

***In The News:***

- SBA Has Sole Authority to Determine Bidder's Eligibility as SDVOSBC, GAO Says
- SBA Proposes Second Rule to Implement Procurement Program for Women-Owned SBs
- SBA Proposal on Women-Owned Firms Comes Under Fire for Requiring Agency Findings of Bias
- OFPP Proposes New Policy Letter On Acquiring 'Green' Products, Services
- FY 2008 Omnibus Spending Act Contains New Restrictions on Competitive Sourcing
- FY 2008 Omnibus Spending Act Mandates Full, Open Competition for DHS Contracts
- Air Force Postpones Plan to Consolidate Procurement Operations for U.S. Installations
- OFPP Needs Plan to Monitor Progress
- GSA Asks Contracting Activities for Input On Application of TAA to ID/IQ Contracts
- DOD, State, USAID Officials Describe Efforts for Improved Contingency Contracting
- Legislative

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**SBA Has Sole Authority to Determine Bidder's Eligibility as SDVOSBC, GAO Says**

A bidder's eligibility for a procurement set aside for service-disabled veteran-owned small business concerns (SDVOSBCs) is a matter of status rather than responsibility, and thus is within the exclusive authority of the Small Business Administration, rather than the procuring agency, the Government Accountability Office decided Jan. 10 (*Singleton Enterprises-GMT Mechanical, a Joint Venture*, GAO, B-310552, 1/10/08).

In sustaining a protest of a joint venture's exclusion from a Department of Veterans Affairs procurement conducted as an SDVOSBC set-aside, GAO said it is "required to give deference to an agency's reasonable interpretation of its regulations, and because the SBA is the agency responsible for promulgating the regulations regarding the SDVOSBC program, we give its interpretation of its regulations great weight." When the VA issued an invitation for bids (IFB) for the replacement of the main transformers at the VA Medical Center in Lexington, Ky., protester Singleton Enterprises-GMT Mechanical, a joint venture, submitted a bid which the contracting officer considered to be nonresponsive.

Based on a review of the protester's joint venture agreement, which was not included in the firm's bid but was on file with the VA, the CO determined that the agreement did not comply with SBA's SDVOSBC regulatory requirement that joint venture agreements to perform a contract set aside for SDVOSBCs must contain a provision designating the SDVOSBC as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the SDVOSBC contract. For this reason, the VA rejected Singleton-GMT's bid as nonresponsive and awarded the contract to Affiliated Western Inc.

GAO said that the VA erred in its determination that the protester's bid was nonresponsive, explaining that responsiveness addresses whether a bid "represents an offer to perform, without exception, the exact thing called for in the solicitation so that, upon acceptance, the contractor will be bound to perform in accordance with the IFB's material terms and conditions." Therefore, an agency determines responsiveness at the time of bid opening from the face of bid documents, and bid documents include information submitted with a bid or incorporated into the bid by reference to accomplish this, GAO stated. Here, GAO explained, the protester's bid took no exception to the IFB requirements, and the protester's joint venture agreement upon which the VA relied was not included, nor incorporated by reference, in the bid.

GAO viewed the issue of the protester's eligibility as an SDVOSBC to be a matter of status. "[W]here an agency has a question regarding a bidder's status as an SDVOSBC, the SBA, not the procuring agency, is responsible for determining whether a firm is an eligible SDVOSBC," GAO said. As required by the Small Business Act, as amended by the Veterans Benefits Act, SBA has established procedures allowing interested parties to challenge a firm's size or status as a qualified SDVOSBC, GAO noted. Therefore, GAO requested input from SBA, which said that issues involving SDVOSBC status, including eligibility, "are not for resolution by the procuring agency, but by the SBA."

Although SBA acknowledged that its regulations do not explicitly address protests involving the eligibility of SDVOSBC joint ventures, GAO agreed with SBA "that such challenges essentially concern the 'status' of an SDVOSBC and that such status challenges are for consideration by the SBA and not the procuring agency."

Also, GAO noted that Federal Acquisition Regulation 19.307(a) provides that for small-disabled veteran-owned small business set-asides, any interested party "may" challenge the awardee's SDVOSBC status. Further, FAR 19.307(h) provides that questions regarding service-disabled veteran-owned small business size or status "must" be referred to the SBA. The word "may" in FAR 19.307(a) does not give the procuring agency discretion whether to consult the SBA on SDVOSBC status, GAO said. Rather, the provision clearly is intended to convey that interested parties, including contracting officers, have the right, but are not required, to challenge an awardee's SDVOSBC status.

**SBA Proposes Second Rule to Implement Procurement Program for Women-Owned SBs**

The Small Business Administration Dec. 27 issued a revised proposed rule that would authorize federal agencies to set aside contracts for women-owned small businesses in industries where such firms are shown to be underrepresented and the procuring agency determines that a set-aside would remedy past discrimination.

