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Waxman Asks GSA to Delay Plan to Add 'Acquisition Support' Contractors to FSS

Citing reports that the General Services Administration plans to add "acquisition support services" to the kinds of services that can be purchased by federal agencies using the Federal Supply Schedule program, Rep. Henry Waxman (D-CA), chairman of the Oversight and Government Reform Committee, has asked GSA to hold off on such a move.

"I am concerned that your proposal may cause conflicts of interest and result in unnecessary waste, fraud, and abuse," Waxman wrote in a June 14 letter to GSA Administrator Lurita Doan. "For these reasons, I request a detailed briefing on your proposal, and I ask that you delay its implementation until GSA demonstrates whether necessary safeguards are in place," he said, adding that he wants the oversight committee to be briefed before June 29.

GSA Federal Acquisition Service Commissioner Jim Williams, in a statement released by the agency in response to Waxman's letter, said that GSA's efforts "to help other agencies fill their need for support services to improve contracting" would not entail "oversight of contractors or committing Government funds." Nonetheless, Williams said the agency "will suspend the addition of acquisition support services to the Mission Oriented Business Integrated Services (MOBIS) Consolidated Schedule so we can meet with Congress to understand and respond to any concerns."

In his letter to GSA, Waxman said that over the last six years, "federal auditors have repeatedly warned that a large and recurring problem in contract management has been inadequate oversight by federal procurement officials" performing the government's traditional role of contract oversight. "Outsourcing additional procurement responsibilities could contribute to the erosion of procurement oversight by federal officials, leading to more wasteful spending," he stated.

Waxman also referred in his letter to an earlier GSA proposal "to increase the outsourcing of contract oversight" by replacing "experienced federal auditors working for the GSA inspector general with inexperienced private contractors." Privatizing the IG's contract audit process and hiring private contractors to oversee other private contractors "runs the risk of creating new dangers, including reduced savings for taxpayers, conflicts of interest among contractors, and lengthy disputes over access to proprietary business information," Waxman warned in a letter to Doan last December.

With respect to potential conflicts of interest, the California Democrat harkened back to a report he and other congressional Democrats issued in 2004 in which they documented conflicts of interest arising when contractors performing oversight of Iraq reconstruction contracts had business ties with the contractors they were overseeing. "Our findings were confirmed by the Special Inspector General for Iraq Reconstruction," who in 2006 "determined that the Bush Administration's decision to let a private contractor oversee the six main reconstruction contracts in Iraq resulted in inefficient management and aggravated existing problems," Waxman said. In light of these findings, GSA's reported plan to allow the contracting officers who purchase the acquisition support services via the FSS to require the selected contractor to certify that there is no conflict of interest does not inspire confidence, Waxman observed.

Waxman Contracting Trends Report Finds Worsening Federal Procurement Practices

As part of a continuing effort to raise awareness about what he views as "problematic practices" in federal contracting, House Oversight and Government Reform Committee Chairman Henry Waxman (D-CA) June 27 released a report on federal procurement spending and announced updates to the committee's database on contracts that are "plagued by waste, fraud, abuse, or mismanagement."

The report, a follow-on to one released a year ago by Waxman's then-committee minority staff, assesses government procurement spending from 2000 to 2006 and identifies what are described as "worrisome trends identified last year [that] have worsened significantly." "For the first time, the federal government now spends over 40 cents of every discretionary dollar on contracts with private companies," the report said, compared to 33 cents in 2000.

According to the report, federal procurement spending reached \$412.1 billion in fiscal year 2006, up from \$337.5 billion in 2005 and \$203.1 billion in 2000. Also, spending on "no-bid and limited-competition contracts" increased threefold compared with the value of federal contracts awarded without full and open competition since 2000, the report said.

Spending on what the report calls "no-bid and limited-competition contracts" grew by more than \$60 billion in 2006 to \$206.9 billion--or 50.2 percent of the total--according to the report. The government spent \$145.1 billion on such contracts in 2005, and \$67.5 billion in 2000, it said. The contracting data used for the report is based on a procurement database application published by Eagle Eye Inc.--the Eagle Eye Federal Prime

Contracts Database--containing data derived from the Federal Procurement Data System maintained by the General Services Administration.

Waxman is the sponsor of the "Accountability in Contracting Act" (H.R. 1362) passed by the House March 15. That bill includes several provisions--including one relating to the disclosure of questioned contract costs and another that discourages the government's use of cost-plus type contracts--that contractor groups oppose.

In addition to their concerns with these specific provisions, contractor groups say Waxman presents an oversimplified, and sometimes distorted, picture of complex contracting issues. "While we share Chairman Waxman's commitment to an effective, transparent, and results-focused federal procurement process, we are disappointed that the report issued today is misleading in the scope of its assumptions and fails to adequately explore or explain the circumstances in which contracts were awarded or have been executed," said Professional Services Council President Stan Soloway in a June 27 statement.

For example, definitions and assumptions underlying allegations made in the report regarding "noncompetitive contracts" or contracts "awarded without full and open competition" are "misleading and simply wrong," Soloway said, in an apparent reference to Waxman's labeling as "noncompetitive" or "no-bid" the task orders issued under large umbrella contracts that were themselves competitively awarded. "To further assert that every nickel spent under every one of those contracts represents tax dollars that were wasted or abused is patently unreasonable," he said.

PSC also said that the report "blithely assumes that all cases of cost increases or schedule changes on contracts result from poor contractor performance or 'overcharging,' ignoring the well-known challenges associated with legitimate changes, changing mission needs or requirements, and numerous other factors unrelated to the contractor's performance." "[T]he report is unfortunately overly simplistic and highly misleading and thus adds little to the important discussions surrounding the real and immediate challenges facing the government and its acquisition processes," Soloway said.

Separately, OMB's Office of Federal Procurement Policy said in a June 1 statement that the percentage of federal contract dollars competed "has remained relatively constant at around 64 percent since 2000." Contract dollars competed have "significantly increased" from \$130 billion to \$253 billion between 2000 and 2006, it said. However, OFPP May 31 issued a memo to federal agency acquisition officers on steps to increase competition in acquisition, especially related to the placement of task and delivery orders valued at more than \$1 million (87 FCR 645, 6/12/07). OFPP's efforts, which would entail amending the Federal Acquisition Regulation, would address some of Waxman's concerns regarding contract competition.

Waxman's latest report includes separate sections on overall procurement spending, program spending by agency, and the award of procurement dollars to contractors. Notably, data in the report shows procurement spending between 2000 and 2006 increasing from \$3.5 billion to \$15.1 billion, or 337 percent, at the Homeland Security Department, and from \$1.2 billion to \$4.7 billion, or 280 percent, at the State Department. The spending increase at DOD during that same period was 123 percent, from \$133.5 billion to \$297.7 billion in 2006, according to the report data.

Meanwhile, government procurement spending "has been concentrated among a few large private contractors," the report said. The 20 largest federal contractors received 38 percent of the contract dollars awarded in 2006, up from 36 percent in 2005, the report said. It listed Lockheed Martin, Boeing, Northrop Grumman, Raytheon, and Halliburton as the government's top six contract award recipients. Collectively, they received \$99.9 billion in 2006, 24 percent of all federal contract dollars, the report said.

