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***In The News:***

**Bush Signs New DOD Authorization Measure; Objects to Wartime Contracting Commission**

President Bush Jan. 28 signed new fiscal year 2008 defense authorization legislation (Pub. L. No. 110-181), while issuing a signing statement objecting to four provisions--two related to contracting--that he said interfere with his presidential authority.

Bush objected to provisions establishing a commission to investigate contracting in support of U.S. operations in Iraq and Afghanistan, expanding protections for whistleblowers employed by contractors, requiring U.S. intelligence agencies to provide documents to Congress, and barring funds for permanent U.S. military bases in Iraq. In his signing statement, Bush said these provisions "purport to impose requirements that could inhibit the president's ability to carry out his constitutional obligations to take care that the laws be faithfully executed to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief."

The version of the bill (H.R. 4986) signed by the president leaves unchanged the wide-ranging acquisition reform and contractor accountability provisions of the earlier version of the bill (H.R. 1585). The only change from the original bill was made to address White House objections to

language authorizing lawsuits in U.S. courts for damages against state sponsors of terrorism, and allows the president to waive the controversial provision.

One of the provisions cited by the president in the signing statement was Section 841, which requires creation of a bipartisan commission to study federal agency contracting for reconstruction, logistical support of coalition forces, and performance of security functions in Iraq and Afghanistan. The commission is to report to Congress on: how much the government relies on contractors in the two countries; contractor performance; the extent to which those responsible for waste, fraud and abuse under the contracts have been held financially or legally accountable; the appropriateness of Defense Department and State Department policies for management of such contracts; incidents in which contractors have engaged in the misuse of force; and the extent of potential violations by contractors of the laws of war, federal law, or other applicable legal standards.

Another cited provision, Section 846, expands the protections for contractor employees who disclose waste, fraud, and abuse with regard to DOD contracts. Protections from reprisal are extended to contractor employees who make such disclosures to a member of Congress or representative of a congressional committee, an inspector general, the Government Accountability Office, or a DOD employee responsible for contract oversight or management. Protected communications are expanded to include information that the employee reasonably believes is evidence of gross mismanagement of a DOD contract, a gross waste of DOD funds, a substantial or specific danger to public health or safety, and violations of law related to the contract, including competition for and negotiation of the contract.

A third provision protested by the president in the signing statement, Section 1222, prohibits use of funds authorized by the law to establish a military installation or base for the purposes of providing for the permanent stationing of U.S. Armed Forces in Iraq or exercising U.S. control of the oil resources in Iraq. The fourth provision, Section 1079, deals with confidential communications between the congressional armed services committees and the national intelligence community. Bush in his signing statement said the "executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President."

In addition, the bill prohibits A-76 competitions at military medical facilities--a restriction prompted by publicity surrounding reports of poor outpatient care services and facility maintenance problems at the Walter Reed Army Medical Center in Washington, D.C.

**SBA Urged to Overhaul Proposed Rule On Women-Owned Small Business Set Asides**

Sens. John Kerry (D-Mass.) and Olympia Snowe (R-Maine), the chairman and ranking member of the Small Business and Entrepreneurship Committee, Jan. 30 told the head of the Small Business Administration they have serious reservations about the agency's recently proposed rule to implement a congressionally-mandated set-aside program for women-owned small businesses, and held out the possibility of pursuing a legislative fix if SBA does not rework the rule before issuing it in final form.

The proposed rule, published Dec. 27, 2007, "is beyond inadequate"; it is a "rank affront to the engagement" of women-owned businesses in the federal marketplace, Kerry said. He urged SBA Administrator Steven Preston to "go back to the drawing board and come up with a workable rule that we can get behind." SBA "had an opportunity to hit a home run," said Snowe, but instead came up with a rule that has "little, if any, measurable benefits" and is "unlikely to have any practical impact." "We are no closer today than we were seven years ago" when the Women's Procurement Program, codified in Section (m) of the Small Business Act, was enacted into law in 2000, Snowe said.