According to the proposed rule, women-owned small businesses (WOSBs) currently are underrepresented in federal contracts in four industries: national security and international affairs; coating, engraving, heat treating and allied activities; household and institutional furniture and kitchen cabinet manufacturing; and "other motor vehicle dealers." However, even in industries in which WOSBs are underrepresented, before an agency can set aside a procurement it must first determine that the set-aside is "substantially related to remedying sex discrimination in that industry." The Justice Department has advised that such an agency determination--which includes a review of the agency's own past procurement activities--is required in order to meet constitutional standards articulated by the Supreme Court, SBA said in publishing the proposed rule.

The proposed rule was quickly and severely criticized by small business advocates in Congress. Rep. Nydia Velazquez (D-N.Y.), chair of the House Small Business Committee, Dec. 27 issued a statement blasting the rule as "insulting," saying that it "unnecessarily limits eligibility for women businesses to only four out of 140 possible industries." SBA's approach to the rule "will simply maintain the status quo" of shutting women-owned firms out of "billions of dollars in federal contracting opportunities," she added. Similarly, Sen. John Kerry (D-Mass.), chair of the Senate Committee on Small Business and Entrepreneurship, called the proposed rule "a slap in the face to women business owners." In a Dec. 27 statement, the senator said that by "cherry picking data," the Bush administration has "not only done nothing to level the playing field, they've actually shut women out of the process for thousands of different types of contracts."

The proposal is SBA's second attempt to implement a program authorized in 2000 to increase the share of federal contracts awarded to women-owned small businesses (WOSBs). The agency, which has come under significant criticism for failure to get the WOSB program up and running, published an earlier proposal in June 2006. SBA said in issuing the new rule that a review of comments received in response to the June 2006 proposal, as well as discussions with the Justice Department and the Office of Federal Procurement Policy, led it to conclude that "significant changes" were required, warranting further public comment and consideration.

The rule would implement Section 8(m) of the Small Business Reauthorization Act of 2000, which authorizes contracting officers to restrict competition for federal procurements of up to \$3 million (\$5 million for manufacturing) to eligible WOSBs in industries in which SBA has determined that there is underrepresentation or substantial underrepresentation in federal contracting. SBA explained in the new proposed rule that the approach used to identify the four industries in which WOSBs are underrepresented in federal contracts is based on an analysis of 2004 Central Contractor Registration data, 2005 Federal Procurement Data System data, four-digit codes from

the National Industrial Classification System, and the dollar value of contracts awarded. This approach was selected from 28 possibilities outlined in the RAND report, and the reasons underlying the selection are discussed in the proposed rule.

SBA said it is proposing to impose this requirement on contracting agencies in order "to ensure that this program is implemented uniformly across the government and in a manner that ensures it will be constitutional under the current Supreme Court jurisprudence."

Section 8(m) of the act requires that to qualify as a WOSB, a small business must be at least 51 percent unconditionally and directly owned and controlled by women who are U.S. citizens. To qualify as an economically disadvantaged woman-owned small business (EDWOSB), at least 51 percent of the owners must also show an impaired ability to compete due to diminished capital and credit opportunities, as well as a personal net worth of less than \$750,000, excluding ownership in the businesses and equity in their homes. Under the act, competition may be restricted to EDWOSBs in industries where WOSBs are underrepresented. In industries in which SBA has determined that WOSBs are "substantially underrepresented" and SBA has waived the economically disadvantaged requirement, COs may set aside the competition for WOSBs.

The proposed rule defines underrepresentation and substantially underrepresentation in terms of a "disparity ratio" based on the WOSB share of federal prime contract dollars divided by the WOSB share of total business receipts in particular industries. Underrepresentation is found if the disparity ratio falls between 0.5 and 0.8; substantial underrepresentation is found if the disparity ratio falls between 0.0 and 0.5. In accordance with Section 8(m), SBA (either itself or through a contractor) at least every five years must conduct a study to identify underrepresented or substantially underrepresented industries and analyze the extent of disparity of WOSBs in federal contracting.

The proposal would establish a "rule of two" standard similar to that used in other small business set-aside programs, which provides for a set-aside when a contracting officer reasonably expects, based on market research, that at least two eligible WOSBs will bid on a set-aside procurement. In addition, the proposed rule states that, absent a release from SBA, COs may not restrict competition to WOSBs if a participant in the Section 8(a) business development program for small disadvantaged firms is currently performing the requirement or has been accepted by SBA to perform the requirement.

*Comments on the proposed rule are due Feb. 25, 2008 (72 Fed. Reg. 73,285, 12/27/07).*

**SBA Proposal on Women-Owned Firms Comes Under Fire for Requiring Agency Findings of Bias**

The Small Business Administration's recently proposed rule to implement a set-aside program for women-owned small businesses (WOSBs)--mandated by legislation enacted seven years ago--was vehemently criticized during a House hearing Jan. 16 for requiring each procuring agency to determine that a planned set-aside is "substantially related to remedying sex discrimination" by that agency in the relevant industry.

