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FAR Councils Propose Rule to Clarify Priority Among Small Business Programs

The Federal Acquisition Regulation councils are seeking input on a proposed rule intended to clarify which small business programs have priority when it comes to deciding whether to satisfy a requirement through an award to a small business; a Historically Underutilized Business Zone (HUBZone) small business; a service-disabled, veteran-owned small business; or a firm participating in the Small Business Act Section 8(a) program for small disadvantaged firms.

The proposed rule, published March 10, is intended to address confusion as to whether there is an order of precedence that applies when making a decision about which program to use for an acquisition, the FAR councils explained. The proposed rule would amend Far subpart 19.2 by adding a new section (19.203) on the relationship among small business programs.

In the background section of the proposed rule, the FAR councils said the rule is intended to make clear that:

- There is no order of precedence among the HUBZone, service-disabled, veteran-owned small business (SDVOSB), and 8(a) programs. However, if a requirement has been accepted by the Small Business Administration under the 8(a) program, it must remain in the 8(a) program unless SBA agrees that criteria for waiving this requirement are met.

- For acquisitions exceeding \$100,000, the contracting officer must consider making an award under the 8(a), HUBZone, or SDVOSB programs (either set-aside or sole source) before the CO proceeds with a small business set-aside. After the CO has considered such an award, he or she may set aside an acquisition for small business, except that under 15 U.S.C. 257a(b)(2)(B) the CO may not set the acquisition aside for small business if the criteria for setting it aside for HUBZone small businesses are met.
- Under FAR 19.502-2(a), an acquisition between \$3,000 and \$100,000 must be exclusively reserved for small business unless the CO determines there is not a reasonable expectation of obtaining offers from two or more small businesses that are competitive in terms of market price, quality, and delivery. The proposed rule clarifies that these small business set-asides do not preclude the award of a qualified HUBZone small business, an 8(a) program participant, or to an SDVOSB--in accordance with each of these programs--because SBA regulations give the CO discretionary authority to use these programs at these dollar levels. Also, the rule shows that, unlike in procurements that are expected to exceed \$100,000, it is not mandatory that the CO set aside an acquisition for HUBZone small businesses before setting aside the requirement for small business.
- SBA believes that progress in fulfilling the various small business goals, as well as other factors such as the results of market research and acquisition history, should be considered by the CO in making a decision as to which program to use for the acquisition.

According to the Initial Regulatory Flexibility Analysis for the proposed rule, there are approximately 313,512 small business firms; 13,000 HUBZone firms; 9,947 8(a) firms; and 9,614 SDVOSBs currently registered in the Central Contractor Registration. "Viewed as a whole, there is no impact on the small business community, as this rule does not increase or decrease the number of contracts awarded to small businesses," the FAR councils said. "However, there will be a negative impact on contractors with a particular preference who lose a contract set-aside to another socioeconomic category of contractors with a different preference who gain the contract set-aside, who thereby will receive a positive impact."

Comments on the proposed rule are due May 9 (73 Fed. Reg. 12,699, 3/10/08).

OFPP Head Denett Outlines Objections To Pending Contractor Accountability Bills

Office of Federal Procurement Policy Administrator Paul Denett Feb. 27 detailed the Bush administration's objections to three contractor accountability bills pending in the House that would require contractors to: certify they have no seriously delinquent tax debts; disclose administrative and legal proceedings prompted by alleged misconduct; and, in the case of certain privately held corporations, identify the names and salaries of top executives and directors.

Denett was among a number of witnesses testifying on a wide range of legislative, administrative, and regulatory developments in the federal procurement arena during a hearing of the House Oversight and Government Reform Subcommittee on Government Management, Organization, and Procurement. The subcommittee specifically sought input on the following bills:

