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Small Business Spotlight:

Technatomy Corporation is an information technology solutions and professional services company. ***Technatomy is an ISO 9001:2000 registered service-disabled veteran-owned small business (SDVOSB) and SBA certified 8(a) small disadvantaged business (SDB).*** Technatomy's focus is to help its customers assess, manage, migrate, protect, share, and harvest their information assets in order to increase organizational communication, knowledge, level-of-service, transactions, competitiveness, and profits.

Technatomy employs highly experienced managers, expert technical personnel, and subject matter experts in order to capture the anatomy of the organization, architect the information-driven solution, and achieve the organization objective.

In the e-business and digitization evolution, organizations must focus on their information assets. The leader always has the right information when and where needed. Our typical engagement starts by asking a simple question;

"What information do you need in order for you or your organization to be effective, to compete?"

Our Mission: Technatomy Corporation is an information technology solutions and services company established to provide results to government and commercial enterprises. Technatomy utilizes a methodical approach, advanced information technology, and subject matter expertise to ensure its customer's return on investment.

Our Vision

Aspiration: *Be a leader in the information technology services market place by leveraging our capability to migrate from legacy environments, our in-depth knowledge of advanced technology, and our subject matter expertise.*

Promise: *Create a dynamic place to work -- a professional environment that is challenging, rewarding, creative, and respectful of ideas, innovations, and individuals.*

Value: *Provide an excellent value to our customers, an equitable reward to our employees, business partners, and owners, and make a positive impact on our communities.*

House Small Business Committee Members, Speakers Call for Repeal of 3% Withhold

House Small Business Committee members of both political parties March 22 voiced support for repealing a provision of a major 2006 tax bill that will require government entities to withhold 3 percent of all payments to contractors and vendors beginning Jan. 1, 2011.

The Tax Increase Prevention and Reconciliation Act of 2005 (Pub. L. No. 109-222) amended Internal Revenue Code Section 3402 to require federal and state governments and "every political subdivision thereof" to deduct and withhold 3 percent of payments made to contractors and vendors, in part to compel tax compliance.

While members of Congress and speakers at a March 22 committee hearing said government contractors have an obligation to pay tax on their income, they also said the withholding requirement will result in a less competitive economy, higher prices for government services, and hinder federal government efforts to reach the goal of awarding 23 percent of contracting dollars to small businesses.

Instead, the withholding regime will be particularly harmful to small businesses, speakers said.

Several speakers said they support H.R. 1023, which would repeal the TIPRA language imposing the withholding requirement. The bill, sponsored by Rep. Kendrick Meek (D-FL), was referred to the House Ways and Means Committee Feb. 13.

The law exempts some government entities and payments from the withholding requirement, including governments that do not process more than \$100 million in annual payments, payments made by public welfare programs, and payments made by tax-exempt government entities. Nevertheless, hearing speakers were unanimous in their conclusion that, as Lonnie Coleman said, the provision "is just a bad idea."

"My biggest fear is this 3 percent will drive some of the small emerging businesses out of the marketplace and I don't really think you want to do that. ... There's got to be other ways to reach the goals you want to see accomplished in closing the tax gap," said Coleman, a construction company executive who represented the Mechanical Contractors Association of America at the hearing. If smaller businesses simply decide not to compete for government contracts, competition for those contracts will decrease and prices will increase, Coleman and others said.

Vincent Iannelli, representing the Associated General Contractors of America, said the withholding requirement could also negatively affect bond ratings associated with large public construction projects. Committee Chairwoman Nydia Velazquez (D-NY) was the first of many committee members to call for repeal of the TIPRA provision. "There are better ways to crack down on those who are not paying their taxes without creating a hardship on small businesses," she said.

Several speakers said the Internal Revenue Service and other federal agencies could effectively combat nonpayment of taxes on government payments without burdening government contractors. For instance, Federation of American Hospitals President and Chief Executive Officer Chip Kahn said the Department of Health and Human Services could allow the Treasury Department's Financial Management Service (FMS) to make Medicare payments on its behalf, which would facilitate IRS levies on payments to vendors owing tax.

