 4.402-4(c)(3). The structure of the rule is clear – as expressly stated in the Policy considerations of Proposed FAR 4.402-2 – that disqualification of an offeror is the ***least-favored approach*** and should only be adopted if no other method of resolution will protect the procurement.

III. Conclusion. What does the Proposed Rule mean for contractors? If adopted in its present form, the Proposed Rule would introduce a more efficient framework for addressing the often-complex situations in which OCIs arise. It introduces an entirely new regime for addressing access to nonpublic information/competitive advantage issues with new requirements, techniques, and remedies. All of this modernizes the concept and approach to OCIs, and reflects the government's current reliance on service contracts – including the complexities of information access that come with the substantial involvement of private entities in supporting the government's acquisition system. This new approach is more clear, flexible and comprehensive. It also will involve a great deal of training and new procedures for agencies and contractors.

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
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

FCR ISSN 0014-9063

BNA
FEDERAL CONTRACTS REPORT

Electronic Resources

VOL. 95, NO. 18 MAY 11, 2011

INDEX

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.acquisition.gov

Centers for Medicare & Medicaid Services (CMS)
http://www.cms.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.gpoaccess.gov/crecord/index.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/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.gpoaccess.gov/fr/

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

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

General Services Administration
http:/www./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/search/criteria.shtml

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

U.S. Court of Appeals for the Federal Circuit
http://www.cafc.uscourts.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

White House
http://www.whitehouse.gov

BNA CONTACTS

Federal Contracts Report
http://www.bna.com/products/corplaw/fcr.htm

BNA Customer Relations, e-mail
customercare@bna.com

BNA PLUS, e-mail
BNAPLUS@bna.com

BNA's World Wide Web Home Page
http://www.bna.com

ISSN 0014-9063