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SBA's SDVOSBC Ineligibility Determination Remained Effective for Another Procurement

The Department of Veterans Affairs properly rejected a joint venture's bid based on the Small Business Administration's determination, made in regard to another solicitation, that the joint venture did not qualify as a service-disabled veteran-owned small business concern (SDVOSBC), the Government Accountability Office decided April 23 (*Singleton Enterprises-GMT Mechanical, A Joint Venture*, GAO, B-311343, 04/23/08).

SBA's determination expressly stated that it was effective immediately and was "final" unless overturned on appeal or unless SBA granted relief, neither of which occurred here, GAO said. Accordingly, GAO dismissed the protest by Singleton Enterprises-GMT Mechanical, A Joint Venture, of the VA's rejection of its bid to perform certain renovation work at a VA facility in Jackson, Miss., under a total SDVOSBC set-aside.

The VA issued the solicitation for the Jackson, Miss., work Jan. 15, 2008, with bids due Feb. 14. Meanwhile, the VA Jan. 22 filed a protest with SBA challenging Singleton-GMT's status as an SDVOSBC for purposes of a bid for VA work in Lexington, Ky. SBA sustained the VA's protest Feb. 20, finding that Singleton-GMT was not eligible to represent itself as an SDVOSBC for purposes of federal procurement.

The VA rejected Singleton-GMT's bid for the Mississippi work Feb. 27, based on SBA's Feb. 20 determination in the Kentucky procurement. Singleton-GMT JV filed an appeal to SBA's Office of Hearings and Appeals (OHA) March 4, and filed its protest of the VA's rejection of its bid for the Mississippi work March 11. On March 27, OHA affirmed SBA's determination that Singleton-GMT did not qualify as an SDVOSBC.

The VA then asked GAO to dismiss Singleton-GMT's protest because its rejection of the JV's bid for the Mississippi work was mandated by SBA's determination that the JV was not an SDVOSBC. Meanwhile, earlier this year, GAO sustained a protest by Singleton-GMT involving the Kentucky procurement, finding that the VA's determination that the JV was not a proper SDVOSBC "could not be made by the agency because it was subject to determination by the SBA". Singleton-GMT subsequently complained that the VA unduly delayed taking corrective action in that protest, but GAO disagreed and denied the JV reimbursement of its protest costs.

In rejecting this latest protest, GAO deferred to what it said was SBA's reasonable interpretation of the agency's own regulations. GAO noted that both the Federal Acquisition Regulation and SBA regulations provide for SBA resolution of questions of SDVOSBC status and for a procedure allowing an agency to protest a firm's SDVOSBC status to SBA.

GAO also said that consistent with SBA regulations, SBA's determination that Singleton-GMT was not an SDVOSBC expressly stated that the determination was effective "immediately" and was "final" unless overturned on appeal or unless relief was granted under SBA regulations (e.g., due to a change in ownership to satisfy the SDVOSBC definition), and that because of this determination the JV was ineligible to bid on or receive any SDVOSBC contract awards.

Given that the OHA affirmed SBA's determination, GAO said, before Singleton-GMT could bid on or receive SDVOSBC contracts, the JV had to request that SBA grant it relief and to establish that it merited relief by documenting the actions it had taken to address the eligibility problems identified by SBA. However, GAO said, Singleton-GMT had not requested, and SBA had not granted, such relief. Had Singleton-GMT successfully pursued such a request and SBA agreed that the JV satisfied SDVOSBC eligibility, then SBA would have granted relief in accordance with its regulations and issued a new determination letter to Singleton-GMT stating its eligibility as an SDVOSBC.

Singleton-GMT also contended that the VA could not rely upon the SBA and OHA determinations to reject its bid, on the ground that the determination was only an initial decision and could not be final for 30 days. However, GAO said that "OHA's rulings on appeal are effective immediately, and are final, unless or until the judge chooses to reconsider the ruling" GAO further noted that the OHA decision states that it is a "final decision" of the SBA. For these reasons, GAO dismissed Singleton's protest. Wayne Singleton and Gary Michael Thompson represented Singleton-GMT. Natica L. Chapman of the VA and Kevin R. Harber of SBA represented the government. Katherine I. Riback and James A. Spangenberg of GAO participated in the preparation of the decision.

Doan Resigns as GSA Administrator, Ending Turbulent 22 Months in Post

Lurita Doan April 30 announced her resignation as administrator of the General Services Administration, giving no reason for leaving the job she has held for 22 months. David L. Bibb, formerly deputy administrator, was named acting administrator following Doan's resignation.