The rule, which is open for public comment until Feb. 25, also came under fire for its restrictive approach to identifying industries in which women-owned firms are underrepresented in federal contracting. According to the proposed rule, WOSBs currently are underrepresented in contracts in four industries: national security and international affairs; coating, engraving, heat treating and allied activities; household and institutional furniture and kitchen cabinet manufacturing; and "other" motor vehicle dealers.

House Small Business Committee Chair Nydia Velazquez (D-N.Y.) said that SBA has published a rule "that is so poorly constructed and so ill-conceived that it is insulting to the tens of thousands of women business owners that have been waiting" for implementation of the Women's Procurement Program for the past seven years. Although Congress intended the program to increase participation of women-owned firms in the federal marketplace, "the SBA's proposed rule is just too narrow and burdensome to achieve this intent," Velazquez said at the hearing, which was held less than three weeks after the proposed rule was published Dec. 27.

However, SBA Administrator Steven Preston defended his agency's effort to come up with a proposed rule "that will satisfy both statutory and constitutional requirements." He pointed out that SBA "worked closely" with the Justice Department "in drafting a proposed rule that is cognizant of the exacting constitutional requirements that apply in implementing a gender specific set-aside program."

Appearing with Preston before the committee, Elizabeth Papez, deputy assistant attorney general in DOJ's office of legal counsel, fielded numerous questions from committee members taking issue with the administration's position that individual agency findings of historical bias are required to justify gender-based contracting programs. That position, she explained, reflects the constitutional requirement that federal programs that discriminate on the basis of gender must pass muster under the equal protection component of the Due Process Clause of the Fifth Amendment.

Advocates of WOSBs who also appeared before the committee strongly disagreed with the administration's position, particularly with respect to the requirement for "agency-by-agency findings of discrimination." Jennifer Brown, vice president and legal director of Legal Momentum, an advocacy group dedicated to advancing the rights of women and girls, said in her prepared testimony there is "absolutely no precedent for requiring agency-by-agency findings in order to implement a federal affirmative action program created by Congress." "No court applying any

level of scrutiny has made such a demand," she asserted. Moreover, in the case of the SBA's WOSB proposed rule, which incorporates a recent RAND Corp. study on the availability and utilization of WOSBs in federal prime contracts, "it defies logic to require that a particular agency undertake its own analysis," Brown said.

The SBA also was criticized for the methodology it chose to determine which industries have an underrepresentation of women-owned firms in federal contracting and therefore qualify for the program. The approach chosen by the agency resulted in an initial identification of four industries as having an underrepresentation of WOSBs, leading Velazquez to observe that "few--if any--women-owned businesses will benefit from the new regulation." Of the more than 10 million WOSBs, only 1,247 firms would qualify under the current methodology, Velazquez said. "Women-owned entrepreneurs in industries like construction and manufacturing that are omitted are left scratching their heads--can this be for real?"

Referring to the availability study prepared for SBA by RAND and published in April 2007, Velazquez said: "Out of the 28 approaches identified by RAND, the agency chose a method that designates less than 3 percent of industries as under-represented by women businesses. In doing so, it is using the 'dollar amount of contracts' method for determining under-representation, which is inconsistent with the program's intent. ... A better measure would be the 'number of contracts' method, which would find 77.1 percent of industries as underrepresented, or a mix of both the number and dollar approaches," the committee chair advised.

However, SBA's Preston asserted that the dollar-amount methodology was determined to be the most valid measure of WOSB contract participation because using contract dollars as the primary measure of participation is the most consistent with the statutory scheme, which includes a goal of having not less than 5 percent of the total dollar value of all federal prime contract and subcontract awards going to WOSBs each fiscal year.

In addition, he pointed out that:

- Congress appropriates federal funding in dollars;
- the federal budget is divided in dollars;
- government contracts are awarded in dollars;
- the accounting and auditing processes focus on how dollars are spent; and
- contract actions do not allow for an accurate accounting of the financial benefits of business development that occur when small firms receive federal contracts.

Preston also explained that SBA, either itself or through a contractor, is required at least every five years to conduct a study to identify underrepresented or substantially underrepresented industries and analyze the extent of disparity of WOSBs in federal contracting. This could lead to an expansion of the industry categories in which WOSBs are underrepresented, he said. Rep. Steve Chabot (R-Ohio), ranking member of the committee, also raised questions with respect to what he

described as the "crucial part of the program, ... the identification of industries in which women-owned businesses are underrepresented" in federal procurement.

"SBA proposes to calculate underrepresentation every five years but fails to specify how it will make that calculation," Chabot said. "Without that information, the potentially affected public has no way of accurately informing the SBA whether the proposal is adequate." While commending the agency for taking "an important first step to see that the program is implemented," Chabot advised that it provide "additional supplemental information to enable the public to respond to the notice in an intelligent manner."