- The Contracting and Tax Accountability Act of 2007 (H.R. 4881), which would prohibit the award of a contract in excess of the simplified acquisition threshold unless the prospective contractor certifies in writing it has no seriously delinquent tax debts. The bill was introduced by Rep. Brad Ellsworth (D-Ind.) and Subcommittee Chairman Edolphus Towns (D-N.Y.) Dec. 19, 2007. Towns sponsored an earlier measure (H.R. 1870) to prohibit companies that owe federal taxes from winning federal government contracts, which was amended and approved by his subcommittee May 9, 2007.
- The Contractors and Federal Spending Accountability Act (H.R. 3033), which would require establishment and maintenance of a database on contractors' involvement in administrative and legal proceedings. The bill, which was introduced by Rep. Carolyn Maloney (D-N.Y.) July 12, 2007, also would amend the suspension and debarment regulations to establish a presumption of nonresponsibility in cases of repeated violations that constitute grounds for debarment.
- The Government Contractor Accountability Act of 2007 (H.R. 3928), which would require contractors that are not publicly traded and that receive more than 80 percent of their annual gross revenues from federal contracts to disclose the salaries of their most highly compensated employees and their directors when they have contracts worth more than \$5 million in any fiscal year. The bill was introduced by Rep. Christopher Murphy (D-Conn.) Oct. 23, 2007.

Efforts already are underway to resolve the problems the contractor tax accountability bill seeks to address, Denett told the subcommittee. He pointed out that amendments to the Federal Acquisition Regulation are expected in March that will authorize appropriate federal officials "to use tax delinquency as sufficient grounds for debarment or suspension in accordance with the established process in the FAR for protecting government interests."

The rule, he said, "will add conditions regarding violations of tax laws and delinquent taxpayers to standards of contractor responsibility, causes for debarment and suspension, and the certifications regarding debarment, suspension, proposed debarment, and other responsibility matters." As proposed March 30, 2007, the FAR rule came under criticism from contractor groups for failing to provide an exemption for commercial items purchased under FAR Part 12. Denett also pointed to recent successes the Federal Contractor Tax Compliance Task Force has had in increasing debt collection. Denett cited Treasury Department data showing that levy collections from federal payments to contractors increased from \$7 million in FY 2003 to \$59.6 million in FY 2006.

With respect to Maloney's bill, Denett agreed there is a need for federal departments and agencies to "share information with one another regarding improper conduct or questionable activities by contractors." He pointed out that OFPP and the Office of Federal Financial Management in August 2006 directed appropriate agency officials to use the Interagency Suspension and Debarment Committee as a means of sharing information about debarments and suspensions, as well as about "certain problematic contractor conduct that would not give rise to a debarment or suspension." He added, however, that he has been advised by the Justice

Department that to the extent that the provisions of H.R. 3033 "may be construed to require disclosure of ongoing investigations, including grand jury investigations and proceedings under seal such as qui tam actions under the civil False Claims Act, they contravene the law, jeopardize critical law enforcement efforts to root out fraud, waste, and abuse, and corruption in procurement, and unfairly expose those falsely or mistakenly alleged to have committed fraud."

Denett also said he sees no benefits associated with the executive compensation disclosure requirements of Murphy's bill, H.R. 3928. The "accounting and reporting burdens" associated with having privately held contractors certify that 80 percent or less of their annual gross revenues are from federal contracts or else disclose the names and salaries of certain senior executives "will likely have a chilling effect on contractor participation in federal acquisition that, in turn, will harm the government's ability to take full advantage of the competitive marketplace," he said.

Denett generally agreed with the assessment offered by Rep. Tom Davis (R-Va.), ranking member of the full committee, who expressed doubts during the hearing that the three bills would do anything to "improve the government acquisition system and process." The measures "focus on punishing companies conducting business with the federal government," Davis argued, not on creating "the most effective and efficient federal acquisition system possible." "However well-intentioned," these bills "are a step in the wrong direction" and "could result in decreased competition for federal contracts as companies decide that doing business with the government is not worth the 'price,'" Davis warned. He also pointed out that none of the bills contains provisions implementing any recommendations of the congressionally-mandated Acquisition Advisory Panel, which was another focus of the subcommittee hearing.

In addition, Denett said OFPP has moved to improve competition for orders under multiple award contracts by requiring:

- public notice of orders awarded on a sole-source basis;
- the receipt of three proposals on Multiple Award Schedule contract buys and the provision of fair notice to all contract holders on other multiple award contracts;
- clear statements of requirements, greater disclosure of the government's evaluation criteria, reasonable response times, and documentation of the basis for best value award decisions; and
- an explanation of the government's award decision for unsuccessful offerors.

With respect to interagency contracts, OFPP expects in March to issue a much-anticipated model interagency agreement to help agencies delineate their respective roles and responsibilities throughout the acquisition process. "We also plan to ensure that agencies develop appropriate business cases as a prerequisite to the establishment or renewal of multi-agency contracts," Denett said.