While Doan told Federal News Radio May 2 that she was called to the White House and asked to step down over what she described as her attempts to increase "oversight" of the agency's inspector general, her April 30 statement focused on GSA's achievements during her tenure. According to Doan's statement, these achievements include: regaining a clean audit opinion, restoring fiscal discipline, re-tooling GSA's ability to respond to emergencies, reducing bureaucratic barriers that have impeded small companies in getting GSA Schedule contracts, leading the nation in teleworking, and improving employee morale.

"These accomplishments are made even more enjoyable by the fact that there were lots of people who told us they could never be done. I have great faith in the abilities of GSA's dedicated team," she added. However, Doan's time GSA was marked by turbulence that began almost immediately after she was named to the administrator post. Shortly after she took the job, Doan raised eyebrows when she publicly complained about the aggressive auditing approach of GSA's office of inspector general, suggesting that the IG's "gotcha" mentality had a deleterious effect on the federal acquisition workforce. She subsequently proposed, but later dropped, the idea of contracting out to small businesses certain audits conducted by the IG--a suggestion Doan attributed to the need to place more fiscal constraint on the agency watchdog.

Doan subsequently got into hot water related to allegations that she:

- attempted to give a \$20,000 sole source contract to a company run by a long-time friend;
- sought to ensure the exercise of a five-year option under GSA's schedule contract with Sun Microsystems Corp. despite concerns by agency personnel that the company was overcharging government buyers;

- intervened in suspension proceedings involving five major contractors--KPGM, Ernst & Young, Pricewaterhouse Coopers, Booz Allen Hamilton, and BearingPoint Inc.--that allegedly performed work for the government while failing to disclose expense rebates received from airlines, car rental firms, hotels, and travel; and
- held a political briefing at GSA headquarters during which she asked how the agency could help Republican candidates.

Appearing before the House Oversight and Government Reform Committee last March, Doan said she did not remember the substance of the political briefing, and denied any misconduct in the other matters.

However, Sen. Charles Grassley (R-Iowa) was unpersuaded by Doan's assertions, and last October raised the possibility that Doan may have fabricated charges of intimidation against the agency's IG to cover up her improper involvement in exercising the option under GSA's IT contract with Sun Microsystems despite concerns of overcharging under the initial contract. The GSA IG had condemned Doan for her involvement with the Sun contract extension, suggesting it showed a lack of respect for both the law and law enforcement.

At that time, Grassley said he had forwarded to the White House and the congressional oversight committees three investigative reports that he said found "no evidence whatsoever" to support Doan's allegations that the IG's office was abusing its power by intimidating government contracting officers and vendors. Rather, he said, these reports detailed "top level-GSA management intervention in the Sun contract negotiations." The Iowa senator declined to make the reports public because they contained proprietary and "privacy-protected" information, but he said on the Senate floor that the "evidence suggests" that the allegations of intimidation by the IG "were a smokescreen" to hide the actions of GSA management in "ramming through a contract that may be bad for taxpayers."

Grassley made his comments shortly after Sun decided to cancel its contract with GSA to provide IT equipment and services to federal agencies. GSA disputed Grassley's remarks and said his investigation of the Sun Microsystems matter "appears to be a conspiracy looking for a theory." However, charges that Sun was withholding information about discounts it provided commercial customers but not to government customers were referred to the Justice Department.

Federal Acquisition Institute Reports Growth In Contracting Workers for Fourth Year in a Row

Government employees working in positions in the GS-1102 contracting series numbered nearly 500 more in fiscal 2007 than the previous year, according to the Federal Acquisition Institute's annual report on the federal acquisition workforce, which was released May 5 by the Office of Management and Budget.

This marks the fourth year of net growth in the government contracting series of positions since FY 2004, and a 1,826 person net increase in this portion of the acquisition workforce between FY 2001 and FY 2007--from 26,608 to 28,434. Since 2001, in every fiscal year but 2003, new hires have exceeded the personnel losses due to retirements, separations, and departures, "maintaining the steady state of the workforce with respect to GS-1102 contracting professionals," the report said. Hires exceeded personnel losses by 490 personnel in FY 2007, the report said. Hires outpaced losses by 653 in FY 2005, by 355 in FY 2006, and by 490 in FY 2007.

These findings regarding gains in the size of the contracting series workforce address what Office of Federal Procurement Policy Administrator Paul Denett told reporters is the misperception that there have been huge cuts in the numbers of federal contracting officials as federal acquisition spending has increased steeply. "This report verifies what I have been saying for a little while in terms of the growth of the acquisition community," Denett said during a telephone news conference. "We've definitely had the significant increases in spending, but we've also had increases in the workforce."

The FAI report also provides information on the larger acquisition workforce, which includes not only the GS-1102 contracting series, but also positions in four other series: general business and industry (GSA-1101), purchasing (GS-1105), procurement clerical and assistance (GS-1106), and industrial specialist (GS-1150). As defined by these five series, the acquisition workforce numbered 61,434 in FY 2007--up from 56,681 in FY 2001. Like the GS-1102 series, this larger acquisition workforce has increased in every fiscal year since 2001, except for FY 2003.

