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President Nominates New SBA Administrator

Sandy K. Baruah was appointed by President Bush to serve as the new Administrator of the Small Business Administration (SBA), replacing outgoing Administrator Steve Preston who was recently confirmed as the new Secretary for HUD.

Sandy currently serves as Assistant Secretary of Commerce for Economic Development. As Assistant Secretary, Mr. Baruah's role is to lead and manage the U.S. Department of Commerce's Economic Development Administration, the domestic economic development arm of the Commerce Department. The mission of EDA is to *lead the federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy*. EDA's annual investment budget for fiscal year 2006 is over \$200 million and the bureau has an investment portfolio under active management of \$1.5 billion. In addition to its headquarters in Washington, D.C., EDA has six regional offices across the nation with 175 professional employees.

Assistant Secretary Baruah represents the agency before the White House, the Congress, the Organization for Economic Cooperation and Development in Paris, France, and other forums on a broad range of economic development issues.

Bill Addresses VA's Responsibility to Push Contracting Opportunities for Disabled Vets

The Department of Veterans Affairs would be required to include in each of its contracts for the acquisition of goods and services a provision requiring compliance with contracting goals and preferences for small business concerns owned or controlled by veterans, under a bill introduced by Rep. John Boozman (R-Ariz.) June 10.

The Veteran-Owned Small Business Protection and Clarification Act of 2008 (H.R. 6221) would require VA and its agents to set aside at least 3 percent of their contracting funds to purchase goods and services from service-disabled veteran-owned small businesses, according to a statement issued by Boozman's office June 10. Boozman is the ranking Republican on the Veterans' Affairs Economic Opportunity Subcommittee.

The bill, which requires the VA to coordinate with any agent to ensure that the 3 percent provisions are being met, fixes a loophole in the "Veterans Benefits Healthcare and Information Technology Act of 2006" (Pub. L. No. 109-461), according to the statement.

It addresses situations involving VA's use of "agents such as other government agencies to provide contracting services," a practice Boozman said "cannot relieve VA from its responsibility to the disabled veteran business community." The bill "reinforces business contracting opportunities at the VA which must set an example for the rest of the Federal government."

GSA Proposes Mentor-Protege Program To Help Small Firms Get GSA Contracts

The General Services Administration is seeking input on a plan to encourage prime contractors to help small businesses qualify for its contracts and subcontracts.

The GSA mentor-protege program recognizes the "continuing need to develop the capabilities of small business, small disadvantaged business, HUBZone small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses and women-owned small businesses to perform contracts and subcontracts for GSA," the agency said in a proposed rule published in the *Federal Register* June 10 and open for public comment until Aug. 11.

The program would "foster the establishment of long-term relationships between these small business entities and GSA prime contractors, and increase the overall number of small entities that receive GSA contract and subcontract awards," according to the proposed rule.

The program is intended to provide small firm proteges "developmental assistance from GSA prime contractors under GSA contracts" and "subcontracting opportunities ... to gain valuable experience and knowledge about federal government contracting," the proposal said. The rule is expected to impact approximately 150 small businesses, according to a summary of GSA's initial regulatory flexibility analysis.

Establishment of the mentor-protégé program falls within GSA's authority under the Small Business Act "to provide appropriate incentives to encourage subcontracting opportunities for small business consistent with the efficient and economical performance of the contract," the rule said. "This authority is limited to negotiated procurements." A large prime contractor would be eligible to serve as a mentor under the program if it is:

- currently performing or has performed under at least one approved subcontracting plan awarded under a negotiated contract within the last five years; and
- able to provide "developmental assistance that will enhance the ability of protégés to perform as subcontractors."

A small business prime contractor could serve as a mentor under the program if it is able to provide "developmental assistance that will enhance the capabilities of protégés to perform as subcontractors and suppliers," the proposed rule said. A number of different forms of "developmental assistance" could be provided by mentors under the rule, including guidance on financial management, organizational management, overall business management/planning, and business development; engineering and other technical assistance; loans; rent-free use of facilities and/or equipment; and temporary assignment of personnel to the protégé for training purposes.