OFPP also continues to take steps to guide agencies on use of performance-based acquisition. Its PBA Interagency Working Group is developing new features for the online guide, *The Seven Steps to Performance-Based Services Acquisition*, a number of which Denett said were recommended by the advisory panel. The guide is being supplemented to include:

- an assessment tool to help agencies determine when to use PBA;
- a matrix of contract performance incentives;
- a best practices guide on performance measures; and
- a checklist to assess how well an acquisition works within the basic elements of the *Seven Steps* guide.

A number of the advisory panel's recommendations received positive responses from members of Congress, according to Marcia Madsen, a partner with the Washington, D.C., law firm Mayer Brown and the chair of the panel. For example, several recommendations addressing competition under multiple award contracts and the needs of the acquisition workforce were included in the fiscal year 2008 defense authorization act (Pub. L. No. 110-181), which President Bush signed Jan. 28.

Also, Senate and House contractor accountability bills (S. 680, H.R. 1362) passed last year incorporate some of the panel's suggestions, Madsen told the subcommittee. For example, S. 680 includes its recommendations on improved management of interagency contracts. In addition, the panel's work on the problems faced by small businesses as a result of contract bundling—which generally involves the consolidation of previously separate, smaller federal requirements into large packages that discourage small business competition—is reflected in bipartisan legislation (S. 2300) unanimously approved by the Senate Small Business and Entrepreneurship Committee last November, Madsen said.

Based on its finding that contract bundling requirements were applied inconsistently across the government, the advisory panel recommended strategies to unbundle contracts and mitigate the effects of contract bundling, Madsen said. "S. 2300 adopts this recommendation requiring a report on best practices to reduce bundling, followed by the issuance of additional policies to reduce bundling."

State, Local Governments Increasingly Using GSA's Schedule for IT Purchases

State and local government use of the General Services Administration's information technology schedule—Schedule 70—has grown dramatically since first authorized in 2003, with orders increasing from \$17.9 million that year to \$361.2 million in fiscal year 2007, according to a new report released Feb. 21 by INPUT, a Reston, Va.-based consulting firm.

Schedule 70 orders by state and local governments rose 45.4 percent between fiscal years 2006 and 2007, from \$248.5 million to \$361.2 million, leading INPUT to project a 24.6 percent compound annual growth rate and orders in excess of \$1 billion by 2012. Over 92 percent of the orders came from five categories, with wireless services heading the list, followed by IT equipment, IT services, perpetual software licenses, and software maintenance.

During FY 2007, 502 companies used their Schedule 70 contract to sell technology products and services to state and local governments. However, "10 of those companies captured 62 percent of the spending," Jason Sajko, a senior analyst specializing in general government services, said in INPUT's announcement of the report's findings. Verizon Wireless topped that list, selling \$78.9 million of the \$87.4 million in wireless services purchased by state and local governments in the last fiscal year.

The report points to the GSA Schedule as an opportunity for firms marketing green products. GSA is moving to place green products on its schedules and to phase out competing non-green products by 2010, the report said. INPUT attributed the move to the Office of Federal Procurement Policy's recent call for federal agencies to give preference to green products and services. Local governments "to a large degree are leading in the adoption of greener practices," the report said. Vendors that "can proactively lead the integration of green products onto their Schedule 70 catalogs will be in a posture to win business as the need for green computing products surges."

Another potential area of growth is software as a service (SaaS), which is "slowly emerging as a major force in government software," according to the report. The technology is sparking interest from state and local governments as they seek to collaborate with their counterparts on common problems such as economic development and social services systems. However, GSA currently has no agreements for SaaS platforms.

Vendors are finding "state and local governments more willing to consider cooperative purchasing vehicles such as GSA Schedule 70," Sajko said. Use of Schedule 70 by state and local governments was authorized by the Cooperative Purchasing Program established by Section 211 of the E-Government Act of 2002 (Pub. L. No. 107-347).

GSA built on that authority when it was mandated by Congress to allow state and local governments to use the Federal Supply Schedules to make purchases in aid of recovery efforts following a natural disaster or act of terrorism. However, according to the INPUT report, no state or local government has yet purchased products and services for disaster recovery from the GSA Schedules.