If SBA fails to address deficiencies in the rule after the Feb. 25 close of the comment period, Snowe suggested the option of pursuing additional legislation "to get the job done." At the heart of the concerns voiced by Kerry and Snowe during the oversight hearing was the approach selected by SBA for identifying industries in which women-owned firms are underrepresented in federal contracting. The two senators complained that as a result of the methodology selected by SBA:

- only four of 140,000 industries were shown to have an underrepresentation of women; and
- only 1,238, or 2 percent, of WOSBs will benefit from the new procurement program.

Kerry pointed out that the RAND study showed that, depending on the measure used, underrepresentation of WOSBs in government contracting occurs in 0 to 87 percent of industries. Rather than choosing the methodology identifying the broadest percentage of industries in which WSOBs are underrepresented, SBA chose the narrowest, he said, asking why the agency could not have at least chosen an approach somewhere in between. Women-owned firms currently account for more than 30 percent of all firms, but only get 3.4 percent of all federal contracting dollars, "far short of the 5 percent goal," Kerry emphasized.

Kerry and Snowe also expressed concern over the proposed rule's requirement that each procuring agency determine that a planned set-aside is "substantially related to remedying sex discrimination" by that agency in the relevant industry. Similar objections were the key focus of a Jan. 16 hearing on the proposed rule held by the House Small Business Committee.

**Sens. Snowe, Dole Offer Bill to Overhaul Rule On Women-Owned Small Business Set****Asides**

Sens. Olympia Snowe (R-Maine) and Elizabeth Dole (R-N.C.) Feb. 7 introduced legislation (S. 2608) to overhaul the Small Business Administration's proposed rule to implement a congressionally-mandated set-aside program for women-owned small businesses.

In introducing the bill, Snowe, ranking member of the Senate Small Business and Entrepreneurship Committee, faulted what she described as "two fundamental flaws" in the rule that she said "hinder it from functioning as Congress originally intended" when it enacted the women's procurement program seven years ago. "First, the proposed rule identifies just four industries, out of more than 100, in which women-owned small businesses are under-represented and eligible for set-asides," Snowe said. This "gross disparity" means a mere 1,238 businesses across the nation--or 2 percent of all women-owned small business contractors--would be eligible for set-asides under the proposed rule, she said.

Second, before implementing a set-aside under SBA's proposed rule, "individual federal agencies must first publicly admit to a history of gender discrimination," Snowe said. "I find it difficult, if not impossible, to envision a scenario where a federal agency would make such an admission," she added. "The SBA must develop a functioning procurement program" that will cultivate women-owned businesses so that they in turn can help grow the U.S. economy, Snowe said. The proposed rule--SBA's second effort in the area--"is highly deficient and unlikely to have any practical effect in helping the Federal Government satisfy its 5 percent women's contracting goal," she asserted.

The bill would address these concerns by amending Section 8(m) of the Small Business Act, which authorizes the women's procurement program, to expand the number of industries in which women-owned businesses will be eligible for set-asides. Specifically, the bill says that "industries identified by the 2007 North American Industry Classification System Code as industry codes 11 through 81 . . . shall be presumed to be industries in which small business concerns owned and controlled by women are underrepresented with respect to federal procurement contracting."

It also would eliminate the proposed rule's mandate that before an agency can justify a set-aside under the program, it must first determine that the set-aside is "substantially related to remedying sex discrimination in that industry," including in the agency's own past procurement activities. The bill would add to Section 8(m) language stipulating that: "Notwithstanding any other provision of law, a contracting officer need not make a finding of past gender discrimination by a contracting agency in order to comply with or otherwise be subject to the requirements of this subsection."

Snowe suggested during a recent hearing of the Small Business Committee that she would introduce the legislation, when she complained that, as a result of the rule, the women-owned business program would have little if any impact. However, SBA Administrator Steven Preston defended the rule, telling the panel that the process for selecting industries in which women-owned

firms are underrepresented was identified in a RAND Corp. study and implemented in accordance with methodology recommended by the National Academy of Sciences. Preston also said the requirement that procuring agencies determine a planned set-aside is "substantially related to remedying sex discrimination" by that agency in the relevant industry is necessary if the set-aside is to survive a constitutional challenge.