Another part of the report targets what it calls "the growing waste, fraud, abuse, and mismanagement in federal procurement" over the last six years under the Bush administration. "Reoccurring problems afflict nearly every aspect of federal contract planning, award, and oversight," the report said, noting increases in the award of contracts without full and open competition, cost-plus type contracts, and "commercial item" authorities.

More than 700 reports by government auditors and investigators were reviewed by House Oversight committee staff, the report said. Government Accountability Office reports, agency inspectors general reports, and other government reports and data are cited as report sources. The report identified 187 contracts with a combined value of \$1.1 trillion as involving some form of "significant waste, fraud, abuse, or mismanagement."

Those 187 contracts also are part of a contracts database recently updated by the Oversight committee. Included in the database are descriptions of contracts that have been the focus of committee hearings, such as the Coast Guard's Deepwater fleet modernization program, the DHS SBInet border security program, and three contracts DOD awarded to former Halliburton subsidiary KBR--the Logistics Civil Augmentation Program, and Restore Iraqi Oil contracts one and two.

The House Committee on Oversight and Government Reform report, "More Dollars, Not Sense: Worsening Contracting Trends Under the Bush Administration," is available at:

<http://oversight.house.gov/features/moredollars/moredollars.pdf>. The committee's database on contracts is available at: <http://oversight.house.gov/features/moredollars/contractsearch.asp>.

Current, Former IGs Endorse Legislation To Improve IG Independence, Accountability

Legislation (H.R. 928) that would enhance the independence and accountability of federal agency inspectors general was generally well-received by former and current IGs during a June 20 House Oversight and Government Reform subcommittee hearing.

Sponsored by Rep. Jim Cooper (D-TN), the Improving Government Accountability Act (H.R. 928) would amend the Inspector General Act of 1978 to:

- establish seven-year terms for inspectors general;
- set strict statutory criteria for removing IGs from office;
- authorize IGs to submit appropriations and budget requests for their offices directly to the Office of Management and Budget and Congress, rather than including them in the agency requests;

- establish a unified IG council with its own appropriations to replace the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency;
- define IG offices as separate agencies; and
- provide that all IGs enjoy the same law enforcement authority.

The bill will "improve the institutional standing of Inspectors General, and better guarantee their independence and accountability," Rep. Edolphus Towns (D-NY) said at the outset of the hearing by the Subcommittee on Government Management, Organizations, and Procurement, which he chairs.

Clay Johnson, OMB's Deputy Director for Management, disputed the argument that the independence of IG offices would be advanced if they were allowed to submit their budgets independently. Johnson, who chairs the two IG councils--the President's Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE)--focused his testimony on the importance of good rather than adversarial working relationships between agencies and their IGs.

Christine Boesz, inspector general of the National Science Foundation and vice chair of the ICIE, and Phyllis Fong, inspector general of the Agriculture Department and chair of the PCIE's Legislation Committee, generally endorsed the bill during the hearing, as did Eleanor Hill, former IG for the Department of Defense, and Kenneth Mead, former IG for the Transportation Department.

Recent situations involving the inspectors general at the Department of Defense and the General Services Administration are illustrative of the challenges to IG independence posed by the politicization of appointments and the IGs' lack of control over their offices' budgets, according to a subcommittee report released in conjunction with the hearing.

The report builds on one in 2004 by the then Democratic minority staff charging that President Bush had favored individuals with Republican backgrounds for IG appointments, while his predecessor President Clinton typically appointed nonpartisan career public servants to IG positions. The latest report is the result of a staff review of incidents in the past five years that raise questions about the independence and accountability of inspectors general.

In the case of DOD, the report recounted that IG Joseph Schmitz resigned in 2005 during a congressional investigation of whether he "had blocked criminal investigations of senior Pentagon officials" and "submitted a report to the White House for review before it was issued." The report also pointed out that Schmitz "left the Pentagon to become general counsel for the parent company of Blackwater USA, a major government and defense contractor." More recently, GSA Administrator Lurita Doan's reportedly contentious relationship with the agency's watchdog office was among a host of "procurement irregularities" examined by the committee.

At issue was Doan's plan to cut \$5 million from the IG's fiscal year 2008 budget dedicated to conducting pre-award reviews to verify pricing information, and instead contract out that work to small businesses. Doan denied charges that she was trying to influence which audits or investigations the IG pursues, and instead linked the proposal to an effort to balance the agency's budget.

GSA ultimately decided in favor of maintaining the status quo and keeping the \$5 million and pre-award audit work inside the IG's office. Politicization of inspectors general, interference by agency management, the possibility of retaliatory agency cuts in IG office budgets, and "campaigns by management to remove IGs who are aggressive in their investigations all jeopardize the independence of the Inspector General," the report said. "At the same time, a lack of consistent and credible mechanisms for investigating and resolving allegations of misconduct by IGs may threaten accountability and credibility."

In her testimony, former DOD IG Hill told the subcommittee she has been "genuinely dismayed by reports and suggestions in recent years of less congressional oversight, coupled with reports of less independence and less professionalism in the IG community." In response to a question from Towns, Hill, who was DOD's IG from 1995 through 1999, said that "congressional oversight is part and parcel of the equation" that is the foundation of IGs' independence. The "creative tension" between Congress, individual agencies, and their IG offices is what makes the watchdogs "stick to the facts," she said.

"Congress has to be willing to insist on thorough and objective oversight from the IG, separate and apart from the views of any Department or any Administration," Hill said in her testimony. "When that happens, the IG has to walk a fine line between what may be the very different views of Congress and of the Department: the overwhelming incentive in those situations is for IGs to resist attempts at politicization from either side. The best way for IGs to succeed, when answering to these two "masters," is to conduct independent, professional, and clearly fact-based inquiries," Hill said in her testimony.

The committee report, [Inspectors General: Questions of Independence and Accountability](http://governmentmanagement.oversight.house.gov/documents/20070620214436.pdf), is available at: <http://governmentmanagement.oversight.house.gov/documents/20070620214436.pdf>.

CODSIA Strongly Opposes FAR Changes On Data to Support Price Reasonableness

Proposed Federal Acquisition Regulation changes intended to resolve what the rule writers said is "confusion" regarding the data that may be obtained by the government to determine the reasonableness of a contract price will in fact result in "greater confusion and ambiguity," a defense contractor group said June 22.

The Council of Defense and Space Industry Associations expressed "grave concerns" about the changes called for in the April 23 proposed rule, and urged the FAR councils to hold a public meeting before proceeding further. CODSIA said it "strongly" opposes the rule in its present form, and argued that the proposed changes conflict with the Truth in Negotiations Act and provisions of the Federal Acquisition Streamlining Act and the Federal Acquisition Reform Act that exempt commercial item acquisitions from TINA requirements for submission of certified cost or pricing data and penalties when such data are not accurate, current, and complete.

In addition, the group said the proposed rule would:

- conflict with TINA by "significantly" re-prioritizing the government's hierarchical policy preferences for the types of information to be obtained from contractors to support fair and reasonable pricing, as outlined in FAR 15.402 and 15.408; and
- provide expanded audit rights not contemplated by TINA.

"We believe the proposed rule will generate more rather than less confusion on both sides of the contracting community when commercial items are being procured by putting contracting officers in a position where the only safe alternative will be to demand the maximum amount of data from any offeror, thereby creating more risk for offerors and contractors. The long-term impact of this rule will be to make it more difficult for the Government to procure needed products and services in the commercial market place," CODSIA warned.