### **OFPP Proposes New Policy Letter On Acquiring 'Green' Products, Services**

The Office of Federal Procurement Policy Dec. 28 proposed a new policy letter that would call on federal agencies to develop and implement "green purchasing policies and affirmative procurement programs" to be incorporated in all government contracting mechanisms and acquisition strategies in order to protect the environment and conserve natural resources and energy through contracting.

The letter would require agencies to give preference to green products and services, including: alternative fuels and alternative fuel vehicles; bio-based products; Energy Star and Federal Energy Management Program (FEMP)-designated products; electronics registered on the Electronic Product Environmental Assessment Tool; low or no toxic or hazardous chemicals or products; non-ozone depleting substances; recycled content and/or remanufactured products; renewable energy; and water-efficient products.

The policies would implement a Jan. 26, 2007, executive order (Executive Order No. 13,423) directing agencies to strengthen the management of environmental, transportation, and energy-related activities, as well as various environmental and energy policy statutes. The letter would supersede OFPP Policy Letter 92-4, "Procurement of Environmentally-Sound and Energy-Efficient Products and Services," dated Nov. 2, 1992. The proposed policies would apply to all acquisition and contracting mechanisms, including service contracts, purchases made using government purchase cards and fleet cards, and purchases valued at less than the micropurchase threshold.

Additionally, OFPP would require that each federal agency develop and implement a comprehensive affirmative procurement plan for the acquisition of green products and services, also to be referred to as a "green procurement plan." At minimum, the plan would be required to:

- state a preference for the acquisition of green products and services, and require the flow down of this preference to all agency contractors and subcontractors;
- explain the green acquisition roles and responsibilities of contracting officials, program managers, product specifiers, purchase card holders, and program administrators;

- promote the acquisition of green products and services internally within the agency and externally to source providers and other government agencies, including agencies at the state and local levels; and
- provide for annual compliance monitoring, corrective action, and/or auditing of the agency green procurement plan.

Further, agency green plans should address:

- the development and use of templates for incorporating green purchasing requirements into solicitations and contracts;
- the use of government E-procurement tools, such as FedBizOpps.com, to publicize green acquisition requirements; and
- the use of past performance evaluations of contractor adherence to green acquisition priorities.

Under the policy letter, agencies would be directed to first determine their specific performance requirements for products and services and, if they determine that a green product or service can meet those requirements, to give first consideration to mandatory and preferred sources in obtaining such green products or services. Socioeconomic programs administered by nonprofit agencies employing people who are blind or disabled, namely the AbilityOne program under the Javits-Wagner-O'Day Act and the Federal Prison Industries' UNICOR program, are mandatory sources in accordance with the Federal Acquisition Regulation Subparts 8.6 and 8.7.

Small businesses, including small disadvantaged, women-owned, Native American, Alaska Native, Historically Underutilized Business-Zone, and service-disabled veteran-owned businesses, are preferred sources.

The OFPP policy letter also would require agencies to:

- implement "automatic substitution policies" for the procurement of "functionally equivalent" green products and services in place of non-green orders for the same products and services ordered through central supply agencies such as the General Services Administration or the Defense Logistics Agency;
- include requirements and preferences for the use of green products in all newly awarded services contracts, or in recompetitions of existing services contracts;
- encourage the incorporation of requirements and preferences for the use of green products during modifications of existing services contracts; and
- require GSA, DLA, and other contract supply agencies to supply "designated green products" and to "phase out any competing non-green products from their catalogs and on-line ordering systems."

*Comments on the proposed policy letter, "Acquisition of Green Products and Services," are due Feb. 26, 2008 (72 Fed. Reg. 73,904, 12/28/07).*

**FY 2008 Omnibus Spending Act Contains New Restrictions on Competitive Sourcing**

The fiscal year 2008 consolidated appropriations measure signed into law Dec. 26 (Pub. L. No. 110-161) includes new governmentwide restrictions on the competitive sourcing process, as well as additional protections for federal government employees whose jobs have been or may be the subject of public-private competitions conducted under Office of Management and Budget Circular A-76.

Other contracting-related provisions with governmentwide application:

- prohibit the award of federal contracts to any foreign incorporated entity that is treated as an inverted domestic corporation for tax purposes;
- require executive departments and federal agencies to assess the creditworthiness of an individual before giving him or her a government travel charge card;
- call on executive departments and agencies to establish and maintain on their Internet home pages a direct, "obvious" link to the Web sites of their inspectors general; and
- clarify that the Buy America restriction on purchasing nondomestic articles, materials, and supplies does not apply to the federal government's acquisition of information technology that is a commercial item.