### **FY '09 DOD Procurement Request Is Below Last Year's Projection**

The Bush administration's request for \$104.2 billion in procurement funds for the Defense Department in fiscal 2009 represents a 3 percent increase in real terms relative to FY 2008's \$99 billion level, but a \$6.4 billion drop below the amount that was projected for FY 2009 in last year's plan, according to an independent budget review.

At the same time, the latest request includes more funding for military personnel, operations and maintenance (O&M) activities, military construction, and research and development (R&D) programs than was projected in last year's plan, said Steven Kosiak of the Center for Strategic and Budgetary Assessments, in a four-page review of the administration's FY 2009 defense budget request. "This 'migration' of funds from procurement does not bode well for DOD's long-term modernization plans," Kosiak continued. Increases in DOD spending on personnel and operations and maintenance costs frequently caused the department to fall short of its procurement funding targets during the Clinton administration, he noted.

"The fact that DOD had to shift funding out of procurement to cover such cost growth in FY 2009 suggests that DOD's current plan may likewise project unrealistically low future funding requirements for these other accounts," Kosiak said.

More generally, Kosiak said that the \$515.4 billion FY 2009 budget request for DOD released by the administration Feb. 4 includes plans for slight decrease in base budget spending, in real dollar terms, beginning in FY 2010. Between FYs 2010 and 2013, DOD plans to reduce its base budget by about 1.5 percent in real dollars. The decline would follow an approximate 37 percent increase in DOD's base budget request between FYs 2001 and 2009. "Thus, the administration is proposing that the buildup begun, in earnest, after the terrorist attacks of September 2001, should come to an end in FY 2010," Kosiak wrote. "Whether the current buildup will, in fact, soon end will depend on the decisions of the next administration and Congress."

*The Center for Strategic and Budgetary Assessment's review, "FY 2009 Request Would Bring DOD Budget to Record (or Near-Record) Levels" (2/4/08), is available at:*  
[http://www.csbaonline.org/4Publications/PubLibrary/U.20080204.FY\\_2009\\_Request/U.20080204.FY\\_2009\\_Request.pdf](http://www.csbaonline.org/4Publications/PubLibrary/U.20080204.FY_2009_Request/U.20080204.FY_2009_Request.pdf).

**OMB Announces Availability of BPAs For Independent Risk Analysis Services**

Office of Management and Budget officials Feb. 4 informed federal agencies that two governmentwide blanket purchase agreements have been established for the purchase of commercial independent risk analysis services that may be required in the event of a data breach.

The governmentwide acquisition vehicles are intended to respond to the government's need for independent risk analysis "documenting the level of risk for potential misuse of sensitive information associated with a particular data breach," Paul Denett, administrator of the Office of Federal Procurement Policy, and Karen Evans, administrator of the Office of E-Government and Information Technology, said in a memo to the heads of departments and agencies. OMB requires that agencies promptly conduct a risk analysis after a data breach occurs and that they be prepared to report to Congress on the findings of the analysis.

Created by the General Services Administration at the direction of OMB, the BPAs--awarded to Identity Theft Guard Solutions LLC, of Beaverton, Ore., and SRA International Inc., of Fairfax, Va.--offer a variety of services, including metadata analysis, pattern analysis, risk analysis, data breach analysis, privacy impact analysis, and statistical analysis. Other services include an analysis of the breached data itself "for evidence of organized misuse" and reports on the probability compromised data has been used to cause harm, the memo said.

The OMB officials encouraged agencies to use the BPAs, directing them to review their pricing, terms, and conditions when the need for independent risk analysis services arises and to compare them with other services under consideration in the course of conducting market research. If an agency decides not to use the BPAs to acquire independent risk analysis services, it must notify GSA and OMB's E-Government administrator and explain how the proposed contract offers a better value, the memo said. "Access to this information will allow GSA to review the BPAs and ensure they offer best value risk analysis services. Accordingly, the notice should identify the pricing and terms and conditions of the award," Denett and Evans directed. The notices should be coordinated by the agency's office of chief acquisition officer and office of chief information officer and submitted at least 10 days prior to award, "except in the event of unusual and compelling urgency."