The report cites GSA data indicating that only five states permit use of the GSA Schedules at the state and local level, 13 allow use only at the local level, 21 allow use at the local level with some limited use at the state level, and 11 do not allow such purchases at all. "Local governments will continue to represent the majority of state and local spending through GSA Schedule 70, while states will hold more tightly to term and custom contracts," INPUT said.

SBA Extends Comment Period for Proposal On Women-Owned Small Business Set Asides

The Small Business Administration Feb. 28 extended until March 31 the comment period on a proposed rule authorizing federal agencies to set aside federal contracts for women-owned businesses in industries where such firms are shown to be underrepresented and the procuring agency determines that a set aside would remedy past discrimination.

The proposed rule was issued Dec. 27, 2007, and the original deadline for comments was Feb. 25, 2008. The proposed rule has been met with significant bipartisan resistance from the House and Senate committees with jurisdiction over small business issues.

Among the chief complaints is the proposed rule's requirement that each procuring agency determine that a planned set aside is "substantially related to remedying sex discrimination" by that agency in the relevant industry. Also at issue is what critics describe as an extremely restrictive approach selected by SBA for identifying industries in which women-owned firms are underrepresented in federal contracting.

Sens. Olympia Snowe (R-Maine) and Elizabeth Dole (R-N.C.) are sponsoring legislation that would revise the proposed rule to address these concerns.

Senators Ask Gates for 'Comprehensive' Review of DOD Rapid Acquisition Processes

A group of senators Feb. 27 sent a letter to Secretary of Defense Robert Gates requesting a "comprehensive, Departmentwide review" of the wartime acquisition processes. "As we begin review of the budget request for the Department of Defense for Fiscal Year 2009, we remain concerned that the rapid acquisition systems designed to support our fighting forces are not working as well as they should," Sens. Joe Biden (D-Del.), Kit Bond (R-Mo.), Jay Rockefeller (D-W.Va.) and Edward Kennedy (D-Mass.) said.

They called specific attention to a Sept. 28, 2007, Naval Audit Service Report on the Marine Corps Urgent Universal Needs Statement (UUNS) process that concluded the process was not effective. The Marine Corps then authorized several case studies of other urgent equipment fielding requests by combatant commanders, including Mine Resistant Ambush Protected (MRAP) Vehicles, which found inefficiencies in the rapid acquisition system similar to those of the UUNS process, the senators said.

For instance, an urgent needs request for explosive formed penetrator (EFP) protection, submitted Feb. 17, 2005, as part of an initial MRAP UUNS, was renewed Jan. 30, 2007, "yet we are still five or six months from fielding even limited quantities of EFP protected vehicles," the senators said. Rapid acquisition problems do not appear to be limited to the Marine Corps, the senators added. The Army experienced initial delays with the fielding of soldier body armor, up-armored humvees, and MRAPs. "It is essential that we fix this system," they said. "Our front line forces must be supported by a modern system that quickly meets their needs, not a slow and lumbering bureaucracy better suited to the last century."

The senators commended Gates for recently asking the DOD inspector general to review the acquisition issues involving the MRAP vehicles, but urged him to mandate a "thorough and comprehensive evaluation of all of our wartime acquisition processes, in all of the services and at the joint level." The senators said the review should address the following questions relating to rapid acquisition at DOD:

- Does DOD capture lessons learned?
- Does DOD measure performance appropriately?
- How much influence do budgetary constraints play on decisions?
- Is there an appropriate balance between urgent wartime needs and long-term military readiness?
- Is there a need to modify laws or regulations to become "more nimble, while still providing the accountability and reliability the American people expect?"

The senators further suggested to Gates that, in addition to the Naval Audit Service UUNS process report and Marine Corps urgent acquisition request case studies, the DOD-wide review could build on the report of the Commission on Army Acquisition and Program Management in Expeditionary Operations produced for the Army under the direction of former Under Secretary of Defense for Acquisition, Technology, and Logistics Jacques Gansler.

"If the effort to provide EFP protection is any guide, unfortunately, we are still not accelerating our development and fielding efforts adequate to meet the current threat," the senators wrote. "It is time for a comprehensive effort to give the American military the full benefit of the nation's production and development capacity."