Costs incurred by mentors in providing this assistance would not be reimbursable as a direct cost under a GSA contract, but GSA said in the rule it will consider these costs in determining indirect cost rates if it is the mentor's responsible audit agency. "If GSA is not the responsible audit agency, mentors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates," the rule said.

The proposed rule would provide competition-related incentives for prime contractor participation in the mentor-protégé program. Contracting officers would be permitted to give mentors evaluation credit under Federal Acquisition Regulation 15.101, Tradeoff Process, which permits tradeoffs among cost or price and non-cost factors when it may be in the best interest of the government to consider award to other than the lowest priced offeror or the highest technically-rated offeror.

Accordingly, the rule said, COs may:

- evaluate subcontracting plans containing mentor-protégé agreements more favorably than subcontracting plans without such agreements; and
- assess the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in evaluating past performance in certain circumstances and determining contractor responsibility.

The proposed rule provides that mentor firms participating in the program will be solely responsible for selecting protege firms, although they are encouraged to select from a broad base of small businesses, including small disadvantaged businesses, small firms in Historically Underutilized Business Zones (HUBZones), and small businesses owned by women, veterans, and service-disabled veterans. The rule also includes provisions stipulating that under the mentor-protege program:

- mentor firms may have more than one protege;
- the selection of protege firms may not be protested except when a protest involves the size or eligibility status of a selected entity; and
- mentors are to negotiate agreements with their proteges that describe the elements of developmental assistance that will be provided, milestones for providing such assistance, factors for assessing protege progress, and the anticipated dollar value and the type of subcontracts that may be awarded to the protege.

The proposed rule would amend the GSA Acquisition Regulation by adding a new subpart outlining the mentor-protege program, and includes associated solicitation provisions and contract clauses. *Comments on the proposed rule are due Aug. 11 (73 Fed. Reg. 32,669, 6/10/08).*

OFPP Issues New Guidance, Mandates On Interagency Acquisition Use, Management

Federal agencies will have to take a more formal approach to interagency contracting under guidance recently issued by the Office of Federal Procurement Policy that spells out the roles of customer agencies and procuring agencies and reinforces the need for sound contracting and business practices. Specifically:

- as of Oct. 1, agencies must make "best interest determinations" to support their decisions to use interagency acquisitions; and
- starting Nov. 3, agencies must either begin using the model interagency agreement included in the guidance, or ensure that new agreements entered into after this date incorporate the model agreement's key elements.

Further, agencies are to use a checklist contained in the guidance to clearly identify the roles and responsibilities involved in a particular interagency acquisition, and agencies "shall also consider modifying existing long-term interagency agreements for assisted acquisitions in accordance with this guidance, as appropriate and practicable," OFPP Administrator Paul Denett said in a June 6 memorandum transmitting the guidance to agency chief acquisition officers and senior procurement executives.

The guidance, which initially was expected to be released a year ago, has been in the works since late 2005, when OFPP formed an interagency working group to explore methods of better managing and using interagency contracts. The Government Accountability Office in February 2005 deemed federal management of interagency contracts to be at "high risk" of waste, fraud, and abuse, warning that the increasingly popular contracting vehicles are being used in an environment in which accountability has not always been established.

"Lack of clear lines of responsibility between agencies with requirements (requesting agencies) and the agencies which provide acquisition support and award contracts on their behalf (servicing agencies) has contributed to inadequate planning, inconsistent use of competition, weak contract management, and concerns regarding financial controls," Denett said in his memo. These problems, he suggested, detract from the benefits interagency acquisitions offer federal agencies, "including economies and efficiencies and the ability to leverage resources."

The new guidance places "particular emphasis" on helping requesting agencies and servicing agencies manage their shared fiduciary responsibilities in assisted acquisitions--those in which the servicing agency performs acquisition activities on the requesting agency's behalf, such as awarding a contract or blanket purchase order, under an interagency agreement--Denett said. The guidance includes a model interagency agreement for an assisted acquisition that establishes the terms and conditions that govern the relationship between requesting and servicing agencies.

It also includes a checklist identifying 16 basic responsibilities in an interagency acquisition and, for each one, the associated roles for the requesting agency and the servicing agency. Responsibilities in the checklist are broken down for each step in the lifecycle of the acquisition: acquisition planning, contract execution, contract administration, and other responsibilities, such as ensuring the accurate and timely collection of data to measure results and plan for future requirements.