According to the group, the proposed rule appears to be expressing the rule writers' dissatisfaction with the ability of the federal acquisition workforce to do "price analysis" rather than "cost analysis." "In lieu of Government contracting officers being trained in appropriate techniques for conducting market research, price analysis, and reaching reasonable conclusions with regard to the price of an item, this proposed rule shifts the burden to the contractor to provide unnecessary and unjustified data," CODSIA asserted.

In issuing the proposed rule, the FAR councils explained that the revisions were drafted to make clear that government contracting officers "should be free to ask for any information necessary to determine the price to be fair and reasonable". The proposed rule would amend the definitions at FAR 2.101 to add new a term, "data other than certified cost or pricing data," which would mean "any data, including cost or pricing data and judgmental information necessary for the contracting officer to determine a fair and reasonable price or price reasonableness."

This term would replace the current term "information other than cost or pricing data" in order to make the regulations more consistent with TINA, the rule writers said. Contracting officers would be instructed to obtain "data other than certified cost or pricing data" when certification is not required by TINA. The definition of "cost or pricing data" in FAR 2.101 also would be revised to remove the reference to certification, while an additional definition of "certified cost or pricing data" would be added.

In addition, the proposed rule would revise FAR 15.4 to "clarify the need and authority to obtain a detailed cost estimate, including cost or pricing data, when there is no other means to determine fair and reasonable pricing during price analysis even though the cost or pricing data will not be certified." As part of this clarification, the proposed rule would incorporate the instructions in Table 15-2 of FAR 15.408 as a mandatory format for the submission of required data when TINA applies.

In opposing these changes, CODSIA argued that they will eliminate the certification-based "bright line test" provided by current terminology, which has been "effectively applied" by both government and industry "to distinguish data that is subject to TINA from data that is not subject to TINA."

Further, the justification for the changes is questionable, the group suggested. The May 2001 report by the Defense Department inspector general cited by the rule writers appears to propose adherence to then-current rules, and the Defense Acquisition University study on the Air Force tanker lease program also cited in the proposed rule remains unavailable to industry for review, CODSIA said. With regard to the proposed reference to judgmental data, the industry group warned of "the risk inherent in employing within regulatory provisions terminology that is ill-defined or unbounded."

"In contrast to the well-understood concept of 'cost or pricing data,' whether certified or not, the Government's view of which judgments or estimates must be disclosed because they may have a bearing on the reasonableness of a proposed price is completely undefined," CODSIA said. The fact that there will not be defective pricing liability with regard to such judgments--because TINA does not require the submission of judgmental information--"may be of small comfort if it is still necessary to defend a False Claims Act case, no matter how lacking in merit such a case might be," CODSIA said.

FAR Changes Issued to Implement New SBA Size Recertification Rule

A governmentwide rule published July 5 amends the Federal Acquisition Regulation to implement new Small Business Administration size recertification requirements that took effect June 30.

The SBA rule, issued Nov. 15, 2006, and the new interim FAR rule and contract clause require small businesses holding long-term federal contracts to re-certify their size before the beginning of the sixth contract year and before any options are exercised extending the contract beyond that period, as well as following a contractor merger or acquisition or a novation.

The FAR rule, included in Federal Acquisition Circular 2005-18, applies to solicitations issued and contracts awarded on or after June 30. It also outlines procedures for protesting recertifications.

In announcing that the new SBA rule is in effect, SBA Administrator Steven Preston said in a statement July 3 that the recertification requirements will "ensure federal rules properly classify small business contracts." Recertification is necessary because federal agencies up to now have been able to count all contracts originally awarded to small businesses as small business contracts for up to 20 years, even if those companies were acquired by large corporations, according to the statement.

Under the new rule, if a company is no longer small, the contract continues but the federal government can no longer count it as a small business contract. As a result of the rule, SBA said, most large businesses credited with small business contracts will no longer be counted as small businesses effective June 30, and almost all of the remaining large businesses will be "scrubbed" from the federal government's small business contracting database within a year.

Accordingly, those contracts will not be counted for purposes of the requirement that at least 23 percent of federal contracts go to small businesses. "Because more than five million actions are recorded in the federal government's contracting database each year, as a practical measure contracting officers are being allowed to review short-term contracts as they are renewed annually," SBA said.

Separately, SBA is sending a letter to the chief executive officers of up to 800 of the government's largest federal prime contractors asking for their help in identifying small business contracts that their corporations, subsidiaries, and divisions may have "so they can be correctly recorded." The letter from the SBA administrator also asks the CEOs to "flag any short-term contracts that have options greater than one year, and voluntarily recertify those contracts as 'other than small.'" The SBA letter asks that these steps be taken by Sept. 30.

For contracts awarded before June 30, the FAR rule says contracting officers must modify existing long-term contracts (contracts of more than five years in duration) to include the new clause, FAR 52.219-28, Post-Award Small Business Program Representation. Also, COs must modify contracts awarded to small business concerns, other than long-term contracts, to include the clause at the time that an option is exercised.

The new clause requires that a contractor "rerepresent" its size status within 30 days after execution of a novation agreement, merger, or acquisition or within 30 days after modification of its contract to include 52.219-28 if the novation agreement, merger, or acquisition took place prior to inclusion of the clause. For long-term contracts, the contractor must rerepresent its size within 60 to 120 days prior to the end of the fifth year of the contract and within 60 to 120 days prior to the exercise date specified in the contract for any option thereafter.

The clause also requires that the contractor rerepresent its size status in accordance with the size standard in effect at the time of the representation that corresponds to the North American Industry Classification System Code assigned to the contract.

It also directs that contractors validate or update their representations in the Online Representations and Certifications Application and in their data in the Central Contractor Registration, as necessary, "to ensure they reflect current status," and that they notify their COs that they have done so.

The clause provides that the small business size standard for a contractor providing a product which it does not manufacture itself, for a contract other than a construction or service contract, is 500 employees.

Comments on the interim rule are due Sept. 4 (72 Fed. Reg. 36,852, 7/5/07). The rule is available at: <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-3279.pdf>.

Maloney Bill Seeks More Data On Contractor Performance, Integrity

Rep. Carolyn Maloney (D-N.Y.) July 12 introduced legislation calling for more disclosure of information about federal contractors' involvement in civil, criminal, and administrative proceedings initiated by the federal government.

The Contractors and Federal Spending Accountability Act of 2007 (H.R. 3033) would require increased disclosure by offerors or bidders seeking federal contracts, and also would mandate the creation of a centralized database of such information.

In addition, the bill would require the amendment of federal suspension and debarment regulations to establish a presumption of nonresponsibility in cases of repeated violations that constitute grounds for debarment.

The bill is similar to Maloney's Contractors Accountability Act (H.R. 6243), introduced late in the 109th Congress to improve federal oversight of contract actions and strengthen the government debarment and suspension system. However, the new bill includes a more extensive list of what it describes as "information regarding integrity and performance" that would be required for submission by offerors and inclusion in a database for contracting officers and suspension and debarment officials.

Although the Past Performance Information Retrieval System, the Excluded Parties List System, the Central Contractor Registration, the Federal Procurement Data System, and the Federal Assistance Award Data System include records and data related to contractors and federal spending, the bill says, "there is no centralized, comprehensive government database on judicial actions, consent decrees, administrative agreements, terminations, or settlements with respect to potential federal contractors or assistance participants."