"The use of a BPA will reduce administrative costs to the government by acquiring commercial items and services from GSA Multiple Award Schedule contracts," the memo said. The BPAs do not obligate funds and the government is obligated only to the extent that authorized task orders are issued under them, the memo explained. There is no limit on the dollar value of task order purchases, and the BPAs' period of performance generally will not exceed five years. The memo includes an attachment setting forth procedures for placing orders on the BPAs, including preparation of statements of work, requests for quotation, evaluation of responses, and documentation requirements.

*A copy of the memo on use of commercial independent risk analysis services is available at: <http://www.whitehouse.gov/omb/memoranda/fy2008/m08-10.pdf>.*

**House Bill to Require More Agency Scrutiny Of Regulatory Burdens Falls Short**

A House bill to require federal agencies to conduct more extensive analyses of the impact of regulations on small business falls short in several respects, according to a recent report by the Congressional Research Service. The measure, known as the "Small Business Regulatory Improvement Act" (H.R. 4458), "may be most notable for what it does not do," said the CRS in a report released Feb. 6.

The bill would add new requirements for agencies under the Regulatory Flexibility Act (Pub. L. No. 96-354), legislation enacted in 1980 that directs federal agencies to consider the potential impact of regulations on small businesses. While current law requires agencies to conduct an analysis of "significant economic impacts" of regulatory activity on small businesses, the bill would require that agencies also gauge "indirect impacts."

However, CRS faulted the measure because it does not clarify what constitutes a "significant" economic impact nor does it define "indirect impact," deficiencies that will continue to allow agencies wide leeway in deciding when analyses are required. CRS pointed out that the Government Accountability Office "has repeatedly recommended that Congress define those terms, or give the Small Business Administration or some other federal agency the authority and responsibility to do so."

Moreover, by adding a new requirement that agency analyses of economic impacts must be "detailed," CRS warns the legislation may create an incentive for agencies to conclude their regulations have no significant impact on small businesses. "With the addition of new requirements that [analyses] be 'detailed,' agencies will have even greater incentives to certify their rules and avoid conducting the analyses altogether," the CRS report stated. Another problem with the bill is that it fails to define what constitutes a rule or regulation subject to its requirements, according to the report.

Introduced by Rep. Brad Ellsworth (D-Ind.) and nine cosponsors, the bill cleared the House Small Business Committee in December 2007 by a 26-0 vote. The House Judiciary Committee, which shares jurisdiction over the bill, has not yet scheduled a hearing or a markup of the legislation. There is no companion bill pending in the Senate.

The House measure would also require federal agencies to conduct a review of all their existing regulations, at least once every 10 years, to determine whether they should be continued, modified or eliminated altogether. CRS noted that such a requirement would significantly expand the Regulatory Flexibility Act to encompass all rules, not just those affecting small businesses. This requirement would not only result in agencies reviewing decades-old rules that have never been examined, CRS observed, but it would also mean that agencies, like the Department of Transportation, which already reviews all its rules every 10 years, would be required to do so again.

Public interest advocates and government watchdog groups oppose the bill. In a Dec. 12 letter to Rep. Nydia M. Valazquez (D-N.Y.), chair of the House Small Business Committee, eight public interest and labor organizations complained that the bill "would add additional layers of analysis to a regulatory process already thick with prescriptive requirements and would further tilt the regulatory playing field in favor of regulated interests."

### **DOD Lacks Adequate Processes to Justify Major Multiyear Procurements, GAO Says**

The Defense Department spends \$10 billion a year on multiyear procurements (MYPs) intended to save the department money in acquiring major weapon systems, but DOD lacks the necessary guidance and rigorous process needed to ensure that MYP use is appropriate and will result in savings for particular programs, the Government Accountability Office said Feb. 7.