The provisions in the FY 2008 spending act related to efforts to convert to contractor performance work currently being performed in-house by federal employees are similar to governmentwide provisions included in the FY 2008 defense authorization measure (H.R. 1585) passed by Congress, but recently rejected by President Bush. For example, both measures require the exclusion of costs for retirement benefits and health care from consideration in cost comparison studies related to public-private competitions. The new language bars a contractor from receiving an advantage for a proposal that would reduce costs for the federal government by offering a retirement benefit that in any year costs less than the annual retirement cost factor applicable to federal employees.

This provision supplements language from earlier appropriations acts intended to ensure that a contractor does not gain an advantage for a proposal that would reduce costs for the contracting agency by not making available to contractor employees an employer-sponsored health insurance plan or offering workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premium or subscription share than the amount that is paid by the federal government for health benefits for civilian employees.

Other changes in the omnibus spending act that potentially will slow momentum for transferring government work to the private sector include:

- a prohibition barring OMB from directing or requiring an agency to prepare for, undertake, continue, or complete a public-private competition or direct conversion to contractor performance;

- a requirement that OMB expand Circular A-76 to include procedures and policies for conducting a public-private competition to evaluate the benefits of converting work from contract performance to performance by federal employees in appropriate circumstances;
- expanded appeals rights for federal employees who have lost A-76 competitions to contractors; and
- direction to the Government Accountability Office to administer the protest process "in a manner best suited for expediting final resolution" of the protests and final action in such competitions.

### **FY 2008 Omnibus Spending Act Mandates Full, Open Competition for DHS Contracts**

The omnibus spending act for fiscal year 2008 that was signed by President Bush Dec. 26, 2007, includes a requirement for full and open competition in Department of Homeland Security acquisitions and mandates that the agency link payment of contract award fees to positive acquisition outcomes.

In addition to this and other departmentwide contracting provisions, the DHS portion of the \$554.7 billion catch-all spending measure (Pub. L. No. 110-161) contains numerous program-specific procurement directives, chiefly focused on the Coast Guard's \$24 billion Deepwater fleet modernization program and the Customs and Border Protection contract for fencing on the U.S.-Mexico border to help combat illegal immigration.

A stand-alone DHS spending bill (H.R. 2683) was passed by the House June 15 and by the Senate July 26 (87 FCR 677, 6/19/07). The provisions incorporated in the omnibus spending act reflect agreement by the House and Senate Appropriations homeland security subcommittees resolving a number of differences between the initial FY 2008 DHS spending bills. The omnibus act provides FY 2008 funding for all federal agencies other than the Defense Department, for which an individual appropriations bill was enacted and signed into law last November as Pub. L. No. 110-116. The omnibus act includes \$38.7 billion for DHS, \$2.7 billion of which is emergency funding for border security and other needs.

In addition to the new mandates regarding DHS contracting practices and the provisions targeting major agency acquisitions, other requirements applicable to DHS under the new law include:

- elimination of the Transportation Security Administration's exemption from federal acquisition laws and the Federal Acquisition Regulation within 180 days of enactment;
- prohibitions on contracting out certain types of work currently performed in-house;
- a restriction on use of funds available under the law to pay the salary of any employee serving as a contracting officer's technical representative, or acting in a similar capacity, who has not received COTR training;
- a prohibition on "full scale procurement" of Advanced Spectroscopic Portal (ASP) units for radiation detection until certain certifications are made;

- an advance notification requirement to ensure that congressional appropriations committees are informed of discretionary contract awards in excess of \$1 million;
- extension of the department's other transaction authority through FY 2008; and
- a requirement that the DHS Web site maintain a direct link to the site of the DHS Office of Inspector General.

The requirement for full and open competition in DHS contract awards, taken from the House version of the initial DHS spending bill, mandates specific management reforms related to contracting, procurement, and competition to help ensure taxpayers' dollars are well spent. The provision (Section 539) requires that all contract and grant funds be awarded through full and open competition, except when other funding distribution mechanisms are required by statute.

The competition mandate was one of many provisions opposed by the Bush administration when the House took up the original FY 2008 DHS spending bill last June. While the language allows the secretary of homeland security to lift the competition requirement during national emergencies, the Office of Management and Budget argued that the laws governing federal acquisition have long recognized other circumstances when noncompetitive contract awards are appropriately justified.

In addition to allowing a waiver for national emergencies, the measure provides exemptions from the competition requirement for purchases made under the Small Business Act and under mandated preferential programs such as the AbilityOne program authorized under the Javits-Wagner-O'Day Act. The spending act also directs the DHS inspector general to "review departmental contracts awarded through other than full competition to assess departmental compliance with applicable laws and regulations." In selecting for review contracts awarded noncompetitively during the previous fiscal year, the IG is to consider:

- the cost and complexity of the goods and services to be provided under the contract;
- the criticality of the contract to fulfilling department missions;
- past performance problems on similar contracts or by the same vendor; and
- complaints received about the award process or contract performance.