Denett said he believes that the contracting workforce should continue to grow, and that OFPP along with the departments are still working hard to determine what the "right number" of personnel is to meet the government's acquisition demands. Civilian agencies have projected a need to do additional hiring, which OMB has "been green lighting," Denett said.

At the Defense Department, the Defense Acquisition University is completing a competency assessment to identify the department's acquisition skill set requirements and hiring needs, Denett said. Noting that the recent Gansler report on Army expeditionary contracting indicated "the need for significant additional hiring" for the Army and DOD, Denett said the department is looking at that report. Denett said OPFF is pleased with the additional acquisition personnel hiring flexibilities provided by Congress in recent years, including the authority for direct hiring authority and the authority to hire retirees while allowing them to keep their annuities.

There is still "some disconnect" with some contracting agencies that complain it takes too long to hire acquisition workers, Denett said. The Office of Personnel Management recently has been making efforts to close this disconnect by informing federal acquisition managers of the hiring authorities available to their agencies, he said.

Denett also said that, starting with this year's report, FAI is collecting demographic data on program managers (PMs) and contracting officer's technical representatives (COTRs). He explained that it is important to monitor the strength of these positions as they represent the "eyes and ears" of contracting officers after contracts are awarded. "It doesn't do any good to have a great contracting officer with a weak program manager or a weak or untrained COTR," Denett said.

Also speaking with reporters, FAI Director Karen Pica said this year's report contains new types of information that "reflect what the agencies are telling us they need in order to do their strategic human capital planning." For example, this year's report includes information on where contracting officials are going, both within and outside government, when they decide to leave contracting series positions. "Preliminary data indicate that 444 individuals who held positions in the Contracting Series at the beginning of FY 2007 had migrated to other series in the federal government by the end of FY 2007," the report says.

The report further incorporates the findings of the contracting workforce competencies survey for civilian agencies that OFPP completed in 2007, Pica said. The report is starting to provide a "robust picture in terms of some of the data that's available" for agencies to do strategic human capital planning, Pica said.

The report indicates that more than half of the total acquisition workforce will be eligible for retirement over the next ten years, although Pica said only about 18 percent in the GS-1102 series are actually electing to retire. Since FY 2004 the attrition level has remained above 2,000, with 2,247 losses in FY 2007, the report said.

Pica said FAI wants to find out why retirement-eligible employees are deciding to continue working for the government, and then share that information with potential hires and individuals participating in one of several federal acquisition internship programs. Denett said the report shows the federal government has been successful at recruiting new hires through efforts such as the Federal Acquisition Intern Coalition. Further, the government has attracted well-educated workers, he noted. According to the report, the percentage of college graduates in the contracting series increased from 71 percent in FY 2006 to 75 percent in FY 2007.

With the government's compensation package and opportunities for advancement given the aging workforce, Denett said, the government has "a good story to tell" individuals interested in joining the federal acquisition workforce. Acquisition "literally is a major component in every department in the federal government," he said.

The Federal Acquisition Institute report, "Annual Report on the Federal Acquisition Workforce Fiscal Year 2007", is available at:

http://www.fai.gov/pdfs/FAI_2007_Workforce_Annual_Report.pdf.

Congressional Limits on Competitive Sourcing Reduce Private Sector Interest, OFPP Says

Office of Federal Procurement Policy Administrator Paul Denett May 2 blamed congressional restrictions on competitive sourcing for a decline in fiscal year 2007 in both the number of full-time equivalent government employees whose jobs were the subject of federal agency public-private competitions for the performance of commercial work and the number of private sector offers for the work being competed.

However, in spite of the "numerous" restrictions Congress has imposed on competitive sourcing activities, public-private competitions completed in FY 2007 are expected to yield savings of around \$400 million, Denett said during a press conference marking the public release of the Office of Management and Budget's latest report on federal agency competitive sourcing results. The average net savings per FTE competed over the last five fiscal years is about \$25,000, or 27 percent, for each position studied, according to the report. Agencies completed 132 competitions covering 4,164 FTEs, approximately one-third fewer than the number of FTEs covered in FY 2006 competitions, the report said. Federal employees won 73 percent of the work competed, compared to 87 percent in FY 2006. The 112 competitions announced in FY 2007 cover 6,153 FTEs.

Even though the competitions concluded in FY 2007 covered only 1.5 percent of federal agency commercial activities, projected savings from the competitions are "significant," the report said. The \$397 million the competitions will save over the next five to seven years brings the cumulative total net savings realized from competitions conducted since FY 2003 to \$7.2 billion, according to OMB estimates. Prior to 2003, few agencies other than the Defense Department used public-private competitions under OMB Circular A-76. As a result of the Bush administration's push for private sector performance of commercial support operations, more than 20 civilian agencies currently use the strategy, the report said.