Statutory criteria at 10 U.S.C. § 2306b provide that MYPs are to be used only for major weapon programs that are stable and entail low risk, and only when their use will result in "substantial savings" to DOD, GAO said in a report prepared for the Senate Armed Services Committee. However, "[i]nconsistent application of criteria, questionable cost and savings estimates, and inadequate documentation increase potential for approving inappropriate, unstable multiyear programs and incurring costly, poor outcomes when plans go awry and conditions change," GAO said.

The congressional investigative arm said that because DOD lacks meaningful guidance interpreting the statutory criteria--such as on applying the terms "reasonable," "substantial," and "stable," or quantifying "substantial savings"--interpretations as to whether programs are meeting these criteria tend to be subjective. For example, while some Navy and Army program officials told GAO that 10 percent would constitute "substantial savings" for MYP justification, an official with the Office of the Secretary of Defense described 4 to 5 percent program savings as a "rule of thumb" for MYP candidates. GAO said DOD uses varying types of cost and savings estimating techniques, which means evidence of program stability is not prepared in a consistent manner. The department also does not keep adequate records to document program decisions and reasons supporting those decisions.

Further, GAO said, "DOD does not have a formal mechanism for tracking multiyear results against original expectations and makes few efforts to validate whether actual savings were achieved by multiyear procurement." DOD and defense research centers informed GAO that due to a lack of information on past multiyear contracts, comparable annual costs, and "the dynamic acquisition environment," actual MYP results are difficult to determine. "Despite these limitations, our case studies indicate that evaluating the actual results from multiyear contracting provide valuable information regarding the veracity of original estimates in the justification packages, the impacts on costs and risks from internal and external events, and lessons learned that can be used to improve future MYP candidates and savings opportunities," GAO said.

GAO devoted particular attention to two major program MYPs authorized by the fiscal 2007 defense authorization act (Pub. L. No. 109-365) that it said have histories of acquisition challenges--the F-22A Raptor aircraft and V-22 Osprey aircraft. GAO said its review of the justification packages for both programs--submitted in the same fiscal year for approval--indicated differences in how the design stability criterion was applied and in the methods and data used to compute contract costs and savings.

The Air Force F-22A MYP authorization was the subject of considerable debate--notably among SASC Republicans--as to whether the program satisfied the "legal and business conditions conducive to success," GAO said. In a June 20, 2006, report on the F-22A MYP, GAO concluded that DOD had not made its business case for further investments in the program, and expressed doubt that the program met the MYP statutory criteria. The V-22 program, for its part, has experienced continuing changes in quantity, funding, and design, as well as production concerns, which in turn have raised doubts about whether the program is appropriate for multiyear contracting, according to GAO. "Development and test efforts continue with a number of design changes under review to address serious safety, reliability, and performance problems," it said.

GAO's case studies of three completed multiyear contracts--the C-17A Globemaster, the F/A-18E/F Super Hornet, and the Apache Longbow Helicopter programs--provided little basis for reassurance. Cost growth for these three MYPs ranged between 10 to 30 percent, with the actual multiyear contract costs for the C-17A and Apache programs exceeding the original estimates for annual contracts costs, GAO said. "All three programs--presumably approved based on their stability--were significantly impacted during contract execution by labor and material cost increases, changes in requirements and funding, and other factors that helped drive up total contract costs much beyond original projections," GAO observed.

To improve DOD justification for MYPs and to enable retention of "corporate memory" in light of frequent personnel turnover, GAO recommended that DOD:

- provide guidance that better defines the multiyear decision criteria for major DOD weapon systems and facilitates more consistent, objective, and knowledge-based evaluations of MYP candidates;
- establish a process for third party validation of the costs and savings data submitted for such candidate programs;
- implement a central database for maintaining historical records and effectively monitoring and tracking major DOD weapon system multiyear procurements, including documentation of the specific decisions made by stakeholders and the rationales for these decisions; and
- require the military services, in conjunction with the office of the secretary of defense, to conduct MYP "after action assessments" for completed programs to measure whether the expected benefits of the MYP were achieved while at the same time mitigating program risk.