Impact of Automated Procurement Systems On Small Firms Explored by House Committee

House Small Business Committee Chair Nydia Velazquez (D-N.Y.) March 6 raised concerns about the adverse effect the decline in the federal acquisition workforce has had on small firms seeking to do business with the government, and stressed the importance of ensuring that such firms are not further disadvantaged by new automated procurement methods.

The number of contracting personnel has been cut by more than one-half in the last 25 years--135,000 to 85,000--while the "dollar amount of contracts has increased by nearly \$200 billion," Velazquez said in opening a hearing on new procurement systems, such as reverse auctions. The result of these dramatic shifts has been more pressure on agencies to consolidate contracts and employ automated, information technology-driven procurement systems, which many small businesses have difficulties accessing, Velazquez said.

John Spotila, who served both as general counsel of the Small Business Administration and head of the Office of Management and Budget's Office of Information and Regulatory Affairs during the Clinton administration, suggested that these concerns are valid ones. "The trend towards reduced staffing in procurement offices has clearly favored large firms over small firms," said Spotila, who now heads R3i, a small federal contracting firm. "Huge sole source awards go to mega contractors, especially in the defense area, in the interest of speed and national security," he said.

Other disadvantages associated with the shrinking of the acquisition workforce, according to Spotila, include:

- procurement office staff who are "too often inexperienced and poorly trained";
- procurement procedures that "are complex and not well-understood";
- a lack of sufficient resources to improve internal processes; and
- a tendency to "combine a wide range of minimally related tasks into larger contracts to get more procurement dollars out the door with a single action."

One solution, Spotila suggested, would be to "turn procurement offices into centers of process improvement and plain language communication. If we can streamline the way procurement offices operate and get them to communicate more clearly, small business will benefit tremendously." To this end, the former federal official endorsed legislation (H.R. 3548), sponsored by committee member Bruce Braley (D- Iowa), which would require executive agencies to use plain language in certain communications with the public.

The bill, which was approved Jan. 29 by the House Oversight and Government Reform Subcommittee on Information Policy, is intended in part to help small businesses, which Spotila said are particularly disadvantaged by the failure of federal agencies to use plain language in communicating with the public. Similar legislation (S. 2291) introduced by Sen. Daniel Akaka (D-Hawaii) is pending before the Senate Homeland Security and Governmental Affairs Committee.

Paul Denett, administrator of the Office of Federal Procurement Policy, told the committee his agency currently is analyzing the results of its recent survey of agency acquisition officials on the government's use of commercially available online procurement services, including reverse auctions. The survey is part of the work of an interagency working group formed by OFPP and the Acquisition Committee for E-Gov to review the regulations, policies, and business considerations for using online procurement services.

"I am reminding the working group to carefully consider in their deliberations whether adequate protections exist for sellers, particularly small businesses, and if additional protections are needed," Denett told the committee. When using the live electronic reverse auction technique for procurements, bidders submit bids online to an online intermediary for the procuring agency. Other bidders are informed of competitors' prices, but do not know who bid what. Bidders bid successively lower prices until no lower price is offered. It is then up to the agency to make the award. Other commercially available electronic procurement services include those that allow government buyers to purchase from electronic catalogs and establish methods of online bidding for delivery orders.

For its part, the General Services Administration is increasingly relying on "e-systems for procurement and delivery of its services to customer agencies," Federal Acquisition Service Commissioner James Williams told the committee. He added that since 1995 GSA has developed electronic systems specifically designed to allow small businesses to participate in GSA acquisitions. "E-systems allow for faster and easier processes, and can increase accessibility and transparency and minimize costs to small businesses wanting to sell to the government," according to Williams.

According to Williams' prepared statement, GSA's efforts to strengthen its relationship with the small business community--including its provision of personal computer-based tools free of charge--are reflected in program participation figures. For example:

- In GSA's Multiple Award Schedules program, small businesses account for about 80 percent of the more than 17,000 contractors, and receive about 37 percent of \$36 billion dollars spent annually under the program.
- In the GSA Advantage! online ordering system, 76.5 percent of sales went to small business contractors in fiscal year 2007--up from 49.5 percent in FY 2001.
- Of the 411 awards made through the e-Offer online tool for submission of contract offers and modification requests to FAS, 488 have gone to small businesses.