The report described private sector participation in the competitions as "mixed." One or more private sector offers were received in 64 percent of the standard competitions completed in FY 2007, compared to a four-year average of 81 percent, while two or more offers were received in 49 percent of standard competitions during the same period, compared to 52 percent on average

during the four-year period. There is no doubt that legislative initiatives limiting the use of competitive sourcing have had a "chilling" effect on private sector involvement, Denett said. The FY 2008 consolidated appropriations act (Pub. L. No. 110-161) "contains at least eight new provisions addressing competitive sourcing, most of which limit its use," according to the report.

Among the new limits included in the spending act are requirements for health and retirement fringe benefit comparability and temporary restrictions on agency use of appropriated funds to carry out public-private competitions and direct conversions to contractor performance related to the Human Resources Line of Business.

"We have not been as effective as we would have liked" in selling members of Congress on the benefits of competitive sourcing, Clay Johnson, OMB deputy director for management, told reporters. He was optimistic, however, that the benefits of competitive sourcing will be better understood as a result of agencies' independent verifications of cost savings and performance improvements realized following the selection of service providers through public-private competitions.

The initial results of the independent verifications are just coming in and they show that the successes of competitive sourcing are not just anecdotal, Johnson said. "It is important to report what we really are doing." A year ago, OMB directed agencies to track and review cost and performance data to determine if the objectives of public-private competitions are being met. According to OMB's report, independent validations have been planned on more than 70 agency competitions, including awards both to agency "most efficient organizations" and to contractors.

"The competitions selected for independent validation are projected to produce \$3.5 billion in savings for taxpayers over their full periods of performance," the report said.

OMB said the "Report on Competitive Sourcing Results Fiscal Year 2007" (April 2008) will be available at: www.results.gov.

Coalition Warns of Problems in Implementing 3% Tax Withhold on Payments to Contractors

Implementing the statutory requirement for a 3 percent tax withholding on federal, state, and local government payments for goods and services will significantly increase costs to these governments and will directly impact their ability "to maintain competition and receive best value for the taxpayer's dollar," the Government Relief Withholding Coalition warned in April 28 comments to the Internal Revenue Service.

Asserting that there is no "equitable, practical, or cost-effective way to implement this new requirement," the coalition--which represents numerous and wide-ranging contractor and industry associations--continued to urge repeal of "this misguided and far-reaching law." The withholding mandate is imposed by Section 511 of the Tax Increase Prevention and Reconciliation Act (Pub. L.

No. 109-222). The coalition's comments were submitted in response to a Treasury Department request for input on issues and processes related to government implementation of the requirement.

The withholding currently is scheduled to go into effect Jan. 1, 2011, although measures are pending in the House and Senate to push back the effective date or repeal the statutory provision.

Key concerns the coalition said must be addressed, particularly with respect to federal contractor payments, include:

- What types of taxes can be offset by the withholding, and how would refunds be returned if withhold amounts exceed a contractor's liability?
- Why would the withholding apply to subcontractors, as suggested in the Treasury Department's request for input?
- What would be the impact of the withholding regime on existing government contracts?
- How would the withholding apply to General Services Administration Multiple Award Schedule contracts?
- How would the withholding apply to prime contractors and subcontractors performing under management and operations (M&O) contracts?
- How would the withholding apply to nontaxable pass-through entities and pass-through entities with government equity holders?
- Would non-U.S. businesses be subject to the same tax withholding treatment?

To bolster its case in opposition to the withholding, the coalition referenced a Defense Department report, released April 14, which concluded that it would cost the department more than \$17 billion over the first five years to apply the withholding to defense contractors payments. This would be "far more than any estimated revenue gains" expected to result from the effort to rectify tax noncompliance issues, the coalition said. "While \$17 billion is substantial, it is only a portion of the additional costs with which governments will be burdened," the coalition added.

Section 511 does not state what types of taxes can be offset by the 3 percent withholding on government payments, nor does it address how contractors would receive refunds when amounts withheld exceed their tax liability, the coalition said. Will entities be able to receive refunds throughout the year, or will they have to wait until they file their annual returns, the coalition asked. "For taxpayers generating operating losses, the ability to receive a refund at the earliest possible date may be essential to the viability of their business."

The coalition expressed similar concerns regarding obligations to make estimated tax payments throughout the year. "Many businesses will experience serious liquidity issues if they are subjected to a government withholding regime while also being required to make estimated tax payments without any offset for amounts withheld by government customers," the coalition said.