The omnibus act also requires that all DHS contracts which provide for award fees link the payment of such fees to successful outcomes in contract cost, schedule, and performance. Expressing concern that DHS was giving bonuses to contractors for work they did not even perform, Sen. Hillary Clinton (D-N.Y.) offered the provision as an amendment when the initial Senate version of the DHS spending bill went to the floor in late July.

Clinton has since asked the DHS IG to determine whether the agency has been complying with a similar provision added as an amendment to the FY 2007 emergency supplemental spending measure (Pub. L. No. 110-28) passed last May. The senator and presidential candidate in November raised questions as to whether DHS was awarding bonuses despite poor performance "or, even worse, without even evaluating the work".

**Air Force Postpones Plan to Consolidate Procurement Operations for U.S. Installations**

Rep. Heather Wilson (R-N.M.) Jan. 11 announced that the Air Force is delaying for up to two years its recently announced plan to consolidate procurement operations in support of bases across the country into five regional centers. The announcement came following discussions between Wilson and Air Force officials, including Air Force Secretary Michael Wynne, regarding her concerns that a pilot project implementing the first phase of the service's "Installation Acquisition Transformation" initiative in the Southwest region of the United States would harm small businesses in New Mexico that have contracts with Air Force bases in the state.

The pilot project was slated to begin in January 2008, Wilson's office said, with contracting operations for installations across the Southwest combined at a contracting facility in San Antonio. According to a statement issued by Wilson's office, the Air Force now has said it will conduct only internal transition planning over the next 18 to 24 months. "For now, the Air Force has abandoned its southwest pilot project and that is good news for businesses in New Mexico who work with any of our bases," Wilson said. "I want to thank the Air Force for taking my concerns seriously and getting input directly from businesses who do the work."

According to materials available on the Air Force IAT Web site, the procurement operations consolidation effort entails the reorganization of more than 70 Air Force buying activities at installations in the continental United States and the establishment of five regional centers to be located in Colorado Springs; Hampton Roads, Va.; San Antonio; St. Louis; and Warner-Robins, Ga. "Installation Acquisition Transformation (IAT) will allow us to take advantage of strategic sourcing opportunities, leverage information technology, employ e-commerce processes and utilize critical resources effectively across the enterprise," Wynne said in an Aug. 20, 2007, memorandum on his decision to approve the initiative.

Although a contracting presence will be retained at each base, the "majority of installation contracting" will be accomplished at the regional centers, Wynne said, with all acquisition authority flowing from the Air Force Materiel Command at Wright Patterson Air Force Base, Ohio. Charlie E. Williams Jr., deputy assistant secretary for contracting and assistant secretary for acquisition, said in a Sept. 7, 2007, letter that implementation of the IAT initiative will:

- minimize supply chain costs through integration and collaboration;
- increase acquisition process visibility and accountability;
- simplify installation-level purchasing;
- provide acquisition professionals with professional development opportunities; and
- result in annual procurement savings.

As to the effect of this restructuring on local small businesses around Air Force installations, Ronald Poussard, director of Air Force small business programs, said in an Oct. 10, 2007, statement that, "[b]y integrating small business partnerships, especially within the local business communities, the regional centers can create strategic and operational solutions that provide world-class support to the warfighter." An IAT implementation timeline included in a Dec. 21, 2007,

PowerPoint briefing presented by Williams showed the San Antonio regional center "Pathfinder Implementation" pilot project scheduled to continue into the fourth quarter on fiscal year 2010. Phased implementation of the four other regional centers was shown to start the first quarter of FY 2010 and end before the fourth quarter of FY 2012.

*The Air Force Installation Acquisition Transformation Web site is at:*  
<https://www.safaq.hq.af.mil/contracting/public/iat/>.

### **OFPP Needs Plan to Monitor Progress**

The Office of Federal Procurement Policy agrees with almost all of the recommendations made a year ago by the congressionally-chartered Acquisition Advisory Panel, and plans to work with federal agency acquisition officials to address more than half of them, the Government Accountability Office said in a report released Jan. 22.

OFPP also has identified legislative actions and Federal Acquisition Regulation cases as appropriate avenues for pursuing more than one-third of the action items recommended by the panel, which was created under the Services Acquisition Reform Act of 2003 and is referred to by GAO as the SARA panel. However, OFPP does not have a strategy or plan to allow it to oversee and establish accountability for implementation of all the recommendations, and to gauge their effect on federal acquisition, GAO said. GAO recommends that OFPP adopt such a plan--including milestones and reporting requirements--and OFPP generally agrees with GAO's recommendation, the report said.

The advisory panel, authorized by Section 1423 of SARA, issued a final draft report on its 18-month review of acquisition laws, regulations, and governmentwide policies in December 2006. The 450-page final report, published last September, covers commercial practices, performance-based acquisitions, interagency contracting, small business, the federal acquisition workforce, the appropriate role of contractors supporting the government, and federal procurement data.