Daryl Deel, the owner of three small trucking companies and vice chairman of the American Trucking Association's tax policy committee, said government entities could simply send Forms 1099 recording payment information to the contractor and IRS once a year. Using this system, IRS could easily monitor vendor tax payments, Deel said. Lamar Whitman, speaking for the Computing Technology Industry Association (CompTIA), said the law will operate differently than other withholding regimes because it will not be based on a taxpayer's overall income.

Small businesses should not be responsible for enforcing the tax code, added Rep. Lynn Westmoreland (R-GA).

Pilot Project Would Require Contractors To Report Subcontract Awards to Web Site

Federal contractors with contracts valued at \$500 million or more soon could be required to report their awards of subcontracts exceeding \$1 million to the public database recently launched by the Office of Management and Budget under the Federal Funding Accountability and Transparency Act.

Under a proposed Federal Acquisition Regulation rule issued March 21, the pilot project on subcontract reporting that is required by the FFATA would begin no later than July 1, 2007, and terminate no later than Jan. 1, 2009. Only contracts awarded and performed in the United States would be covered by the requirement.

The FAR Councils chose the proposed \$500 million prime contract threshold and \$1 million subcontract threshold "to ensure that a sufficient number of subcontract award reports will be entered into the database to permit assessment of its effectiveness without imposing a significant burden on contractors during the pilot program," according to the proposed rule.

Before the pilot project is completed, a separate rulemaking process will be used to establish the requirements for the final subcontract reporting database, the councils explained. The Councils anticipate that the final reporting requirement will apply to contracts with values equal to or greater than the simplified acquisition threshold [currently \$100,000] and will require the reporting of subcontracts with values greater than \$25,000, regardless of the award or performance locations of the prime contract or subcontracts," according to the notice.

The rulewriters also noted that:

- The government does not guarantee the reliability of the data reported, and has no mechanism to verify the data submitted.
- The rule does not apply to classified contracts or commercial item contracts issued under FAR Part 12.

The FAR Councils are specifically inviting public comments with regard to: *The pilot program--*

(1) the burden imposed;

(2) whether making this information publicly available will affect the contractor's competitiveness;
and

(3) whether availability of the information on a public Web site raises industrial, national, or other security concerns.

Possible final reporting requirements--

(1) whether the reporting requirements (after the pilot program) should apply to contracts and subcontracts that: (a) are awarded or performed outside the United States; (b) have values greater than \$25,000; and (c) are awards below the first tier;

(2) whether the reporting period should be 30 days after award of a contract as stated in the statute or a longer period; and

(3) whether the unique subcontractor identifier should be the Data Universal Numbering System (DUNS) number, the Taxpayer Identification Number (TIN), some other number, or a non-numerical unique identifier.

OMB launched an interim Web site Feb. 15 as part of its effort to implement the FFATA requirement to provide a searchable public database of federal contracts and grants worth more than \$25,000.

The act established a Jan. 1, 2008, deadline for OMB to set up a site with prime contract information, and a January 2009 deadline for subcontract information.

The database is to include the name of the entity getting the award, the amount of the award, the type of award, the program that provided for the award, the purpose of the funding, the location and congressional district in which performance will occur, and other data.

The address of the interim Web site is: www.federalspending.gov.

Comments on the proposed FAR rule are due May 21 (72 Fed Reg. 13,234, 3/21/07).

House Small Business Chair 'Frustrated' With SBA Over WOSB Contracting Efforts

House Small Business Committee Chairwoman Nydia Velazquez (D-N.Y.) March 21 said she is "frustrated" that the Small Business Administration has not yet implemented a set-aside program to provide women-owned small business with improved government contracting opportunities, even though Congress passed legislation to create such a program more than six years ago.

Chairwoman Velazquez, sitting in on a Contracting and Technology Subcommittee hearing on government contracting with women-owned businesses, also expressed dissatisfaction with federal agencies' failure to meet the goal, established by the Federal Acquisition Streamlining Act in 1994, that 5 percent of the total value of all government prime contracts and subcontracts for each fiscal year be awarded to women-owned small businesses (WOSBs).