This lack of information "compromises the federal government's ability to safeguard the integrity" of federal procurement activities, according to Maloney's bill.

The bill calls on the General Services Administration to create a database of information regarding civil, criminal, and administrative proceedings initiated or concluded by the federal government and state governments against recipients of federal contracts in the past five years. Details are to include:

- a brief description of the proceedings and amounts paid to the federal or state government as a result of the proceedings;
- all federal contracts awarded to that contractor that were terminated due to default;
- all federal suspensions or debarments of that contractor;
- all suspension and debarment show cause orders received by that contractor; and
- all administrative agreements signed by that contractor.

"Without such a database or disclosure, federal contracting officers and suspension and debarment officials lack important information relevant to present responsibility," the bill says. A separate provision of the bill would require the disclosure of similar information by applicants for federal contracts, "whether by submission of a proposal, any solicitation, bid, or other offer."

The disclosure requirements in this provision are somewhat more detailed, covering "all administrative, civil, and criminal settlements, agreements, consent decrees, enforcement actions, corrective actions, compelling reason waivers, and other like judgments, orders, decisions, and final dispositions with respect to federal contracts or assistance that the person is implementing within 5 years after the date of submission of the application."

Maloney's bill also would amend federal suspension and debarment regulations to provide "that a person shall be presumed nonresponsible with respect to award of a federal contract or assistance if the person has rendered against the person twice within any 3-year period a judgment or conviction for the same offense, or similar offenses, if each conviction constitutes a cause for debarment under the governmentwide debarment system."

This presumption can only be rebutted by clear and convincing evidence "that the person is presently responsible and has corrected the conditions that gave rise to the violations," the bill says. In addition, the bill would direct the Interagency Committee on Debarment and Suspension to:

- resolve issues regarding which of several federal agencies should take the lead in initiating suspension or debarment proceedings;
- help agencies pool resources and achieve "operational efficiencies" in the governmentwide suspension and debarment system;
- authorize the Office of Management and Budget to implement changes to the system endorsed by a majority of the interagency committee members; and
- report annually to Congress on involvement in the suspension and debarment system by individual agencies, as well as on efforts to improve the system.

The bill cites statistics from the Project on Government Oversight's federal contractor misconduct database indicating that, since 1995, of the top 50 federal contractors based on total contract dollars received, nine have a total of 12 resolved criminal cases in which they have paid a total of \$161 million in penalties. Moreover, "since 1995, such 50 contractors have paid approximately \$12,000,000,000 in fines, penalties, restitution, and settlements, and more than 350 instances of misconduct have been identified," the bill says, again referencing the POGO database.

DOD Rule on Pass-Through Charges Meeting Resistance from Contractor Groups

The interim rule issued by the Defense Department in April to implement a statutory provision intended to protect the government from paying excessive pass-through charges when DOD contractors subcontract work is meeting with resistance from contractor groups, who are urging that it be substantially rewritten.

In separate and extensive comments, the Aerospace Industries Association, the National Defense Industrial Association, and the Professional Services Council each took issue with the rule's requirement that DOD contractors that subcontract more than 70 percent of the total cost of work performed under a contract must provide information to the department on their indirect costs, profit, and the value they add to the subcontracted work.

The 70 percent figure is not taken from the statute, and no rationale has been provided for its use, the three contractor groups said.

The groups also were unanimous in asserting that whether pass-through charges are excessive should be a one-time determination made by the contracting officer at the time of contract award. "We strongly oppose any after-the-fact contracting officer 'look back' determination," PSC said in its July 6 comments.

Similarly, AIA, in its June 29 comments, asserted that "[i]t should be the Government's responsibility to complete the market research in advance of the solicitation that is sufficient to understand the market place for the item being acquired, identify the typical extent of subcontracting, and avoid award of contracts where the extent of subcontracting is excessive when compared to typical business practice for that item or service."

In the same vein, NDIA urged June 28 that if contractors and the government "work together to avoid excessive pricing of pass-through charges at the point of price negotiations, the need for after-the-fact audits, unilateral determinations, and costly disputes is minimized to everyone's advantage."

The interim rule, issued April 26, implements Section 852 of the fiscal year 2007 defense authorization act (Pub. L. No. 109-364), which directed DOD by May 1 to issue regulations to ensure that pass-through charges are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor on contracts, subcontracts, task orders, and delivery orders (87 FCR 507, 5/1/07).

Section 852 defined an excessive-pass through charge as "a charge to the Government . . . for overhead or profit on work performed by a lower-tier contractor or subcontractor (other than charges for the direct costs of managing lower-tier contracts and subcontracts and overhead and profit based on such direct costs."

Congressional concerns over pass-through charges in government contracting have arisen in recent years at oversight hearings related to the government's use of contractors in rebuilding projects in Iraq and the Gulf Coast following Hurricane Katrina. Also, Senate Armed Services Committee Chairman Carl Levin (D-Mich.) offered an amendment to the Senate's fiscal year 2006 defense authorization bill that was intended to address excess pass-through charges under DOD time-and-materials (T&M) contracts, but that provision was dropped from the final measure.

The DOD rule includes a solicitation provision and contract clause that prohibit excessive pass-through charges and require offerors and contractors to identify the percentage of work that will be subcontracted, with the 70 percent figure triggering the requirement for submission of further information to the department. Under the rule, the contractor must insert the clause in its subcontracts, and provide the same information to the contracting officer for any subcontractor that subcontracts to a lower-tier subcontractor more than 70 percent of the total cost of the work to be performed under its subcontract.

The excessive pass-through requirement applies to negotiated fixed-price contracts, but does not apply to other types of fixed priced contracts such as firm-fixed-price contracts awarded on the basis of price competition and fixed-price contracts for commercial items.

"The '70% rule' that requires identification and discussion of value added for pass-through charges is not consistent with the legislation, causes confusion and is unnecessary," NDIA said. "No rationale has been presented for limiting price negotiation disclosure and discussion to only those contracts with more than 70% subcontracting."

"Teaming among defense contractors is a common (sometimes DOD-mandated) practice on major programs and consequently the 70% threshold is too low," according to AIA. "The prime contractor on such teams always adds significant value and should not be required to demonstrate that fact where it is performing 30% of the work," AIA said, adding that the percentage should be raised to 90 percent or eliminated all together.

"The 70% factor adopted in the regulations is not provided for in the statute and there is no explanatory statement or justification for adopting such a low percentage," PSC wrote. Moreover, the "use of a fixed percentage factor excludes other potential situations where excessive pass-through costs may exist and therefore may not be consistent with the legislative purpose," the group cautioned.

Further, the rule at least should be modified to treat the 70 percent amount "as a binary, triggering condition at the time of contract award," PSC advised. If the offeror's proposal does not identify 70 percent or more of the work to be performed under subcontracts, "the contracting officer's one time determination--at the time of contract award--must be that there is not excessive pass through of costs and no further action is required by either the contractor or the contracting officer, absent a change in the amount of the subcontract," it said.

In arguing that determinations of pass-through charges should be made "at the conclusion of negotiation, not after contract award," AIA complained that the rule as written "subjects contractors to continuing post-award assessments by the government--with audit rights--of pass-through charges and potential disallowances or recoveries throughout the life of a contract. This open-ended aspect of the rule is onerous, not required by statute, unjustified, and inappropriate," AIA said.