A separate list included in the guidance sets forth the elements of an interagency agreement, including: the legal authority the servicing agency will use to conduct interagency acquisitions; the scope of the agreement, specifically organizations that may request assistance under the agreement, provide assistance under the agreement, and the general types of services or products the requesting agency may need; the responsibilities and roles of each agency in an interagency acquisition; the duration of the agreement; contract termination, disputes, and protests; and the rights of each party to terminate the agreement. Denett in his memo directed that agencies ensure that new interagency agreements for assisted acquisitions entered into on or after Nov. 3, 2008, either follow the model agreement or contain the elements included in the checklist of participating agencies' basic responsibilities.

Denett also said that, as of Oct. 1, 2008, agencies will be required to ensure that decisions to use interagency acquisitions are supported by "best interest determinations"--a decision by the requesting agency prior to a request for acquisition assistance that such assistance is necessary and can be provided by the servicing agency. This requirement applies to direct acquisitions--those in which a requesting agency places an order directly against a servicing agency's indefinite delivery vehicle (IDV), such as a governmentwide acquisition contract (GWAC) or multi-agency contract (MAC)--as well as to assisted acquisitions. (In a direct acquisition, the servicing agency manages the IDV, but does not participate in placing the order, the guidance explains.)

The guidance advises that, when choosing a servicing agency, the requesting agency should consider the servicing agency's authority and expertise in entering into a contract or order for the required products or services, as well as the servicing agency's ability to comply with the requesting agency's statutes, regulations, and policies, including any unique acquisition and fiscal requirements. Customer satisfaction with the servicing agency's performance and the reasonableness of its fees also should be taken into account. The guidance establishes processes to ensure acquisition offices within requesting agencies are appropriately involved in the decision whether or not to grant a requiring office's request to enter into an interagency acquisition. For interagency acquisitions over \$200,000, a requiring office must notify the acquisition office of its plan and allow that office one week to respond before sending the request to the outside servicing agency.

For interagency acquisitions over \$500,000, "instead of simply requesting a response from the in-house acquisition office, the notifier shall seek its concurrence and allow one week for response. Non-concurrences shall be presented to the requesting agency's senior procurement executive and resolved within one week of the non-concurrence," the guidance says.

Despite some urgings that OFPP establish a governance structure to formalize the establishment and continuation of interagency contracts--in order to provide more oversight of these vehicles--the working group did not use the interagency acquisition guidance to do so. Denett in his memo said improving the governance structure for creating and renewing interagency acquisitions is "equally important" as providing for the sound management and use of the contracting vehicles, "especially for multi-agency contracts. We have made important strides to leverage the government's vast buying power under the Federal Strategic Sourcing Initiative and to identify suitable executive agents that can manage governmentwide acquisition contracts on behalf of customers across government," he said.

Denett said he is committed to "build on these efforts in order to maximize the contribution of interagency contracts to mission success" and intends to work with members of the Chief Acquisition Officers Council, including its strategic sourcing working group, "to design a business case review process similar to that currently used for the designation of executive agents for GWACs and to define the structure required to support such a process." The congressionally

mandated Acquisition Advisory Panel in its January 2007 report recommended that the Office of Management and Budget assume a greater oversight role with respect to the creation and continuation of interagency contracting vehicles, but concluded that individual government agencies should bear the ultimate responsibility for deciding whether to enter into such contracts and for managing them when they do (85 FCR 213, 2/28/06).

The panel adopted a package of recommendations covering use of GWACs, the General Services Administration's multiple award schedules program, and franchise funds, all of which already are subject to statutory review. The recommendations from the panel's working group on interagency contracting suggested, however, that the existing review procedures need to be formalized and extended to cover multi-agency contracts, enterprisewide vehicles, and the assisting entities that support these contracting vehicles. It called on OMB to issue guidance and procedures for agencies to "formally authorize the continuation/reauthorization of the vehicles and entities ... on an appropriate recurring basis consistent with the nature or type of the vehicle or entity."