As a result, taxpaying entities providing goods and services to governments will incur high costs associated with the annual financing expenses necessary to compensate for illiquidity as a consequence of the withholding, the coalition said. "It is essential that the Congress and procurement officials at the federal, state, and local levels understand that over time the price of goods and services sold to governments will increase to cover these additional financing expenses."

The coalition suggested that any implementing regulations should permit offsets to be taken against income and payroll tax submissions. Further, "all government payment offices imposing withholding should be required to submit the amounts withheld to the IRS along with a file providing transaction-level detail of the withholdings taken on a weekly or every-other-week basis," and this information should be hosted on a secure Web site that taxpayers can access to determine the aggregate withholding that can be used to reduce payroll or estimated income tax submissions.

The coalition also took the IRS to task for asking how to apply the withholding to government subcontractors, asserting that Section 511 does not grant authority for a company to withhold taxes on behalf of another company. "The law on its face pertains to prime contracts only since the government's contract is with the prime contractor," the coalition said. "Flowing down the additional costs may very well be prohibited under the terms of Federal Prompt Payment laws, the Federal Acquisition Regulation (FAR) clauses, and other federal statutes," it added.

If contractors were required to withhold 3 percent on payments to subcontractors, the compliance burden would be high, since it would be "like creating a payroll department for non-employees," the coalition said. "Currently companies do not need to withhold on payments to non-employees and are required to issue a Form 1099 to only a limited number of vendors," the coalition continued.

Similarly, the coalition said "it is unclear" what impact the withholding would have on existing GSA schedule contracts, since the prices for these contracts were negotiated without taking into account the 3 percent withhold. They also are negotiated for five-year increments, making them "nearly impossible to renegotiate" all at the same time. "GSA Multiple Award Schedule (MAS) holders and GSA itself would face serious consequences if this law is implemented," the coalition said. This is because schedule holders, especially small businesses, have gross margins in the 3 percent to 8 percent range.

Application of the withholding to M&O contractors is also difficult, the coalition made clear. As a nongovernmental entity managing a government site, an M&O prime contractor must manage the procurement of services and equipment on the government's behalf from other commercial vendors and subcontractors, and is obligated to pay vendors and subcontractors 100 percent of their invoices. Currently, this is done through a zero-balance account system. Under such a system, the government wire transfers funds into the M&O contractor's advance payment account, and the funds are virtually simultaneously wire transferred out to the vendors and subcontractors.

However, this zero-balance account system "would be severely disrupted and would not be able to function properly if, under the new withholding rules, the government can only wire transfer 97% of the amounts due into the zero-balance account held in the name of the prime contractor," the coalition said. Further, withholding on such transfers could well exceed the M&O contractor's entire management fee, ultimately leading to increased time value costs to the contracting agency, which would in effect finance the time value benefit that Treasury is expected to receive from the withholdings, the group said.

The Government Withholding Relief Coalition comments to the IRS are available at:
<http://www.withholdingrelief.org/>.

Sen. Clinton's New Contractor Reporting Bill Goes Further Than Measure Passed by House

Sen. Hillary Clinton (D-N.Y.) April 24 introduced legislation that would require federal contractors to notify agency inspectors general and their contracting officers when they have reasonable grounds to believe violations of federal criminal law or significant overpayments have taken place in connection with one or more of their contracts or subcontracts.

Like legislation passed by the House (H.R. 5712), Clinton's "Guaranteeing Real Accountability in Federal Transactions Act" (S. 2916) incorporates the requirements of a proposed Federal Acquisition Regulation rule issued last November and extends those requirements to cover contracts performed outside the United States and contracts for commercial items. A similar extension has been included in a revised version of the proposed rule currently under review by the Bush administration.

Under Clinton's bill, which would apply to conduct associated with the bidding for or award or performance of contracts over \$1 million, notification would be required within 14 days after the contractor becomes aware of the violation or overpayment; failure to comply would be a cause for debarment or suspension of the contractor.

The bill also contains provisions mandating that:

- reported violations and overpayments be listed on the Office of Management and Budget Web site--www.USASpending.gov--that contains detailed information on government transactions that exceed \$25,000;
- OMB submit annual reports to Congress on violations of federal criminal law or significant overpayments that have occurred in connection with the award or performance of covered contracts and subcontracts; and
- the whistleblower protections in Section 315(a) of the Federal Property and Administrative Services Act of 1949 be strengthened for employees who report to the government on contract-related criminal violations or overpayments.

Clinton's bill goes further than its House counterpart, sponsored by Rep. Peter Welch (D-Vt.), which covers contracts over \$5 million and simply directs that overseas and commercial item contracts be covered by any FAR amendment requiring notification by contractors of criminal violations or contract overpayments.