GAO said it found wide common ground between the Acquisition Advisory Panel's recommendations and its own related work and recommendations. GAO said the two share the general view that key focus areas include:

- the importance of a "robust" requirements definition process;
- the need for competition, as mandated by the statutes and regulations governing federal procurement;
- the necessity for clear performance requirements, measurable performance standards, and a quality assurance plan to improve the use of performance-based contracting;
- the risks resulting from the rapid growth and improper management of interagency contracts;
- the troubled state of the acquisition workforce and the importance of developing a strategic approach to assess workforce needs;

- concerns about the role of contractors engaged in acquisition program management and other procurement activities traditionally performed by government employees; and
- the adverse effects of inaccurate and incomplete federal procurement data.

More specifically, GAO said that the panel's recommendations, if taken as a whole and implemented effectively, "can bring needed improvements in the way the federal government buys goods and services."

With respect to one of the panel's more controversial recommendations, revising the definition of commercial items or services, GAO agreed that there are problems associated with misclassification of commercial items. The panel recommended amending the definition of stand-alone commercial services in FAR 2.101 to ensure that only those services actually sold in substantial quantities in the commercial marketplace are deemed "commercial." The current FAR definition includes services "of a type" sold in the commercial marketplace.

Another high-profile recommendation from the panel that GAO said is still under review by OFPP and could be addressed legislatively would permit protests of awards of task and delivery orders over \$5 million under multiple award contracts. "The panel's position was that task and delivery orders over \$5 million were most likely not routine or repetitive purchases; rather they were in effect contracts that should be subject to bid protests," GAO explained.

In other areas, GAO reported that it generally agrees with the panel as to the need for improvements in:

- guidance, training, and measures related to performance-based acquisition;
- competition related to interagency contracts and guidance on selecting the most appropriate interagency vehicle for particular procurements;
- the status and capability of the federal acquisition workforce;
- the definition of inherently governmental functions and controls related to organizational conflicts of interest associated with contractor responsibilities; and
- the accuracy and timeliness of federal procurement data, along with independent validation and verification of that data.

However, GAO distanced itself from the panel's recommendations for changing guidance for awarding contracts to small businesses, all but one of which would require legislation. GAO said it does not usually make recommendations for statutory and regulatory changes "when arguments for such changes are based on value judgments, such as those related to setting small business contracting goals."

The GAO report, "Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations (GAO-08-160)," is available at:  
<http://www.gao.gov/new.items/d08160.pdf>.

The final report of the Acquisition Advisory Panel is available at:  
<http://www.acqnet.gov/comp/aap/finalaapreport.html>.

### **GSA Asks Contracting Activities for Input On Application of TAA to ID/IQ Contracts**

In response to differing views on how to apply the Trade Agreements Act of 1979 to indefinite-delivery/indefinite-quantity contracts, the General Services Administration's acquisition policy office Jan. 7 asked GSA contracting activities to report on "the impact of the application of the TAA on GSA multiple award schedule contracts."

The TAA generally requires government contractors to deliver only end products made in the United States or designated countries, and currently applies to solicitations and contracts valued at \$193,000 or more. However, when the contract is an ID/IQ contract, there is disagreement as to whether this threshold applies at the total contract level or at the order level. "Questions have been raised with respect to the appropriate level at which the TAA restrictions should apply," according to the memo signed by David Drabkin, who at the time was GSA's senior procurement executive and has since been named acting chief acquisition officer. "[S]ome assert that the nature of the ID/IQ contract is such that it could be interpreted that the actual value of the obligation is determined at the order level instead of at the total contract level," he explained.

While there is some internal GSA guidance in the area, it has not been updated, "due largely to the lack of uniform governmentwide policy," Drabkin added. Information to be provided by GSA contracting activities concerning the impact of the application of the TAA to GSA MAS contracts will help policymakers "understand current market conditions," Drabkin said.

TAA compliance problems under GSA MAS contracts several years ago resulted in a number of high dollar value settlements between large suppliers of office products and the federal government, the most recent being the \$5 million payment by Corporate Express Office Products (CEOP) announced by the Justice Department in February 2006. CEOP, like Office Max Inc., Office Depot Inc., and Staples Inc., settled False Claims Act lawsuits filed by Safina Office Products alleging that the companies violated the TAA and the terms of their GSA contracts by providing products from countries that do not have reciprocal trade agreements with the United States, such as China and Taiwan.

While China's recent application to join the World Trade Organization's Government Procurement Agreement (WTO GPA) could, if accepted, ultimately result in nondiscriminatory treatment of Chinese products under the TAA, the terms of China's membership remain to be negotiated between China and GPA signatories and no immediate change in the status of Chinese products for purposes of federal government procurement is expected.