AIA urged that the rule should be written "solely as a direction" to government contracting officers to deal with issues of contract price fairness and reasonableness prior to entering into a contract with industry. The rule inappropriately focuses on items such as contractor overhead rates, allocation of costs, and accounting practices, AIA said. The appropriate approach, it added, "would be for the rule to focus on whether or not contractors and/or subcontractors 'add value' with a determination that should be made upfront, pre-award by the Contracting Officer."

NDIA wrote: "Not only should pass-through charges be resolved at the time of price negotiation, ... the negotiated resolution of such issues should be documented." NDIA also took issue with the rule's section on "Recovery," saying that it implies separate audits to find excessive pass-through charges on an after-the-fact basis, including on fixed-price contracts. This would be inequitable because it would allow one party--the government--to unilaterally change a mutually agreed-upon price, NDIA said.

The rule should "include guidance that permits the Contracting Officer to enter into an advance agreement" that excessive pass-through charges do not exist in the contract, PSC said.

Another key concern with the rule, according to PSC, is its failure "to fully implement the statutory exclusion for firm fixed price subcontracts or task orders awarded based on adequate price competition or for commercial items." Further, PSC recommended that the rule recognize additional exceptions for:

- competitively awarded T&M contracts, which already are subject to a Defense Federal Acquisition Regulation Supplement clause governing establishment of subcontractor rates and application of profit; and
- all current regulatory exceptions to the submission of cost or pricing data as specified in the Federal Acquisition Regulation, as well as pricing actions below the Truth in Negotiations Act Threshold (TINA).

Similarly, AIA called for exempting any proposal that is based on cost data. "The onerous burdens added by this interim rule are entirely unnecessary in the cost-base pricing environment where TINA and the Cost Accounting Standards (CAS) are applicable," it said. Among other points made by the groups were that:

- determination of excessive pass-through charges should not be treated as a cost principle, but rather as a matter of reasonableness;
- the rule lacks clear definitions of such key concepts as "value" and "subcontract"; and
- application of the rule is unclear in such situations as indefinite delivery/indefinite quantity contracts and proposed work scope changes after award.

House Ways and Means Votes to Delay 3% Contractor Tax Withholding Program

The House Ways and Means Committee July 18 voted to delay by one year, until Dec. 31, 2011, a requirement that federal, state, and local governments withhold 3 percent from all payments for goods and services.

The delay would allow for a Treasury Department study, called for by the bill, of the impact that the withholding requirement would have on government contractors. In a 23-18 vote, the committee approved the Tax Collection Responsibility Act of 2007 (H.R. 3056), which also would kill the private debt collection program at the Internal Revenue Service.

After a partisan debate over whether government employees or private contractors are better suited to collect certain taxes, all 17 Republicans voted against the \$1.168 billion bill and were joined in opposition by Rep. John Tanner (D-Tenn.). A spokesman said Tanner believes as long as there are "proper safeguards" in place, the program is a "reasonable, business-minded approach" to collecting revenue that would otherwise go uncollected by IRS. The cost of the legislation is entirely offset. There is no schedule for the bill's floor consideration at this time.

The 3 percent contractor withholding provision was inserted into the conference report of the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) (Pub. L. No. 109-222) at the behest of the Senate. Legislation to repeal the provision has been introduced in both chambers, but the Government Withholding Relief Coalition, which represents a number of industry groups, said in June that their best bet for action then resided in the House.

Rep. Wally Herger (R-CA) made two attempts at altering the contractor withholding provision, but was defeated both times, in part, because he also sought to strike the language ending the private debt collector program.

Herger expressed opposition to committee Democrats tying a bipartisan issue such as the contractor withholding language to a divisive issue like private debt collection, calling it a "poison pill" that undermines the work he and Rep. Kendrick Meek (D-FL) have done to shore up support for a full repeal of the withholding language.

Their proposal, he said, "deserves consideration alone and on its own merit." Meek said he felt "momentum is building toward complete repeal of this unfair 3 percent withholding tax provision."

The Information Technology Association of America June 20 issued a statement applauding the Ways and Means move. "While we continue to push for a full repeal of this egregious and ill-considered withholding requirement, the delay sends a welcome signal that Congress is prepared to reconsider," said ITAA President Phil Bond. "This withholding will be a default tax on government vendors that punishes the majority of tax-compliant companies for the already illegal acts of a few."

The Ways and Means Committee fought off on a party-line basis a number of Republican amendments that sought to strike the language ending the debt collection program. The Tax Collection Responsibility Act of 2007, as introduced, would have immediately ended the private debt collection program. The committee adopted a substitute amendment providing that the repeal of the program does not apply to any contracts entered into before July 18, 2007. The substitute also clarified that any contract entered into after that date would be void upon enactment.

Much of the debate focused on the \$345 billion annual tax gap and who should be dealing with delinquent taxpayers--IRS employees or private contractors. "A lot of us strongly believe that the chore of collecting taxes ... should be a government function and not done by the private sector," said Chairman Charles Rangel (D-NY).

Rep. Sander Levin (D-MI) slammed the administration, saying it failed over the past few years to request enough resources for IRS, while Michael Desmond, the Treasury Department's tax legislative counsel, said the administration has requested "steady" increases over the last few years. Ways and Means Oversight Subcommittee ranking member Jim Ramstad (R-MN) said the program should remain operational because it helps narrow the tax gap. Ramstad said that without the program, IRS would assign workers elsewhere and this money would not be collected.

"Repealing this program would be a huge step backward in our efforts to close the tax gap," Ramstad said. "This is tax debt that would not be collected unless it is collected by the private debt collectors." The committee defeated by a vote of 18-23 an amendment by Rep. Kevin Brady (R-TX) that would have struck the language repealing the private debt collection program. He said there "clearly is a difference in philosophy" between the two parties in who should collect taxes, but said the program must be retained because of how it helps the tax gap. Tanner was the only Democrat to vote for the amendment.

Kerry, Snowe Plan Bipartisan Push For Small Business Procurement Reform Bill

Sens. John Kerry (D-MA) and Olympia Snowe (R-ME), the chairman and ranking member of the Senate Small Business and Entrepreneurship Committee, indicated July 18 that they are planning to push for bipartisan small business procurement legislation in the 110th Congress.

Referring to their joint effort last year to attach reforms to small business reauthorization legislation, Kerry said during a committee hearing on small business contracting: "This year we want a bill that will move." The Small Business Administration reauthorization bill that Snowe introduced in August 2006 contained "many good provisions" related to small business contracting, but "we couldn't get them through the Senate," Kerry said.

The 2006 small business reauthorization bill would have made it easier for the federal government to prosecute, suspend, and debar large corporations that obtain government contracts by misrepresenting themselves as small businesses. It also contained provisions to promote contracting officer compliance with small business mandates, require closer monitoring of small business subcontract achievement by large business prime contractors, address the impact of contract bundling, increase small business participation in multiple award contracts, and ensure small business participation in federal disaster recovery.

This year's bill, Kerry said, will be one that "is measured and that has a chance to succeed. It won't be perfect, but it will be a start." While not getting into the specifics of what may be included in their bipartisan bill, Kerry and Snowe both made clear during the hearing that a key focus will be on ensuring that small business contracting goals are met.