The New York Democrat and presidential hopeful said in a statement that her bill, which has been referred to the Senate Homeland Security and Governmental Affairs Committee, "closes the unacceptable loophole" that would allow "contractors that hide criminal fraud and abuse ... to continue unexposed." Declaring that the "American people deserve an efficient, transparent and accountable government that works for them," Clinton criticized the Bush administration for outsourcing "critical government functions to unaccountable and too often unqualified private contractors."

S. 2916 is the second piece of legislation addressing contractor accountability that Clinton has introduced in recent weeks. S. 2866, a wide-ranging executive compensation bill introduced April 15, includes provisions requiring certain contractors to disclose compensation structures for top executives and directors and is similar in that regard to a recently-passed House bill (H.R. 3928) sponsored by Rep. Christopher Murphy (D-Conn.).

Sen. Claire McCaskill (D-Mo.) also is pushing for Senate action on the recent spate of House-passed contractor accountability bills. The Missouri Democrat recently introduced two bills--S. 2905, a companion to Welch's bill, and S. 2904, which tracks Rep. Carolyn Maloney's (D-N.Y.) bill (H.R. 3033) requiring offerors or bidders seeking federal contracts to disclose their involvement in administrative and legal proceedings initiated by the federal government.

The House passed H.R. 5712, H.R. 3928, and H.R. 3033 April 23. Less than two weeks earlier, the House April 14 acted on another contractor accountability bill and passed H.R. 4881, which is sponsored by Rep. Brad Ellsworth (D-Ind.) and is aimed at prohibiting companies with seriously delinquent taxes from receiving new contracts. Sen. Barack Obama (D-Ill.) is sponsoring the companion (S. 2519) to that bill in the Senate.

GSA Seeks Input on Draft Requirements For Acquisition, Contract Writing Software

The General Services Administration is seeking input on a draft document that specifies the functional and technical requirements that software for government acquisition and contract writing systems must meet in order to be purchased for use by federal agencies.

Prepared at the request of the Chief Acquisition Officers Council and the Chief Financial Officers Council, the proposed "Federal Acquisition System Requirements" is intended as a first step toward integrating the acquisition and finance functions more effectively. When finalized, the requirements are expected to become the standard for qualifying commercial off-the-shelf acquisition systems for purchase by federal agencies.

The document stresses that vendors are to offer acquisition system products using COTS software to the greatest extent practicable, reflecting the view--set out in Office of Management and Budget Circular A-130, Management of Federal Information Resources--that COTS software reduces costs, improves the efficiency and effectiveness of system improvement projects, and reduces costs inherent in developing and implementing a new system.

The draft document provides a framework for connecting program planning, core financial, and asset management processes with agencies' acquisition systems in order to deliver fully integrated acquisition support. It sets out detailed acquisition system requirements that incorporate the latest changes in laws and regulations governing such systems as the Federal Procurement Data System--Next Generation and the Central Contractor Registration.

The requirements also cover common system capabilities needed by all federal agencies, namely:

- delivering a template for an SF 149 Solicitation/Contract/Order for Commercial Items;
- verifying funds availability;
- capturing receiving report data; and
- generating a checklist of contract closeout items.

Other requirements set out in the 322-page document cover the need to implement basic automated internal controls, as required by OMB Circular A-123, Management's Responsibility for Internal Controls, and to maintain complete, reliable, consistent, timely, and useful management information.

Comments on the draft Federal Acquisition System Requirements are due June 27 (73 Fed. Reg. 22,948, 04/28/08).

Commercial T&M Contracts Should Be Part of Audit Coverage, DCAA Tells Auditors

Auditors should include Defense Department commercial time and materials (T&M) and labor hour (LH) contracts as part of their overall audit coverage, the Defense Contract Audit Agency said in guidance issued April 24.

This includes provisionally approving interim vouchers and reviewing final amounts billed under such contracts for compliance with contract terms, the guidance instructs. It references an April 14 memorandum from Defense Procurement, Acquisition Policy, and Strategic Sourcing Director Shay Assad that reminded contracting officials that approving interim vouchers is part of DCAA's responsibility.

As to what costs should be approved for payment, the guidance reminds auditors that the acceptability of costs billed under a commercial T&M/LH contract "is determined based on the terms and conditions of the contract," and is not subject to the Federal Acquisition Regulation cost principles (FAR Part 31.2) or the Cost Accounting Standards.

Effective Feb. 12, 2007, FAR Part 12 was revised to provide for commercial T&M and LH contracts, with terms and conditions for such contracts set out in the clause at FAR 52.212-4, Alternate I, DCAA explained. As detailed in July 31, 2007, DCAA guidance, commercial T&M/LH contracts provide that:

- hourly labor rates will be paid at the rate specified in the contract, and blended labor rates (combined prime, subcontractor, and/or interdivisional rates) by labor category may be used;
- hourly rates will be paid only for contract labor that meets the labor qualifications specified in the contract;
- material, subcontracts not included as part of the labor schedule, and other direct costs will be based on actual costs, and other direct costs should be listed in the contract by type of expense (e.g., travel, computer usage charges, etc.); and
- indirect cost, as applicable, will be reimbursed at a fixed amount prescribed in the contract on a pro rata basis over the contract period.