DOD mostly concurred with GAO's recommendations, but said that the department "will consider whether the benefits of requiring third party validation of preliminary estimates of costs and savings data for all programs warrant the delays and expense of validation, since a final determination of statutory compliance must be made as part of the contract negotiation and award process."

*The GAO report, "Defense Acquisitions: DOD's Practices and Processes for Multiyear Procurement Should be Improved" (GAO-08-298, 2/7/08), is available at: <http://www.gao.gov/new.items/d08298.pdf>.*

### **GAO Lacks Jurisdiction of Protest Challenging Modification of Task Order**

The Government Accountability Office said Jan. 31 that it does not have jurisdiction to consider whether an agency's modification of a task order under an indefinite-delivery/indefinite-quantity contract exceeded the scope of the task order (*Global Computer Enterprises Inc.*, GAO, B-310823, 1/31/08).

Global Computer Enterprises Inc. protested the Coast Guard's decision to obtain federal financial information technology support services through modifications to a task order issued to QSS Group Inc. under the Transportation Department's Information Technology Omnibus Procurement (ITOP) II multiple-award, ID/IQ governmentwide acquisition contract. GCE, which previously provided such services to the Coast Guard, claimed that the services were beyond the scope of QSS's task order and should have been separately and competitively procured. GCE argued that the services were materially different from those requested in the original task order, and that the modification violated the Small Business Act by improperly bundling work requirements.

However, GAO said it is generally precluded by the Federal Acquisition Streamlining Act from considering challenges to the issuance of task or delivery orders under ID/IQ contracts, unless the protest asserts that the order increases the scope, period, or maximum value of the contract under which it is issued. Since GCE asserted only that the modifications at issue are outside the scope of the task order, GAO determined that its protest did not fit within the FASA exception. "In sum, we conclude that FASA's bar on protests in connection with the issuance or proposed issuance of task orders encompasses protests concerning the issuance or proposed issuance of task order modifications," GAO said.

GAO also determined that it lacked jurisdiction to consider GCE's argument that the modification constituted improper bundling under the Small Business Act, saying that GCE's protest only challenged the task order, as opposed to the terms underlying the ID/IQ solicitation.

QSS was one of 35 businesses to receive an award under the ITOP II contract. In June 2005, the Coast Guard issued a task order to QSS under ITOP II for systems engineering and technical services (SETS II) for a total estimated cost of nearly \$205 million. Prior to September 2007, the Coast Guard had not procured its federal financial IT support services via the SETS II task order,

instead relying on GCE for those services. However, a Coast Guard acquisition plan led the agency to issue a modification which added financial IT support services to QSS's SETS II task order.

In protesting that the services were beyond the scope of the SETS II task order, GCE argued that FASA only expressly prohibits protests involving the proposed issuance of task and delivery orders and the issuance of original task and delivery orders. GAO acknowledged that FASA does not expressly bar protests involving modifications of task and delivery orders issued under ID/IQ contracts, but concluded "that the restriction on protests of orders placed under a task order as contained in 41 U.S.C. § 253j(d) also applies here." In FASA, GAO said, it was Congress's intent to exempt from protests the issuance of individual task orders to contractors that had already received awards. GCE's argument--that although protests regarding an agency's issuance of task orders under ID/IQ contracts are precluded, protests regarding the modification of task orders are permitted--is "inconsistent with the both the language of FASA and the underlying congressional intent." "In our view, accepting GCE's position--which would permit protests regarding task order modifications but not the task orders themselves--would elevate form over substance," GAO stated.

GAO also said it lacked jurisdiction to consider GCE's contention that combining federal financial IT support services with the original SETS II work constituted improper bundling that violated the Small Business Act, as well as GCE's claim that the Coast Guard failed to perform a bundling analysis. In support of its argument that GAO had jurisdiction to consider its protest on these grounds, notwithstanding the general bar on task order protests, GCE cited GAO's decision in *LBM Inc.*, B-290682, 9/18/02, 2002 CPD ¶ 157.