Kerry also suggested that reform legislation may address the challenges small businesses face as a result of contract bundling, size standards, a lack of protection for subcontractors, and difficulties getting access to the General Services Administration's schedule program. The House May 10 overwhelmingly endorsed bipartisan legislation (H.R. 1873) aimed at improving federal procurement opportunities for small businesses.

The Bush administration has an "abysmal record when it comes to giving small businesses a fair opportunity to compete for federal contracts," Kerry said at the outset of the hearing. For her part, Snowe said she is "alarmed that only one federal small business contracting program--the small disadvantaged business program--has met its statutory goal, and that the three other small business 'goaling' programs have all fallen drastically short."

She pointed out that in fiscal year 2005 federal agencies failed to meet the five percent small business goal for the women-owned small business program, achieving only 3.3 percent. They also failed to meet the 3 percent goal for the Historically Underutilized Business Zone (HUBZone) program, achieving only 1.9 percent. "Most troubling of all, our nation's service-disabled, veteran-owned small businesses (SDVOSBs) received a governmentwide, paltry total of only 0.6 percent of its three percent goal," Snowe said in her opening statement. She particularly criticized the Defense Department for being "woefully short" of the goal, awarding only 0.49 percent of contracts to SDVOSBs.

"This is no way to treat those who have given their all for this country--and who seek to contribute even more," Snowe said. During the hearing, Kerry grilled Anthony Martoccia, director of DOD's Office of Small Business Programs, on the administration's shortcomings with respect to expanding opportunities for small businesses generally. Martoccia assured the committee chairman that DOD is committed "from top to bottom" to achieving the 3 percent goal for SDVOSBs.

In another area, Martoccia in his written testimony said DOD is concerned that unrealistically low small business size standards "will or have had a negative impact on the Defense small business supplier base." It is DOD's view that a number of size standards representing critical defense industries have not kept pace with the U.S. economy, Martoccia said.

The size and complexity of engineering professional and information technology services within DOD, for instance, have increased dramatically over the last decade, Martoccia said, and DOD favors the adjustment of small size standards as needed to keep them in line with the dynamics of the U.S. economy and the U.S. military. "Although it may be difficult to fathom a multi-million dollar firm as 'small', when judged within the context of the industry and the capital investment necessary to start, sustain, and build a business, the concept becomes a reality," he pointed out.

Last June, according to Martoccia, SBA advised that it was proceeding with a comprehensive review of the size standards and that it would focus on those associated with military systems and the engineering services. Kerry said in his opening statement that updating the size standards is long overdue and needs to be done "in a way that doesn't harm small business." Moreover, reevaluating size standards "is critical as agencies promote larger and larger contracts," the committee chairman said. "Small businesses should not be restricted to just subcontracting due to their size, which is increasingly becoming the case."

Kerry also was critical of SBA's new size re-certification rules, which require small businesses to recertify their size standards on long-term contracts at the end of the first five years of a contract and thereafter whenever a contract option is exercised. The new rule amended regulations under which a business's size status was determined as of the date that it submitted its initial offer, including price, for the contract and generally continued for the life of the contract.

Kerry said those regulations allowed large businesses to retain small business contracts. With respect to the new rule's recertification requirements, Kerry asked: "Why should we allow big businesses to get small business set-aside contracts for one day let alone five years?" Language included but ultimately dropped from last year's small business reauthorization bill would have required annual recertification.

Both Kerry and Snowe complained that GSA Administrator Lurita Doan failed to appear before the committee in keeping with the original plan for the hearing. Snowe said she had wanted the GSA head to explain why her agency decided last year to award a \$500 million contract for information technology support services under its governmentwide acquisition contract program for small disadvantaged firms rather than set aside the award for HUBZone firms.

In an October 2006 letter to Doan, Snowe complained that the federal government in general, and GSA in particular, "have developed a record of failing to deliver on their obligations under the Small Business Act to direct federal contracts to economically distressed areas."

Snowe said she also wanted to follow up on a request that she and Kerry recently sent to Doan asking that GSA postpone its decision to drop office supplies from the Global Supply Stock Program until Congress has a chance to examine the detrimental effect the change could have on small businesses.

Approximately 80 percent of the office supply procurements for the Stock Program are directed to small businesses, they said in a July 9 letter to the GSA administrator, expressing concern that these services will now be allocated to a handful of larger business supply companies.

Senate Acquisition Reform Bill Seek Input on Improving Bipartisan Effort

The Senate sponsors of wide-ranging acquisition reform legislation made clear July 17 that they are open to suggestions for improving the bill, known as the Accountability in Government Contracting Act (S. 680), as they solicited input from a panel of procurement experts during a hearing of the Senate Homeland Security and Government Affairs Committee.

Sens. Susan Collins (R-ME), ranking member of the committee and lead sponsor of the bill, committee Chairman Joseph Lieberman (I/D--CT), who joined Collins as a co-sponsor when she introduced the bill last February, and Thomas Carper (D--DE) sought the opinions of the hearing witnesses on a number of key provisions. The senators' questions focused largely on improving competition and promoting transparency. In this regard, the bill includes changes based on recommendations of the congressionally mandated Acquisition Advisory Board, which completed its work last December and whose chair, Marcia Madsen, was among the witnesses at the hearing.

Madsen summarized the panel's recommendations "regarding enhancements to competition," almost all of which have been included in S. 680, she said. Bill provisions reflecting the panel's recommendations address:

- higher standards of competition for sole-source orders over \$5 million;
- competition for multiple award contract task or delivery orders over the \$100,000 simplified acquisition threshold; and
- protests to the Government Accountability Office in connection with the issuance of a task or delivery order valued at more than \$5 million.

The advisory panel's recommendations "take into account the government's needs for access to the commercial marketplace, the growth in acquisition of services by the private sector and government alike, and the pivotal role of competition in the acquisition process," Madsen told the committee. She particularly emphasized the need for improved requirements development and competition, saying that large commercial buyers see these two factors as key to the successful acquisition of services.

Altogether, the advisory panel, which started work in February 2005 under a mandate in the Services Acquisition Reform Act, made 100 findings and 80 recommendations in areas including, but not limited to, competition and adoption of commercial practices in government acquisitions; the management and use of interagency contracts; acquisition workforce deficiencies; and the appropriate role of contractors supporting the government.

While the final report containing the advisory panel's findings and recommendations was sent to the Government Printing Office last January, the printed version was not released and transmitted to the Office of Federal Procurement Policy and members of Congress until July 17--the day of the hearing. Lieberman characterized the conclusion of the lengthy finalization process as a "happy coincidence."

David Walker, head of the Government Accountability Office, seconded the need for improved requirements development, saying that GAO has identified "establishing and supporting realistic program requirements" as one of four key systemic challenges in federal agencies' acquisition of goods and services. (The other three, identified in his written testimony, are: separating wants and needs; using contractors in appropriate circumstances and contracts as a management tool; and creating a capable workforce and holding it accountable.)

At the Defense Department, Walker said, GAO has found that program requirements are often set at unrealistic levels and then are changed frequently as recognition sets in that they cannot be achieved. In addition, DOD contracts, especially service contracts, often do not have definitive or realistic requirements at the outset in order to control costs or facilitate accountability.