According to the group, these vehicles and the assisting entities "should be subject at the agency level to periodic review and disestablishment if they do not continue to meet specific agency needs and support the effectiveness of governmentwide contracting." While making agencies responsible for deciding to create and continue individual contracting vehicles, the group set forth parameters for wider involvement by OMB by providing a detailed list of factors it wanted addressed in the guidance as well as procedures "to structure the agency decisions" in this area.

Information compiled by OFPP showing that there were 54 interagency contracts in April 2007, not counting the 13 GWACs specifically dedicated to information technology products and services, raised concerns that the contracting vehicles may be duplicative and buttressed arguments for a government structure to provide for better oversight of these vehicles.

The interagency acquisition guidance and Denett's memo are available at:
http://www.whitehouse.gov/omb/procurement/interagency_acq/iac_revised.pdf

House Adopts 'Clean Contracting' Provisions Amending FY '09 Defense Authorization Bill

The House May 22 adopted by voice vote a sweeping "Clean Contracting Act" amendment sponsored by Rep. Henry Waxman (D-Calif.) for inclusion in the fiscal 2009 defense authorization bill (H.R. 5658).

The amendment, approved before the House passed the defense measure by a vote of 384 to 23, contains multiple provisions originally put forth in a freestanding clean contracting bill offered by Waxman in 2006. These provisions, which would apply governmentwide, include language aimed at enhancing competition for awards, curbing the use of "abuse--prone" cost-plus contracts and commercial item acquisition authorities, and extending whistleblower protections for contractor employees.

The bill also includes transparency in contracting language based on several freestanding bills already passed by the House, such as one sponsored by Rep. Carolyn Maloney (D-N.Y.) that would require offerors or bidders seeking federal contracts to disclose their involvement in legal or administrative proceedings initiated by the federal government, and another offered by Rep. Peter Welch (D-Vt.) that would require that a proposed Federal Acquisition Regulation rule requiring contractors to disclose to the government violations of federal law apply to all federal contracts valued at \$5 million or above, including those performed entirely overseas and contracts for commercial items.

The amendment "consolidates these provisions into a single reform measure" and sends the message that Congress is serious about thwarting fraud, waste, and abuse by contractors that have "squandered billions of dollars," said House Oversight and Government Committee Chairman Waxman, in offering the amendment on the House floor. Shortly before the House vote on the amendment, the White House released a statement of administration policy on the defense bill, warning that the administration "would strongly oppose burdensome and costly governmentwide statutory requirements contained in the Clean Contracting Act of 2008." The administration objected in particular to the database to be created under the provision taken from the Maloney bill, saying that the database would be "unwieldy" and would "unfairly expose [contractors and grantees] to possible Government-wide exclusion without appropriate safeguards."

Rep. Tom Davis (R-Va.), the ranking Republican on the House Oversight committee, was less than enthusiastic about the amendment. Davis said that while the contracting reform measures may be well-intended, he is "skeptical" that they will be effective in addressing government acquisition challenges without imposing "undesired burdens" on the acquisition community. Davis said a better acquisition reform approach would be to ensure that acquisition requirements are well defined and to provide more training to acquisition officials.

Davis expressed support for language in Waxman's amendment that would require agencies to devote a larger portion of their service contracting budgets to contract oversight and planning, as well as for a provision that would mandate the creation of a contingency contracting corps able to respond to national emergencies. However, Davis objected to a provision that would allow the Government Accountability Office to access contractor records and to interview contractor employees. This measure, which Waxman previously offered before the Oversight Committee and then withdrew, has not been subject to debate in Congress and "is not ready for prime time," Davis said.

The Waxman amendment added to the defense authorization measure a new Division D, titled "Governmentwide Acquisition Improvements." According to its terms, the amendment is aimed at:

Enhancing Competition--Provisions in this area would:

- require federal agencies that awarded at least \$1 billion in contracts in the preceding fiscal year to develop and implement plans to minimize the use of noncompetitive contracts;
- limit to nine months the duration of noncompetitive contracts awarded to meet urgent and compelling circumstances, unless the agency head determines that "exceptional" circumstances apply;
- require that purchases made under a multiple award contract be made on a competitive basis, meaning that all offerors that provide the relevant goods or services are provided notice of the intent to make the purchase and a fair opportunity to make an offer and have the offer fairly considered; and
- require federal agencies to publish notice on the FedBizOpps Web site and the agency Web site of sole-source task or delivery orders that are placed against multiple award contracts.