SBA figures indicate that only 3.3 percent of federal prime contract dollars went to WOSBs in 2005. "Women business owners should have the opportunity to do business with the federal government," Velazquez told SBA Deputy Administrator Jovita Carranza and senior acquisition officials with the departments of Energy and Education and the National Aeronautics and Space Administration.

Had the federal government met the 5 percent contracting goal for women-owned small businesses in 2005, Velazquez said, those businesses would have been awarded an additional \$5.2 billion in government contracts. "And this is exactly why we passed legislation six years ago," Velazquez said, who authored the Equity in Contracting for Woman Act passed by Congress in December 2000.

That legislation directed SBA to conduct a study to identify industries in which WOSBs are underrepresented in government contracting. It also required SBA to establish procedures to verify businesses eligible to participate in a contract set-aside program for women-owned small businesses.

In a March 20 news release, SBA explained that although the Supreme Court has required legislative findings to justify a gender-based preference program such as the WOSB set-aside program, Congress delegated to SBA the responsibility for providing such findings as to WOSBs. The complexity of this task is responsible for the delay in implementing the program, the agency said in the statement, and Carranza amplified on this theme in her remarks to the panel.

Carranza said SBA expects to publish a final rule to implement the set-aside program, known as the Women's Procurement Program, later this year, and promised that the agency would keep the committee informed of program progress and any foreseen delays. "I speak on behalf of the Agency and on behalf of Administrator [Stephen] Preston when I say that SBA is focused on this issue and ensuring the implementation of the program," Carranza said.

She also said that the under-representation study required by the 2000 act is in "the final stages of clearance" and should be complete and made available to the public sometime in April. Carranza explained in her testimony that not long after the legislation was passed, SBA itself conducted a study to make the findings needed to justify the set-aside program, but an independent panel of experts at the National Academy of Sciences determined that the agency's methodology was flawed and might not "withstand legal scrutiny" concerning the constitutionality of gender-based preference programs.

SBA subsequently awarded Rand Corp. a contract to conduct the study in accordance with the methodology recommended by the National Academy of Sciences. As these events transpired, the U.S. Women's Chamber of Commerce brought suit against SBA to expedite implementation of the Women's Procurement Program, Carranza said, and the U.S. District Court for the District of Columbia is now monitoring SBA's progress.

The senior agency acquisition officials who spoke at the hearing said their agencies have taken steps to improve the contracting opportunities available to WOSBs. For example, Energy Department Chief Acquisition Officer Francis Spampinato said DOE's fiscal year 2006 prime contracting goal for small business was set at \$828.7 million, or 4.3 percent of the department's estimated procurement base of \$19.1 billion. The portion of procurement dollars DOE aimed to give women-owned small businesses in FY 2006 was \$65.1 million, Spampinato said, which DOE exceeded by awarding \$160.1 million to WOSBs.

"Women-owned small business concerns are a key focus in all of DOE's efforts to improve contracting and subcontracting opportunities for small businesses," Spampinato said. However, he said that department faces a challenge in reaching out to small businesses with respect to the large facility management and operating (M&O) contracts DOE generally awards to large businesses, educational institutions, and nonprofit organizations.

Contracting Subcommittee Chairman Bruce Braley (D-IA) noted that since the establishment of the 5 percent government contracting goal for WOSBs, their number has grown nearly 20 percent, making them "one of the fastest growing segments of small business."

Despite their growing presence in the market, businesses owned by women still are not getting their fair share of opportunities, he said.

According to a post-hearing statement released by Braley's panel, the hearing was the first in a series to be held by the full committee in advance of legislation to be introduced this spring to restructure "how entrepreneurs enter the federal marketplace."

Democrats Finalize Small-Business Tax Package

Democratic House and Senate tax writers reached a long-awaited agreement April 20 on a \$4.84 billion package of small-business tax breaks and revenue increases to accompany an increase in the minimum wage.

The agreement, announced by Senate Finance Chairman Max Baucus (D-MT), and House Ways and Means Chairman Charles Rangel (D-NY), is expected to be incorporated into the conference report on the supplemental appropriations bill (HR 1591).