More generally, Walker expressed support for the acquisition reform measure pending before the committee and told the bill sponsors GAO would be submitting assessments of specific provisions and suggestions for modifications. The government "needs to engage in a fundamental and comprehensive re-examination" of its "overall approach to contracting," Walker said. He emphasized that it is "imperative" to address long-standing systemic challenges in the acquisition arena "sooner rather than later."

On the other hand, Stan Soloway, president of the Professional Services Council, sought to assure committee members that, "despite its evident problems, the federal acquisition system functions quite well." Soloway called S. 680 a "valuable starting point for discussing how to ensure that the federal procurement process fully protects how the government spends taxpayer dollars while also enabling the government to acquire the full array of necessary resources and support."

With respect to specific provisions in the bill, Soloway said PSC "strongly" supports requiring that multiple award contracts be competed openly among all holders of the overarching contract. This requirement currently applies only to DOD. However, Soloway expressed concerns with bill provisions imposing time limits on task orders, allowing protests of task order awards under multiple award contracts, encouraging greater use of fixed price contracts rather than cost reimbursement contracts, and calling for debarment of federal contractors that are considered threats to national security.

The shortage of qualified federal acquisition professionals was another concern dominating discussion at the hearing. "Government spending on contracts has exploded, while the trained workforce that oversees them has shrunk," Lieberman said. This "has already caused widely publicized--and I might add infuriating--examples of waste, and the problem will only worsen in the years ahead if we don't act to better protect taxpayers' dollars."

Collins said S. 680 would address the shortage of federal acquisition professionals in a variety of ways, including establishment of:

- an acquisition internship program and a government-industry exchange program;
- an acquisition fellowship program offering scholarships in exchange for a commitment to federal service; and
- requirements for human-capital strategic plans by chief acquisition officers, with oversight provided by a new senior-executive-level position in the Office of Federal Procurement Policy.

PSC supports these steps, Soloway said, but believes "more must be done." Rather than "layering an already beleaguered workforce with more regulations and process demands," Soloway called for what he described as "a kind of workforce 'Marshall Plan' that aggressively addresses the hiring, retention, training, reward and development of the workforce" that is being asked to manage 40 percent of the federal government's discretionary budget.

It is standard commercial practice for companies to "develop, reward, and otherwise foster their core workforces differently, and even more aggressively, than they do other elements of the company," Soloway said, suggesting that it is time for the federal government to follow suit. Although the advisory panel made a number of recommendations for improving the acquisition workforce, Madsen singled out as key the suggestion that each agency engage in systematic assessment of and human capital strategic planning for its acquisition workforce.

"Without such plans, it is impossible to know how and to what extent a given agency's workforce is deficient," she said. "It is also difficult to know to what extent and how efficiently agencies are using contractors to support the acquisition function." Walker agreed with the need for strategic human capital planning with respect to agency acquisition workforces. Such planning lets agencies facing workforce challenges develop long-term strategies for acquiring, developing, motivating, and retaining staff to achieve programmatic goals, he said.

Agencies also need to "engage in broad, integrated succession planning and management efforts that focus on strengthening their current and future organizational capacity to obtain or develop the knowledge, skill, and abilities they need to meet their missions," according to the GAO head.

Senate Democrats Back Webb Bill To Create Wartime Contracting Commission

A number of Democratic senators have signed on as co-sponsors of a bill (S. 1825) introduced July 18 by Sen. Jim Webb (D-VA) that would establish an independent, bipartisan "Commission on Wartime Contracting" to investigate what many of the co-sponsors believe to be contracting problems in Iraq and Afghanistan that have resulted in the waste of American tax dollars.

Webb, along with Sen. Claire McCaskill (D-MO), six other freshmen Democratic senators, and Sen. Bernard Sanders (I-VT), originally introduced the measure as an amendment to the fiscal year 2008 defense authorization bill (H.R. 1585) as it was being debated by the Senate the week of July 16. They then introduced it as a stand-alone bill after Senate Majority Leader Harry Reid (D-NV) pulled the defense bill from the floor earlier July 18. According to the bill, the commission would be comprised of eight members—

two appointed by the Senate majority leader, two appointed by the speaker of the House, one appointed by the Senate minority leader, one appointed by the House minority leader, and one each selected by the secretaries of defense and state.

The general duties of the commission would be to investigate contracts awarded for reconstruction projects in Iraq and Afghanistan, and contracts for logistics support, security, and intelligence in support of military operations in both countries, according to the bill. Specifically, the commission would be responsible for reviewing:

- the extent and impact of the government's reliance on contractors to perform activities in support of military operations in Iraq and Afghanistan;
- the performance of the contracts under review and the mechanisms used to manage these contracts;
- the extent of waste, fraud and abuse associated with contracts;
- the extent to which those responsible for such waste, fraud, abuse, or mismanagement have been held financially or legally accountable; and
- the appropriateness of the organizational structure, policies, and practices of the departments of Defense and State for handling contingency contract management and support.

Webb, in speaking with reporters at a Capitol Hill press event July 18, noted that the legislation seeks to pursue financial and legal accountability in wartime contracting. "It's going to look retroactively at the contracts that have been let, to try to get accountability," Webb said. Webb also said the commission would be established for two years and would not become a "new bureaucracy." It would deliver its first report after a year, but also would have the authority to issue intermittent reports on contracting items that need to be addressed. "This is, I believe, a very necessary and essential step for us to put the right kind of accountability into the government," Webb said.

Senators Propose Acquisition Amendments Before Reid Pulls Defense Bill From Floor

Senate Majority Leader Harry Reid (D-NV) pulled the fiscal 2008 defense authorization bill (H.R. 1585) from the floor of the Senate July 18 following an all night session and failed effort to get Republicans to vote "up or down" on an amendment that would require the president to begin the withdrawal of military personnel from Iraq.

While the almost two weeks of debate on the bill focused on Iraq policy and wounded warrior issues, senators nonetheless proposed a number of acquisition-related amendments that could be considered when--or if--the bill is returned to the floor. One amendment by Sen. Charles Grassley (R-IA) would mandate defense contractor use of the Electronic Employment Verification System (EEVS) to prevent hiring of illegal immigrants. Another amendment, by Sen. Byron Dorgan (D-N.D.), aims to prevent organizational conflicts of interest by Defense Department contractors that are performing acquisition-related functions.

Also, Sen. Thomas Carper (D-DE) said July 17 that he plans to offer an amendment that would require all military personnel without acquisition skills to receive training on contingency operations contractor support and oversight responsibilities.

Speaking with reporters after pulling the bill, Reid would not rule out the possibility of returning to the measure prior to the scheduled delivery in September of a high-level military report on Iraq progress. Reid added that he has asked Senate Armed Services Committee Chairman Carl Levin (D-MI) and Assistant Majority Leader Richard Durbin (D-IL) to work with their Republican counterparts to find out how "to pass a defense authorization bill, but with a deadline dealing with Iraq."

"Once we put that together, we'll move forward on it. If that's tomorrow, we'll do it tomorrow. If it's later, we'll do it later," Reid said. SASC Ranking Republican John McCain (AZ) said in a statement that he is "deeply disappointed" that the bill has been pulled from the Senate floor, noting that Congress has passed and the president has signed a defense authorization bill for 45 years in a row. "We all know why" this year's bill is stalled, he said. "The Democrats tried to load up the bill with their agenda on Iraq, knowing full well that in September General [David] Petraeus is coming back and giving [Congress] a report--and we will have another debate and reports at that time," McCain said.