Curbing 'Abuse-Prone' Contracts--Provisions in this area are aimed at restricting the use of cost-reimbursement contracts, interagency acquisitions, lead systems integrator contracts, acquisition support contracts, excessive pass-through charges, award and incentive fees that are not adequately tied to performance, and commercial item contracts for services that are "of a type" sold in the commercial marketplace.

Specifically, these provisions would:

- require that the FAR be amended to minimize the "inappropriate use" of cost-reimbursement contracts and require agency heads to establish and implement metrics to this end;

- require the Office of Management and Budget to: submit to Congress a comprehensive report on interagency acquisitions, including frequency of use, management controls, cost-effectiveness, and savings generated; develop guidelines on the use of interagency acquisitions and categories of contracts that are inappropriate for interagency acquisition due to high risk of waste, fraud, or abuse; and revise the FAR to require written agreements between the requesting agency and servicing agency that assign responsibility for contract administration and management and include a determination that an interagency acquisition is the best procurement alternative;
- prohibit the award of new contracts for lead systems integrator functions after Oct. 1, 2010, and, effective immediately, permit the award of new contracts for LSI functions in the acquisition of a major system only if the contract does not proceed beyond the demonstration phase and the agency head determines in writing that it would not be practicable to carry out the acquisition without continuing to use a contractor to perform LSI functions;
- require agency heads to ensure that the acquisition workforce is of the appropriate size and skill level necessary to accomplish inherently governmental functions related to major systems acquisition;
- permit agencies to award contracts for acquisition support functions for major systems only if the contract: prohibits the contractor from performing inherently governmental functions; ensures that federal employees are responsible for determining courses of action to be taken in the best interest of the government; and provides that the prime contractor may not recommend the award of a contract or subcontract to an entity owned in whole or in part by the prime contractor;
- require that the FAR be amended to ensure that excessive pass-through charges on contracts (or task or delivery orders) are not paid by the federal government;
- require that all new contracts using award and incentive fees link such fees to acquisition outcomes defined in terms of program cost, schedule, or performance, and that regulations be issued to provide guidance on determining the percentage of available fees a contractor should be paid for certain performance levels; and
- require that the FAR be amended to minimize the "abuse of commercial services authority" by ensuring that services that are not offered and sold competitively in substantial quantities in the commercial marketplace--but rather are "of a type" offered and sold competitively--may be treated as commercial items only if the contracting officer determines in writing that the offeror has submitted sufficient information to allow the government to evaluate, through price analysis, the reasonableness of the price for such services.

Strengthening the Acquisition Workforce--Provisions in this area would: mandate the establishment of an acquisition workforce development fund to recruit, hire, educate, train, and retain members of the acquisition workforce in civilian agencies; and require the establishment of a governmentwide contingency contracting corps to be available for deployment in responding to an emergency or major disaster, or a contingency operation, within or outside the continental United States.

Preventing Fraud--Provisions in this area would:

- provide increased protections for contractor whistleblowers by expanding the types of disclosures that are protected and accelerating the schedule for denying relief or providing a remedy;
- require that FAR provisions that require federal contractors to disclose to the government violations of federal criminal law or overpayments apply to contracts performed outside the United States and to contracts for commercial items; and
- require that the FAR be revised to prevent contractor conflicts of interest, and to include, at a minimum, a standard organizational conflict of interest clause and a standard contractor employee personal conflict of interest clause.

Enhancing Contract Transparency--Provisions in this area would:

- require the disclosure of chief executive officer salaries and salaries of the five most highly compensated officers if a privately-held company has more than \$25 million, and 80 percent or more, in annual gross revenues from federal contract awards;
- mandate the establishment and maintenance of a database on contractor integrity and performance that would include information on: civil, criminal, or administrative proceedings concluded by the federal government or a state government that result in a finding of fault by the contractor and payment of restitution to the government of \$5,000 or more; federal contracts or grants that were terminated; and federal suspensions or debarments imposed.