The FAR clause also contains an access to records provision that allows the contracting officer--or the CO's authorized representative--access to records that verify that employees whose time is included on any invoice meet the qualifications for the labor categories specified in the contract. Also, for labor hours, including any subcontractor hours reimbursed at the hourly rate in the schedule, access must be provided to:

- original time cards (paper or electronic);
- contractor timekeeping procedures;
- contractor records that show the distribution of labor hours between jobs or contracts; and
- employees whose time has been included in any invoice, for the purpose of verifying that these employees worked the hours shown on the invoice.

Further, for material and subcontract costs that are reimbursed on the basis of actual cost, access must be provided to any invoice or subcontract agreements substantiating material costs, and any documents supporting payment of those invoices. "The prime contractor is responsible for monitoring and providing substantiation to the Government of the hours and amounts incurred by its subcontractors," the guidance says. The contract clause also allows reimbursement to the government for any payments later found to be not payable under the terms and conditions of the contract, and requires the contractor to submit a final voucher within one year of contract completion, DCAA observes.

For contractors with incurred cost audit activity, auditors should include DOD T&M/LH contracts as part of their overall coverage of contract billings, the guidance says. The extent of review of commercial vouchers should be governed by "the materiality of the billed amounts and the adequacy of the contractor's billing system and eligibility for direct billing." Further, auditors should

ensure that DOD commercial T&M/LH contracts are included in the universe for transaction testing for system reviews, and should include employees charging time to such contracts in the universe for any floor checks performed.

At contractor locations where DCAA has no current incurred cost audit activity, audits will be limited to provisional approval of vouchers, floor checks, and audits of final vouchers. Auditors should consider reviewing the first voucher submitted to DCAA, and then should review vouchers selectively, based on sampling techniques established by the field audit office, according to the guidance (08-PPD-014(R)).

GSA MAS Advisory Panel Starts Work; Sees Need for Transparency, Consistency

Members of a new federal advisory committee recently created to recommend changes to the General Services Administration Multiple Award Schedules (MAS) contracting program sounded a common theme at their first meeting May 5, agreeing that pricing policies need to be more transparent and consistent.

The 15-member MAS Panel, unveiled by former GSA Administrator Lurita Doan April 17, has been tasked with reviewing the program's pricing policies, specifically "the most favored customer provisions and price reduction policies and provisions in the context of current commercial pricing," according to the advisory group's charter. The panel's "advice and recommendations will assist GSA in assuring that such policies result in MAS prices that are the lowest overall price," the charter says.

Panel Chairman Elliot Branch, the Naval Sea System Command's executive director for contracts, suggested that the panel's endeavor to come up with "workable recommendations" will be guided by the need to ensure that the schedules are run "more efficiently" and the schedule guidelines are applied consistently. At its next meeting, scheduled for May 22, the panel will determine whether to draft a "problem statement," lay out what issues will have to be considered in developing that statement, and set forth a "plan of attack" to address those issues, Branch said. If necessary, the panel will divide into working groups.

While expressing the hope that the panel can reach consensus in developing recommendations for improvements to the schedules program, votes will be held if members disagree over a particular course of action, Branch said. Ten of the committee's members come from federal agencies and include representatives of the Chief Acquisition Officers' Council and the legal and auditing fields. Four members are from industry associations representing companies that do business with GSA through the schedules program--the Professional Services Council, the Coalition for Government Procurement, the Security Industry Association, and the International Facility Management Association.

Under the MAS program, GSA negotiates and awards indefinite delivery, indefinite quantity contracts for commercial products and services, and federal agencies issue task and delivery orders against these contracts to make particular buys from schedule vendors. To meet Competition in Contracting Act requirements that MAS contracts and orders result in the lowest overall cost alternatives, GSA's goal in price negotiations generally has been to obtain prices for the government that are comparable to those paid by the firm's "most favored commercial customer." After award, if the firm reduces its prices to commercial customers, the price reduction provisions of the MAS contract may entitle the government to the reduced prices as well.

Both government and industry members of the panel agreed that current pricing policies make use of the schedules program a frustrating process for all parties involved. A key reason cited is the government's increasing use of the schedules to acquire services, rather than to buy the goods that were the original focus of the program. The advisory committee's charter directs that the program's pricing policies need to "result in MAS prices that are the lowest overall price." It calls on the panel to "identify other means of meeting this objective and recommend whether such alternate approaches satisfy competition requirements; protect the best interests of the government; ensure financial and ethical integrity of federal acquisitions; and promote the effective, efficient and fair award and administration of multiple award schedules program contracts."