In remarks on the Senate floor July 16, Grassley described his amendment as requiring DOD contractors to participate in the "basic pilot program"--also known as EEVS--originally authorized under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and expanded and extended in 2003 to allow employers in all 50 states to voluntarily use the program.

Grassley explained that the basic pilot program provides a way for employers to electronically verify the identity and work authorization of workers they hire by checking Social Security and alien identification numbers databases maintained by the Social Security Administration and the Homeland Security Department. Under the Immigration Reform and Control Act of 1986, it is unlawful for employers to "knowingly" hire and employ illegal immigrants not authorized to work in this country, he noted. "We've seen plenty of evidence that contractors with the Defense Department have been negligent in ensuring that their workers are legal," Grassley said in an announcement of the amendment issued by his office. "Some of these illegal immigrants are working in sensitive areas, which makes it all the more important that the identity of the employees working for these contractors be verified," he said.

Specifically, the amendment (SA 2253) would require use of the EEVS by any DOD contractor covered by Section 2(b)(1) of the Service Contract Act. That section provides that no contractor with a federal government contract of which the principal purpose is to furnish services through the use of service employees, and no subcontractor under such a contract, may pay contract employees less than the minimum wage specified by the Fair Labor Standards Act.

The requirement for use of the EEVS also would apply to DOD contractors that are exempt from the Service Contract Act because their contracts provide for direct services to a federal agency by an individual or individuals (SCA exemption (6)). The amendment would further require all federal agencies to participate in the employment verification program with respect to their hires. However, the Grassley amendment, which would go into effect 90 days after the enactment of the defense bill, does not make specific provision for application of sanctions to defense contractors that fail to meet its requirements.

Earlier this year, the Senate passed several bills calling for the debarment of federal contractors that knowingly hire illegal immigrants, but establishing EEVS use as a safe harbor to prevent debarment. Such language, sponsored by Sen. Jeff Sessions (R-Ala.), is included in the minimum wage (H.R. 2, Section 249) passed by the Senate in February (87 FCR 185, 2/20/07). Identical language also was included in the initial version of the fiscal year 2007 emergency supplemental appropriations bill that was passed by the Senate in

March (H.R. 1591), but the provision was dropped from the revised supplemental bill that ultimately was signed into law by the president.

Also on July 16, Dorgan proposed an amendment (SA 2248) that would prohibit agencies from entering into any contract for performance of an inherently governmental function. In addition, the amendment is intended to address organizational conflicts of interest that may arise when federal agencies use contractors to perform certain acquisition-related functions.

Specifically, the language would prohibit federal agencies from contracting for the performance of "acquisition functions closely associated with inherently governmental functions" unless the agency head determines in writing that neither the contractor nor any related entity will be responsible for performing any work under a contract that the contractor will help to plan, evaluate, select a source for, manage, or oversee.

Also, the agency would be required to prevent or mitigate any organizational conflict of interest that may arise because the contractor:

- has a separate ongoing business relationship with any of the contractors to be overseen;
- would be placed in a position to affect the value or performance of work it is doing under any other government contract;
- has "a reverse role" with the contractor to be overseen under another government contract; or
- has some other relationship with a contractor that "could reasonably appear to bias the contractor's judgment."

Other acquisition-related amendments proposed July 16 address:

- *Defense acquisition workforce.* Sen. Saxby Chambliss (R-GA) submitted an amendment that would require the defense secretary to develop a plan for establishing the appropriate size of the defense acquisition workforce. The plan would have to identify positions and skills that are inherently governmental in nature, identify skills gaps in the current acquisition workforce, establish steps for obtaining a proper match between acquisition expertise and risk within each acquisition program office, and identify additional personnel or hiring authorities that would be required until the defense acquisition workforce is sufficient to fill the positions designated as inherently governmental. (SA 2218)
- *Acquisition of products and services in Iraq and Afghanistan.* Chambliss also submitted language that would allow DOD, when acquiring products or services in support of military operations in Iraq, Afghanistan, or other contingency area within the responsibility of the Central Command, to: limit competition to products or services that are within that area; use procedures other than competitive procedures in award contracts; or provide a preference for products or services from that area. The secretary of defense would be required to make a determination that: the product or service would be used only by military forces, police, or security personnel in the area; it is in the national security interest of the United States to limit competition or apply a preference; and use of a limited competition or preference will not adversely affect the U.S. industrial base. (SA 2219).

- *Small Business Innovation Research Program technology transition.* Sen. John Kerry (D-Mass.) submitted an amendment to promote the transitioning of Small Business Innovation Research Program (SBIR) technologies into defense programs or fielded systems. It would provide that, for any contract with a value of \$100 million or more, DOD may: establish goals for transition SBIR Phase III technologies in subcontracting plans; change the profit guidelines to increase the incentive for the prime contractor to insert SBIR technology; and require the prime contractor to report the number and dollar amount of contracts entered into for Phase III SBIR technologies. Further, it would require the secretary of defense and the secretaries of the military departments to: set a goal to increase the number of Phase II contracts awarded that lead to technology transition into defense programs or fielded systems; use incentives to encourage prime contractors to meet that goal; and report to Congress annually regarding the percentage of such contracts awarded. (SA 2221).
- *State sponsors of terrorism.* Sen. John Kyl (R-AZ) submitted an amendment to require multiple reports with regard to business activities carried out with state sponsors of terrorism, including an annual report to Congress by the Government Accountability Office on federal government procurement of goods and services from persons engaged in such business activities. (SA 2226)

LEGISLATIVE ACTION

Bill Number	Sponsor	Description	Action
H.R. 556	Maloney	To reform Committee on Foreign Investment in United States proceedings for analyzing the national security implications of foreign direct investments in the U.S.	Passed by House 7/11/07, 370-45; sent to president
H.R. 3013	Scott	To restrict the Justice Department's ability to pressure corporations to waive attorney-client privilege in return for more lenient charging decisions in criminal cases	Introduced in House 7/12/07; referred to Judiciary
H.R. 3033	Maloney	To improve federal agency awards and oversight of contracts and strengthen accountability of governmentwide suspension and debarment system	Introduced in House 7/12/07; referred to Oversight & Government Reform
H.R. 3037	Schwartz	To ensure that all federal agencies consider environmentally preferable features and practices of vendors when purchasing meeting and conference services	Introduced in House 7/12/07; referred to Oversight & Government Reform
S. 1747	Specter	To restrict use of presidential signing statements	Introduced in Senate 6/29/07; referred to Judiciary
H.R. 2740	Price	To expand the Military Extraterritorial	Introduced in House 6/15/07;

		Jurisdiction Act to include all contractors involved in military operations and to require the Justice Department to report on investigations of abuses alleged to have been committed by contractor personnel	referred to Judiciary
H.R. 556	Maloney	To reform the Committee for Foreign Investment in the United States, which reviews foreign investments for their national security implications	Passed by Senate by unanimous voice vote 6/29/07
S. 1702	Roberts	To promote employment of individuals with severe disabilities through federal government contracting and procurement processes	Introduced 6/27/07; referred to Homeland Security & Governmental Affairs
S. 1723	McCaskill	To enhance the independence of inspectors general and create a council of the inspectors general on integrity and efficiency	Introduced 6/28/07; referred to Homeland Security & Governmental Affairs