This last provision, drawn from the Maloney bill, also would require offerors seeking a federal contract or grant to report their involvement in such proceedings. In addition, it would require that prior to awarding a federal contract or grant, the responsible federal official must review the database and, if a prospective awardee has, within any three-year period, been subject to more than one judgment that is a cause for debarment, the official must document why the prospective awardee is considered presently responsible to receive a federal contract or grant.

Bipartisan 'Smart Contracting Caucus' Announced by Departing Rep. Tom Davis

Rep. Tom Davis (R-Va.) May 22 announced the formation of the "Smart Contracting Caucus" to promote informed discussion of federal procurement policy issues once he leaves the House at the end of the current session of Congress.

Davis, now the ranking Republican and formerly the chairman of the House Oversight and Government Reform Committee, sponsored some of the major acquisition reform legislation of recent years--including the Federal Acquisition Reform Act and the Services Acquisition Reform Act--and has been widely considered the House member most knowledgeable about federal acquisition and contracting issues.

"I am fortunate to come from a procurement law background, so I've had an advantage in understanding of a lot of the nuances of contracting laws," Davis said in a statement released by the committee. "I've been privileged to take a lead role in a lot of procurement reforms. As I prepare to leave Congress, I want to make sure others who care about procurement have a forum to discuss and push for sound procurement policy."

Warning that there are some in Congress "who would sacrifice smart procurement for short-term political gain," Davis emphasized that there are "plenty of other procurement leaders ready to take up the cause" of smart procurement, and that the caucus will provide a vehicle to broaden the number and the voice of these leaders.

The caucus is a Congressional Member Organization, registered with the Committee on House Administration. Davis solicited membership in an April 24 "Dear Colleague" letter sent to all House Member offices and signed by himself, Rep. Joe Courtney (D-Conn.), Rep. Christopher Shays (R-Conn.), and Rep. Christopher P. Carney (D-Pa.).

The federal government spends about \$430 billion per year on contracts for goods and services. It is incumbent upon members to ensure we do this efficiently, Davis said in the letter. "Businesses that engage in government contracting employ tens of thousands of American citizens in every region of the country and nearly every congressional district," the letter pointed out. "This caucus will be a venue for Members to share their positive experiences regarding small business economic development with other Member offices."

Davis announced his retirement last January, saying he planned to return to the private sector. For a time, Davis had been considered a likely candidate to succeed retiring Sen. John Warner (R-Va.), but he opted not to pursue that seat after Virginia's Republican party decided to use a convention, rather than a primary, to select a candidate. That decision was seen as favoring James Gilmore, a former Virginia governor who is more conservative than Davis.

OFPP Issues Guidance for Agencies To Assess, Improve Acquisition Functions

The Office of Federal Procurement Policy May 21 gave federal agencies new guidance on evaluating and improving their acquisition functions.

The *Guidelines for Assessing the Acquisition Function* will help agencies gauge the "health" of their acquisition operations in a "uniform, standardized way," as opposed to the "hodgepodge" of approaches currently employed, OFPP Administrator Paul Denett told reporters in a teleconference announcing the guidance. A template included in the new guidance provides a standard approach for conducting the entity-level acquisition reviews mandated under Office of Management and Budget Circular A-123, Management's Responsibility for Internal Control, which requires agency managers to continuously monitor and improve the effectiveness of the internal controls associated with their programs.

Agencies are required to integrate their acquisition assessments with internal control and reporting processes established under Circular A-123, and report to OFPP by July 31 on implementation plans for using the new template. Denett said agencies are encouraged to use the template for acquisition and program management reviews for the remainder of the fiscal year and are required to do so starting in fiscal year 2009. The guidance is modeled after a framework developed by the Government Accountability Office in 2005 for identifying where agencies are experiencing acquisition management difficulties. Like GAO's framework, the acquisition assessment guidelines cover "all important components," according to Denett.

The four "cornerstones" identified by GAO and reflected in the guidance are:

- organizational alignment and leadership;
- policies and processes;
- human capital; and
- knowledge and information management.

For each of these areas, the template provides a series of critical questions, cautions, and successful practices to help acquisition officials identify and close performance gaps. "Each of these cornerstones has a direct influence on the extent to which the acquisition function is efficient, effective and accountable to the taxpayer," Denett said in a May 21 memo transmitting the guidance to federal agency chief acquisition officers (CAOs).