The protester in *LBM* challenged the propriety of the Army's decision to transfer motor pool requirements for Fort Polk, La., which previously had been set aside exclusively for small businesses, to a large multiple award ID/IQ contract for a wide range of logistical functions. *LBM*, a small business, protested the Army's decision to withdraw the motor pool services from exclusive small business participation and to transfer them to the ID/IQ contract. "We decided that FASA's limitation on our bid protest jurisdiction regarding task orders did not apply in this case, as *LBM*'s protest was a challenge to the terms of the underlying ID/IQ contract solicitation," GAO said.

"By contrast, GCE challenges only the agency's decision to combine federal financial IT support services with other work originally required under the SETS II task order. Unlike the circumstances in *LBM*, GCE has not shown or even alleged that these services represent work not already encompassed by the ITOP II ID/IQ contract" GAO said. Therefore, GAO dismissed the protest.

**Rep. Skelton Wants OMB to Revise Rules On Overseas Contracts Oversight Exemptions**

The chairman of the House Armed Services Committee Feb. 19 urged Office of Management and Budget Director James Nussle to reconsider two "recent rulemakings" that would reduce oversight and accountability of federal contracts performed overseas.

Rep. Ike Skelton (D-Mo.) wrote the OMB head that he was "quite dismayed" to learn from recent news reports of rulemakings that he said "appear to indicate a failure to recognize the significance of the waste and fraud that has occurred with contingency contracting in Iraq." The two rulemakings cited by Skelton were:

- The pending proposed Federal Acquisition Regulation rule that would require contractors to report to agency inspectors general and to their contracting officers if they have reason to believe that there has been a violation of criminal law in connection with a contract or subcontract valued at \$5 million or more, which would not apply to contracts or subcontracts performed outside the United States; and
- The Cost Accounting Standards Board's recent announcement that it has discontinued its review of the CAS exemption for contracts executed and performed outside the United States, meaning that the current exemption will remain in effect.
- With regard to the proposed FAR rule, Skelton warned that, "While self reporting is certainly no panacea in combating contract fraud, it is profoundly unwise to send the message that overseas contracts need not follow whatever internal processes for accountability that companies establish to comply with this rule."

Reviewing waste, fraud, and abuse in Defense Department contracts in Iraq and Kuwait has been "one of the most unpleasant and disillusioning tasks" of his recent congressional service, Skelton said. "The House Armed Services Committee has received testimony that a review of these contracts has discovered over \$15 million in bribes, and that contracts valued at over \$6 billion have potentially been undermined as a result." "In many of these cases government employees, and even a few military officers, have seriously abused the public trust," Skelton said.

- Skelton asked Nussle for a response to his letter by April 1, before the committee begins to consider the president's proposals for fiscal 2009 defense authorization legislation. "Reconsideration of these two decisions will go a long way toward ensuring that accountability and oversight of contingency contracting are once again high priorities of government," he said. Skelton also cited several provisions in the FY 2008 defense authorization act (Pub. L. No. 110-181) that are specifically aimed at improving contingency contracting practices.

**OFPP Administrator Issues Guidance On New Competitive Sourcing Restrictions**

Office of Federal Procurement Policy Administrator Paul Denett Feb. 20 provided the heads of executive departments and agencies with guidance on the new competitive sourcing restrictions included in the fiscal year 2008 consolidated appropriations act (Pub. L. No. 110-161) signed by President Bush Dec. 26.

The provisions in the FY 2008 spending act provide additional protections for federal government employees whose jobs have been or may be the subject of public-private competitions conducted under Office of Management and Budget Circular A-76. The OFPP guidance on the new limits placed on efforts to convert to contractor performance work currently being performed in-house by federal employees addresses:

- health and retirement fringe benefit comparability requirements;
- the use of competitive sourcing for human resources activities;
- application of the conversion differential; and
- the performance of commercial activities by non-profit agencies under the AbilityOne program.