The deal could end a months-long stalemate between the chambers over the size and specifics of a tax-break sweetener package tied to a plan raising the minimum wage \$2.10 per hour over two years, to \$7.25. The wage increase is a top Democratic priority. The Senate version of the supplemental included a package that would have cost \$12.2 billion over 10 years to soften the blow of the wage increase on small businesses. The House version, first passed as a stand-alone bill (HR 976) and then added to the supplemental, included an estimated \$1.3 billion in tax breaks.

Even if the supplemental gets vetoed, as expected, the minimum wage and tax package could survive as a stand-alone bill or get attached to other legislation. “We have reached final resolution — and I mean final — on a package of small-business tax credits that will enable us to pass the first increase in the federal minimum wage in nearly a decade,” Rangel said in a statement. “This package provides common sense, responsible tax relief so our small businesses can continue to hire new workers and promote economic growth in our communities.”

The Baucus-Rangel agreement extends the work opportunity tax credit for three-and-a-half years and expands it to rural counties that are losing population. The credit gives businesses an extra incentive to hire workers in struggling areas. The provision, closer to the Senate language, would cost about \$2.6 billion over 10 years, according to the statement released by Baucus and Rangel.

Another provision, which started in the House bill, would allow small businesses subject to the alternative minimum tax to claim the work opportunity tax credit and the tip credit. That would cost about \$617 million over 10 years. The new agreement also incorporates extended tax breaks for low-income housing in areas affected by the 2005 Gulf Coast hurricanes. The House separately passed similar language last month (HR 1562).

The Baucus-Rangel deal cut out many of the expensive tax breaks that business groups liked in the Senate version, including extended accelerated depreciation for restaurants and certain leased property changes. It also removes some of the most controversial revenue increases, such as a cap on deductions for deferred compensation for executives. The smaller size of the package and the absence of some of the business-friendly provisions left ranking Finance Republican Charles E. Grassley of Iowa fuming.

“The Senate package was barely adequate,” he said in a statement. “I called it peanuts. The House package was puny. I called it a peanut shell. Now we have a single shriveled peanut. This package is stripped of a lot of meaningful tax relief.” In the narrowly divided Senate, opposition from Grassley and other Republicans could make it tough for a stand-alone wage and tax bill to pass.

The Baucus-Rangel agreement includes two main provisions that would raise money. One would change the “kiddie tax,” so the unearned income above \$1,700 of anyone under 19 is charged at their parents’ tax rate. Current law applies only to people under 18. Just last year, Congress increased the number of taxpayers affected by the provision by boosting the age limit from 14 to 19 in the tax reconciliation package (PL 109-222). The provision is expected to raise \$1.4 billion over 10 years.

The other major revenue increase would allow the IRS to charge interest and penalties to taxpayers for 36 months, even if the taxpayer has not been notified of the problem. Current law sets an 18-month limit. That would raise \$2.4 billion over 10 years. "It's past time to get a pay increase on the ground for America's minimum-wage workers," said Baucus. "Chairman Rangel and I worked together to craft a targeted, fiscally responsible package of small-business tax incentives that can help minimum wage legislation move through both chambers and into law."

OFPP Concerned that Interagency Contracts May Be Duplicative

Now that it has compiled information showing that there are 54 interagency contracts that can be used by federal agencies to acquire goods and services--not counting the 13 governmentwide acquisition contracts (GWACs) specifically dedicated to information technology products and services--the Office of Federal Procurement Policy is concerned that these interagency contracting vehicles may be duplicative, a top agency official said April 16.

Because the aim of interagency contracts is to leverage the government's buying power, this purpose is defeated if there "are too many," Robert Burton, deputy administrator of OFPP, said at a conference sponsored by the Government Contracting Institute in Washington, D.C. Burton told the group his "initial impression" is that there are too many interagency contracts, that they may be duplicative, and that there needs to be a governance structure in place for the "establishment and continuation" of these vehicles.