The departments of Energy, Treasury, Homeland Security, Defense, and Interior have had success incorporating evaluation and analysis of the four cornerstone areas into their acquisition and program management reviews, self-assessments, and other internal control-related review and survey practices, Denett observed. "By assessing an acquisition program from the perspective of each cornerstone, an agency can more clearly identify the sources and reasons for performance

gaps," he said. "Equally important, the agency can bring all affected stakeholders together to develop a clear definition of success and steps to achieving success, including a corrective action plan to close performance gaps."

The guidance emphasizes that improved quality of the entity-level acquisition reviews is dependent upon efforts by CAOs to achieve standardization and integration. "As part of their responsibility for monitoring the performance of acquisition activities and programs required by SARA [Services Acquisition Reform Act of 2003], and as managers under OMB Circular A-123, CAOs must employ a standardized assessment methodology that, at a minimum, includes consideration and evaluation of acquisition activities and programs in the template's four cornerstone areas," the guidance says. "CAOs must use the template to evaluate the acquisition function as part of the internal control assessments conducted at the entity level."

With respect to integration, the guidance says CAOs must integrate entity-level assessments of the acquisition function into agencies' existing internal control review and reporting processes established under Circular A-123. Under Circular A-123, agencies: perform risk assessments and implement control activities; develop corrective action plans for material weaknesses in the operation of internal controls; track progress on corrective action plans; and report the material weaknesses in performance and accountability reports prepared for OMB and Congress.

"Accordingly, activities conducted pursuant to these guidelines shall support the establishment, assessment, and correction of internal controls for acquisition," the guidance says. The integration called for by the guidance "will contribute to a more holistic assessment of agency acquisition activities and minimize duplication of effort," Denett said.

Denett's May 21 memo to CAOs and the Guidelines for Assessing the Acquisition Function are available at: http://www.whitehouse.gov/omb/procurement/memo/a123_guidelines.pdf.

Proposed FAR Rule Outlines Requirements For Contractor Use of DHS E-Verify System

The Federal Acquisition Regulation councils issued a proposed rule June 12 to require federal contractor participation in the Homeland Security Department's E-Verify system to check the eligibility of company personnel to work in the United States.

The proposed rule would amend the Federal Acquisition Regulation to reflect the responsibilities of federal agencies under Executive Order No. 12,989, as amended and signed by President Bush June 6, to prevent illegal immigrants from working on contracts performed in the United States. The order requires federal agencies to make contractor use of the DHS electronic employment verification system a condition of each federal contract.

The proposed rule sets out a new clause requiring contractors to utilize E-Verify to confirm the legal employment status of all newly hired personnel and of existing employees who are "directly engaged in the performance of work in the United States under those contracts." The rule would require inclusion of the clause in prime contracts that include work in the United States and exceed the micropurchase threshold (generally \$3,000) and in subcontracts over \$3,000 for commercial or noncommercial services, including construction, but for not materials.

However, the clause would not be included in contracts for commercially available off-the-shelf (COTS) items or items that would be COTS items but for minor modifications. The rule writers said the FAR councils decided to exempt these contracts because "COTS suppliers by definition do not specialize in serving the federal government, and because the government might lose access to COTS suppliers if they determine the cost of complying with the rule outweighs their gains from government business."

The rule also would not apply to any employment outside the United States, including work on U.S. embassies or military bases in foreign countries. In addition, it does not cover employees hired before Nov. 6, 1986, because they are exempt from the employment verification requirements of the Immigrant and Nationality Act. Heads of contracting activities would be allowed to waive the requirement for the E-Verify contract clause based on "exceptional circumstances," the rule said.

The FAR changes in the proposed rule would apply to solicitations issued and contracts awarded after the effective date of the final version of the rule. Federal agencies and departments would be directed to amend existing indefinite-delivery/indefinite-quantity contracts to include the clause for future orders "if the remaining period of performance extends at least six months after the effective date of the final rule and the amount of work or number of orders expected under the remaining performance period is substantial," according to the proposed rule. The FAR councils--the Civilian

Agency Acquisition Council and the Defense Acquisition Regulation Council--are "attempting to balance competing needs" in drafting the rule, the rule writers said. "It was written to apply the requirements in a manner to ensure effective compliance by the contractor community, but it exempts certain prime contracts and subcontracts when the cost of compliance would likely outweigh the benefits, e.g., COTS items," they said.