In addition to transparency and consistency, panel members suggested that improvements could be made to streamline the program, better ensure that pricing results in the lowest overall cost alternative, and enhance competition. The panel plans to meet twice a month in order to complete its initial findings and recommendations within six months. A third meeting tentatively was scheduled for June 16.

Information about the MAS Panel is available at: www.gsa.gov/masadvisorypanel.

House Judiciary Panel Raises Concerns With New DOD FPI Competition Requirements

Recent legislation requiring the Defense Department to conduct competitive procurements when purchasing products for which Federal Prison Industries has a "significant market share" could result in a significant reduction in inmate jobs under the program, members of a House Judiciary Committee panel complained May 6.

Section 827 of the fiscal 2008 defense authorization act (Pub. L. No. 110-181) modified the mandatory sourcing policy for DOD purchases of products manufactured by FPI so that the competitive procurement mandate kicks in on products for which FPI's market share exceeds 5 percent, Rep. Robert "Bobby" Scott (D-Va.), chairman of the Crime, Terrorism, and Homeland Security Subcommittee, said at a hearing on the impact of the provision on FPI.

FPI--which does business under the trade name UNICOR--can submit a bid for the competitive procurement, he noted. Nonetheless, the Bureau of Prisons and prisoner advocates believe that this modification "will have the effect of drastically reducing the number of jobs available for prisoners," Scott said. He added that the provision was included in the defense authorization measure by "the senator from Michigan"--Senate Armed Services Committee Chairman Carl Levin (D-Mich.), whose constituents include furniture manufacturers that compete with FPI for federal agency business--without going through either the Senate or House Judiciary committees, which have jurisdiction over the FPI program.

FPI receives no appropriated funding, and thus relies on revenues generated from the sale of its products and services provided by prisoners, Scott pointed out. The goal of the program, which was established in 1934, is to provide prisoners with work skills they can use when they are released from prison and reenter the general workforce, and thereby reduce recidivism.

Ranking Republican Louis Gohmert (Texas), who also expressed dissatisfaction that the committee was not given the opportunity to weigh in on the provision before it became law, said he supports FPI. But he acknowledged the concerns of some that FPI, which is not subject to federal acquisition requirements that apply to private-sector contractors, might in some cases cause law-abiding workers to lose their jobs to prison workers.

"The truth is we've got to struggle for balance here," Gohmert said.

At least \$144 million in FPI program sales and a commensurate 3,250 prison inmate jobs "are potentially at risk," Harley Lappin, director of the Federal Bureau of Prisons at the Justice Department, told the panel. Lappin referred to March 28 DOD guidance implementing the change in the competition mandates for FPI products under Section 827. The guidance lists eight FPI product categories, identified by Federal Supply Classification codes, in which FPI meets the statutory 5 percent market share and therefore must be acquired by DOD using competitive procedures. These products include laundry and cleaning equipment, electrical and hardware supplies, and office furniture.

"It is difficult to say with certainty how much of the FPI program's sales that are potentially affected by Section 827 may be lost," Lappin said. As with previous modifications to FPI sourcing requirements, it will take some time to see how the mandate is fully implemented by contracting officers at DOD. "We're not opposed to competition as long as it's on a level playing field," Lappin said.

John Gage, national president of the American Federation of Government Employees, said his union opposes legislation to eliminate FPI's mandatory source status out of concern for the safety of union members who work as federal correctional officers and other staff inside Bureau of Prisons facilities. FPI occupies the time of prisoners who participate in the program, thereby reducing the risk that they might engage in violent activities that threaten federal employees and other inmates, witnesses said.

However, over the past few years AFGE has "come to accept the idea of eliminating the FPI mandatory source preference if and only if a strong work-based training program is developed to supplement the 'FPI' program," Gage said. "This strong work-based training program must necessarily create a sufficient number of new federal prison inmate jobs to replace the prison inmate job positions that would be lost if the FPI mandatory source preference is eliminated," he said.

LEGISLATIVE ACTION

Bill Number	Sponsor	Description	Action
H.R. 5968	Wittman	To amend the Small Business Act to make service-disabled veterans eligible to participate in the 8(a) business development program	Introduced 5/5/08; referred to Small Business
H.R. 5973	Price	To enhance oversight of intelligence agency contractors and prohibit their use in prisoner detention operations	Introduced 5/6/08; referred to Intelligence, Armed Services, and Judiciary
H.R. 5983	Langevin	To enhance the security of DHS information infrastructure, authorize a chief information officer position, and require the DHS secretary to make determinations about the security posture of contractors prior to entering into network service agreements with them	Introduced 5/7/08; referred to Homeland Security