Regulatory implementation of the TAA is provided by Federal Acquisition Regulation Part 25, which establishes a \$193,000 TAA threshold and provides for application of the Buy American Act to solicitations and contracts below that threshold but with "a value exceeding the micropurchase threshold," currently \$2,500 for most agencies. Shortly after Drabkin transmitted his memo, the Defense Department issued an interim rule increasing the dollar threshold for application of the TAA and the Free Trade Agreements, as well as the WTO GPA, from \$193,000 to \$194,000 (see related story in this issue). GSA in May 2006 was urged to clarify application of the Trade Agreements Act and the Buy American Act to Federal Supply Schedule contracts and governmentwide acquisition contracts following the agency's request for public input on improving its acquisition regulation.

#### **DOD, State, USAID Officials Describe Efforts for Improved Contingency Contracting**

Officials with the departments of Defense and State and the U.S. Agency for International Development Jan. 24 described for two Senate Homeland Security and Governmental Affairs subcommittees steps their agencies are taking to improve contingency contracting operations, while at the same time getting an earful from senators over the government's poor contract oversight in Iraq.

The "continuing lack of management attention and proper oversight over the contractors in a war zone has resulted in runaway costs," charged Sen. Thomas Carper (D-Del.), chairman of the Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security. "Unfortunately, waste, fraud, abuse are all too common in Iraq." Carper pointed to fluctuations in the number of contractors the Defense Department has said it has working in Iraq, which has ranged from 130,000 to 180,000. "There's an old saying that you can't manage what you can't measure," he said.

Carper also cited Iraq reconstruction projects costing hundreds of millions of dollars in which contractors have built subpar facilities or, in some instances, no facilities at all. The construction of the U.S. Embassy in Baghdad has been fraught with safety and structural problems, and prime contractor First Kuwaiti is accused of labor abuses, including human trafficking, Carper said. "And the list goes on and on." Sen. Daniel Akaka (D-Hawaii), chairman of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, reiterated his long-held concern that the size of the federal acquisition workforce, particularly at DOD, is not large enough to manage the growing numbers of contracts awarded by the government.

Since 1999, he said, the number DOD contracting specialists has remained frozen at 30,000, while the Federal Acquisition Institute projects that more than half of the entire federal acquisition workforce will be eligible for retirement within the next ten years. "We need to shift course in the management of contracting," Akaka said, urging increased levels of contract oversight to prevent future wasteful spending on multimillion dollar contracts.

Sen. Susan Collins (R-Maine), the ranking member of the full committee, said the Senate "took an important step toward contracting reform" by passing the bipartisan "Accountability in Contracting Act" (S. 680) last session, and added that the House also has passed its own version of a contracting reform bill. "I hope this will be one of the accomplishments that we can get done this year," Collins said, alluding to the enactment of a final contractor accountability bill to be agreed to by both chambers.

The Senate bill was passed unanimously Nov. 7, 2007. The House bill (H.R. 1362), sponsored by House Oversight and Government Reform Committee Chairman Henry Waxman (D-Calif.), was passed by the House late in March of that year. Also participating in the hearing was Sen. Claire McCaskill (D-Mo.), who said she was disheartened to learn from military contracting officials she spoke with during a trip to Iraq last year that many of the contracting mistakes made in that country also were made years earlier during the U.S. military involvement in Bosnia. The freshman Democrat, a leading cosponsor of a fiscal 2008 defense authorization bill (H.R. 4986) provision that will establish a commission to review wartime contracts in Iraq and Afghanistan, also made clear her view that military officials, including general officers, should be held accountable for "the massive failure of appropriate oversight and management."

## LEGISLATIVE

Bill Number	Sponsor	Description	Action
H.R. 1585	Skelton	To authorize fiscal year 2008 appropriations for DOD military activities, military construction, and DOE defense activities	Veto by president announced 12/28/07
H.R. 2764	Lowey	To provide FY 2008 appropriations for the departments of Agriculture, Commerce, Justice, State, Energy, Homeland Security, Interior, Labor, Health and Human Services, Veterans Affairs, Transportation, and Housing and Urban Development	Signed by president 12/26/07 (Pub. L. No. 110-161)

<b>H.R. 4851</b>	Andrews	To tighten enforcement of the Davis-Bacon Act by requiring federal contractors subject to the law to disclose their payroll records to the Labor Department or face cancellation and exclusion from participation in future contracts	Introduced 12/19/07; referred to Education & Labor, Government Reform & Oversight
<b>S. 2488</b>	Leahy	To update the Freedom of Information Act to promote accessibility, accountability, and openness in government	Signed by president 12/31/08 (Pub. L. No. 110-175)
<b>S. 2524</b>	Clinton	To tighten enforcement of the Davis-Bacon Act by requiring federal contractors subject to the law to disclose their payroll records to the Labor Department or face cancellation and exclusion from participation in future contracts	Introduced 12/19/07; referred to Senate Health, Education, Labor and Pensions
<b>H.R. 5037</b>	Boozman	To require that at least 3 percent of the aggregate value of all goods and services purchased by legislative branch offices goes to eligible small businesses owned and controlled by veterans with service-connected disabilities offices	Introduced 1/17/08; referred to Administration