The rule writers also said contractor participation in E-Verify "differs in one significant respect" from the requirements that apply to other employers, in that "current employees of federal contractors that are assigned to work in the United States on a covered federal contract, as well as the contractor's new hires in the United States, must be verified under this rule." Under the rule, employees assigned to the contract would have to be verified within 30 days in the initial contract start-up phase. Once the start-up phase has ended, newly hired and newly assigned employees would have to be verified within three days, according to the rule.

The rule writers added that U.S. Citizenship and Immigration Services (USCIS), the DHS agency responsible for E-Verify, is revising a memorandum of understanding (MOU) employers are required to enter into with DHS and the Social Security Administration in order to use E-Verify, as well as system training materials, Web site content, and other materials to "reflect the duties that Federal contractors will take on when they sign a contract containing the clause promulgated by the rule." These accommodations "will make this proposed FAR amendment and the E-Verify System consistent for Federal contractors, but will not apply to E-Verify users who are not required to comply with the contract clause promulgated by the rule," the rule writers said.

"Federal contractors' compliance with that revised MOU will be a performance requirement under the terms of the Federal contract or subcontract, and the contractor must consent to the release of information relating to compliance with its verification responsibilities to contracting officers or other officials authorized to review the Employer's compliance with Federal contracting requirements." The supplementary information accompanying the proposed rule outlines the steps in the E-Verify process, in which worker information is checked against information contained in SSA and USCIS databases, and the responsibilities of an employer with respect to the process.

Approximately 168,324 contractors and subcontractors are expected to enroll in E-Verify under the rule and an additional 3.8 million employees are expected to be "vetted through E-Verify" as a result, according to a summary of the regulatory impact analysis conducted to estimate the costs of the rule. The cost of the proposed rule at 7 percent net present value is approximately \$107 million in the initial year, and \$550.3 million between 2009 and 2018, according to the summary. The summary also details the kinds of costs that are anticipated, including the startup costs associated with E-Verify registration, training costs for employees that use the system, the costs of the actual entry of verification data, and employee replacement costs.

The rule writers estimate the average direct cost of the rule--that is, those associated with E-Verify participation as opposed to compliance with immigration laws--to a contractor with 10 employees to be \$419 in the initial year; for a contractor with 500 employees, the initial year costs is estimated at \$8,964. "This level of direct cost is well under 1% of the expected annual revenue of these . . . sizes of entities," according to the proposal.

Comments on the proposed rule (FAR Case 2007-013; Docket 2008-001) are due Aug. 11 (73 Fed. Reg. 33,379, 06/12/08). A revised MOU reflecting program participation requirements for federal contractors has been placed in the docket for this rulemaking, and will be available online at: <http://www.regulations.gov>.

LEGISLATIVE ACTION

Bill Number	Sponsor	Description	Action
H.R. 3179	Towns	To allow state and local governments to use GSA schedules program to purchase homeland security and public safety equipment and services	Passed by Senate under unanimous consent, 06/10/08
H.R. 6193	Harman	To limit federal government from restricting disclosure of information by labeling it "sensitive but unclassified"	Introduced 06/5/08; referred to Homeland Security
H.R. 6221	Boozman	To require the VA to include in each of its contracts for the acquisition of goods and services a provision requiring compliance with contracting goals and preferences for small business concerns owned or controlled by veterans	Introduced 06/10/08; referred to Veterans' Affairs
H.R. 6244	Thompson	To require DHS to issue regulations mandating that any award fee under a cost-plus-award-fee contract entered into by the agency shall be determined and paid based on a successful acquisition outcome that is specified in the contract	Introduced 06/11/08; referred to Homeland Security
H.R. 6245	Thompson	To require a direct link on the DHS Web site to the Web site of the DHS Office of Inspector General	Introduced 06/11/08; referred to Homeland Security
S. 3112	Enzi	To reauthorize the Javits-Wagner-O'Day Act and the Randolph-Sheppard Act	Introduced 06/11/08; referred to Health, Education, Labor and Pensions