House Oversight Committee Approves Three Contractor Accountability Measures

The House Oversight and Government Reform Committee March 13 approved by voice vote three contractor accountability bills that would require federal contractors to:

- disclose their involvement in federal administrative and legal proceedings prompted by alleged misconduct;
- certify that they have no seriously delinquent tax debts; and
- in the case of certain privately held corporations, identify the names and salaries of top executives and directors.

The committee's action followed by two days the unanimous approval of the three bills by the Subcommittee on Government Management, Organization, and Procurement March 11. The subcommittee held a hearing on the measures Feb. 27.

The committee approved a substitute version of the Contractors and Federal Spending Accountability Act (H.R. 3033), which would require increased disclosure by offerors or bidders seeking federal contracts regarding their involvement in civil, criminal, and administrative proceedings initiated by the federal government, as well as the establishment and maintenance of a database of that information. In addition, the bill, which was introduced by Rep. Carolyn Maloney (D-N.Y.) July 12, 2007, would amend regulations governing the suspension and debarment of companies from eligibility for federal contract awards to establish a presumption of nonresponsibility in cases of repeated violations that constitute grounds for debarment.

Prior to the subcommittee markup, changes were made to the initial version of the measure in order to address due process concerns. The changes are intended to ensure that information in the database does not include mere allegations of wrongdoing, and that contractors have an opportunity to include in the database information regarding their conduct. A further change made before the committee markup provided a more specific definition of the administrative proceedings against a contractor that would warrant inclusion in the database. The database, which is to be established by the General Services Administration, would be used by federal contracting officers and suspension and debarment officials in determining present responsibility for purposes of federal contract awards.

Rep. Tom Davis (R-Va.), ranking member of the committee, expressed concern over bill language that he said would require debarment proceedings against any company that has been subject to two adverse actions within a three-year period. In a statement issued following the markup, Davis pointed out that, if the bill were to become law in its current form, debarment proceedings could be issued against the Boeing Co. "The Boeing Company has had several judgments against it and entered into settlements involving various federal laws, including the Arms Export Control Act, the False Claims Act, the Americans with Disabilities Act, and Constitutional claims under the Equal Protection clause," Davis said in the statement. "If those adjudications are included under this bill's terms, Boeing and a great many other firms could face automatic debarment proceedings." Davis made the observation as others in Congress are challenging the recent Air Force decision to award the contract for development of new aerial refueling tankers to the team of Northrop Grumman Corp. and European Aeronautic Defense and Space Co. rather than to Boeing.

The third contractor accountability bill approved by the panel, the Government Contractor Accountability Act (H.R. 3928), would require contractors that are not publicly traded and that receive more than 80 percent of their annual gross revenues from federal contracts to disclose the salaries of their most highly compensated employees and their directors when they have contracts worth more than \$25 million in any fiscal year. Rep. Christopher Murphy (D-Conn.), the sponsor of the bill, increased the original \$5 million threshold to \$25 million prior to the committee markup. Murphy introduced the bill Oct. 23, 2007, in reaction to the refusal by Blackwater USA founder Erik Prince to disclose to the House Oversight and Government Reform Committee information on the company's profits and his own compensation.

REGULATORY ACTION

Agency	Action	Description	Comment Due Date/ Effective Date; Federal Register Cite
DOD	Final rule	To amend the DFARS to reflect the modification of Berry Amendment domestic sourcing requirements by the FY 2002 defense authorization act	Effective 3/3/08 (73 Fed. Reg. 11,354, 3/3/08)
DOD	Final rule	To require use of the Wide Area WorkFlow electronic system for submitting and processing payment requests and receiving reports under DOD contracts	Effective 3/3/08 (73 Fed. Reg. 11,356, 3/3/08)
DOD, GSA, NASA	Proposed rule	To amend the FAR to ensure it reflects the Small Business Administration's interpretation of the Small Business Act and	Comments due 5/9/08 (73 Fed. Reg. 12,699, 3/10/08)

		regulations with regard to the relationship among various small business programs	
EPA	Proposed rule	To revise the EPA Acquisition Regulation Technical Direction guidance clause to expand its use beyond cost reimbursement type solicitations and contracts and allow contracting officers to use the clause in solicitations and contracts in which the CO will delegate authority to issue technical direction to the contracting officer technical representative	Comments due 4/3/08 (73 Fed. Reg. 11,602, 3/4/08)