The FY 2008 spending act, which provides funding for all federal agencies other than the Defense Department, requires the exclusion of costs for retirement benefits and health care from consideration in cost comparison studies related to public-private competitions. The new language bars a contractor from receiving an advantage for a proposal that would reduce costs for the federal government by offering a retirement benefit that in any year costs less than the annual retirement cost factor applicable to federal employees.

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

These requirements apply to competitions that are publicly announced on or after Dec. 26, 2007, according to the OFPP guidance. The spending measure provides certain exemptions from these requirements, including ones for:

- activities that are the subject of an ongoing competition that was publicly announced prior to the date of enactment;
- activities performed by 10 or fewer full-time equivalent employees;
- depot contracts or contracts for depot maintenance;

- a commercial or industrial type function that is included on the procurement list established under the Javits-Wagner-O'Day Act to provide individuals who are blind or severely disabled with jobs manufacturing and delivering products and services to the federal government; and
- a commercial or industrial type function that is planned to be converted to performance by a qualified nonprofit agency for the blind or other severely handicapped individuals in accordance with the Javits-Wagner-O'Day Act.

To ensure uniform application of the health and retirement comparability requirements, the act "requires that adjustments be made to private sector proposals in certain instances, but does not authorize an agency to reject a private sector offer based on the cost or extent of the private sector offeror's health or retirement benefits," according to an attachment accompanying the memo. Agencies "shall ensure, for evaluation purposes, that private sector proposals are adjusted, if necessary, to include amounts for employee health and retirement benefits at least equal to those amounts that are included in the agency cost estimate for federal employee health and retirement benefits," the attachment on application of the benefit comparability requirements says.

Also included in Denett's memo is guidance on the general restriction included in the spending act that prohibits funds from being spent to convert to contractor performance an activity or function of an executive agency that, on or after the date of enactment, is performed by more than 10 federal employees unless:

- the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization (MEO) plan developed by such activity or function; and
- the competitive sourcing official determines that the performance of the activity or function by a contractor would be less costly to the executive agency by an amount that equals or exceeds 10 percent of the MEO's personnel-related costs or \$10 million, whichever is less.

An agency "is precluded from converting work to private sector performance if this conversion differential is not met, even if the agency can demonstrate that private sector performance would provide a superior solution, when both cost and quality considerations are taken into account," the memo says. Agencies are to ensure that "the full conversion differential is added to the total adjusted cost of the private sector performance for activities that are being considered for partial conversion from agency to contract performance."

The restriction applies to competitions publicly announced on or after Dec. 26, 2007.

The exemption from the act's competitive sourcing restrictions for work awarded to qualified nonprofit agencies under the AbilityOne program, formerly the Javits-Wagner-O'Day program, also is detailed in the OFPP guidance. Agencies that "seek to consider contracting with AbilityOne nonprofit agencies for commercial work currently performed by federal employees may continue to

use streamlined or standard public-private competitions under OMB Circular A-76, as appropriate," Denett said.

He pointed to the streamlined competition process in particular as a means of providing an "efficient method for determining if nonprofit agencies could provide a commercial service more cost-effectively than the government," saying nonprofit agencies would be the sole representatives of the private sector in the agency's comparison of costs between the public and private sectors. The OFPP administrator said his memo specifically authorizes agencies to use OMB Circular A-76's streamlined competition procedures "for activities of any size when considering conversion of work to or from an AbilityOne nonprofit agency."

The memo also authorizes agencies to "directly convert activities to or from performance by nonprofit agencies under the AbilityOne program notwithstanding the requirements of the Circular, if appropriate and where the resulting contract would be performed at a fair market price, as required by law." As such, the memo "constitutes a deviation from OMB Circular A-76 for purposes of conducting streamlined competitions involving more than 65 FTEs or direct conversions of work to a nonprofit agency under the AbilityOne program," according to a footnote in the memo.

*A copy of the OFPP memo on the new competitive sourcing requirements is available at:*

<http://www.whitehouse.gov/omb/memoranda/fy2008/m08-11.pdf>.