Pointing out that agencies seeking to establish GWACs are required under the Clinger-Cohen Act to make a business case for the contract vehicle and have it approved by the Office of Management and Budget, Burton suggested that a similar structure might prove useful in the case of other interagency contracts. In March 2006, OFPP asked federal agencies to provide detailed accounts of their use of interagency contracts, a move Burton said was prompted in part by lessons learned from Hurricane Katrina, when it became clear there was not a lot of information about products and services already available through interagency contracts.

Another impetus was the inclusion of interagency contracts on the Government Accountability Office's high-risk list in February 2005, he said. At the time, GAO warned that interagency contracting vehicles were being used by some agencies with limited expertise in this contracting method, and in a complex environment in which accountability was not always clearly established.

Improper use of interagency contracts has been identified not only by GAO but also by agency inspectors general, GAO said. In a highly publicized example, the Interior Department IG found that task orders for interrogators and intelligence services in Iraq were improperly awarded under a General Services Administration schedule contract for information technology services. OFPP convened an interagency working group in December 2005 to explore problems in the use of interagency contracts and to clarify the roles of the requiring and procuring agencies involved in these vehicles. OFPP expects to issue guidance in this area late this spring or early summer, Burton said.

Closer at hand will be a new memo from OFPP Administrator Paul Denett on increasing the use of competition for government contracts, including task orders awarded under interagency contracts, Burton said. Awards of "big dollar task orders" arguably should be more competitive in some instances, he said. "We will see some guidance on that very shortly."

Interagency contracts received substantial attention from the Acquisition Advisory Panel established under the Services Acquisition Reform Act. Burton said OFPP currently is considering the panel's recommendations in this area, which include:

- formalizing existing procedures for reviewing the use of GWACs, the General Services Administration's multiple award schedules program, and contracting franchise funds;
- extending these review procedures to cover multi-agency contracts, enterprisewide vehicles, and the assisting entities that support these contracting vehicles;
- developing guidance and procedures for agencies to formally authorize the continuation/reauthorization of these vehicles and entities;
- ensuring periodic agency review of these vehicles and the assisting entities; and
- disestablishing vehicles that do not continue to meet specific agency needs and to support the effectiveness of governmentwide contracting.

OFPP's list of the 13 governmentwide acquisition contracts for information technology products and services is available at:

http://www.whitehouse.gov/omb/procurement/interagency_acq/gwac_list.pdf.

COFC Rules Modification of 8(a) Contract Does Not Require Adverse Impact Analysis

An agency that modified an 8(a) contract to add further help desk services to those already being performed under the contract was not required to consider the adverse impact of that modification on the other 8(a) firm that previously performed the services that were the subject of the modification, the U.S. Court of Federal Claims ruled March 30 (*Management Solutions & Systems Inc. v. United States*, Fed. Cl., No. 07-7C, 3/30/07).

Accordingly, the court denied the protest by 8(a) small disadvantaged business Management Solutions & Systems Inc. of the Department of Housing and Urban Development's modification of the agency's 8(a) contract with Creative Computing Solutions Inc.

Between July 2002 and December 2006, MSSI held an 8(a) contract to provide help desk support to the Public and Indian Housing Information Center (PIC), which was a unit of HUD's Office of Public and Indian Housing's Real Estate Assessment Center. The challenged modification added the PIC help desk support services to CCSI's 8(a) contract to provide help desk support services to the Real Estate Assessment Center.

The court ruled first that the Small Business Administration's "adverse impact" rule--which prohibits SBA from accepting a procurement into the 8(a) program if doing so would have an adverse impact on an individual small business or group of small businesses located in a specific geographical location--does not apply to the modification. Under the SBA rule (13 C.F.R. 124.504), to form an initial 8(a) contract the procuring agency is required to offer the "procurement" to the SBA Section 8(a) program by a "written offering letter," Judge Susan G. Braden said, quoting from the rule. SBA then decides whether to accept the procurement into the program in accordance with the criteria in the rule.

"A modification, however, does not require a formal 'offer,' and therefore does not require a formal 'acceptance' in accordance with the criteria of 13 C.F.R. 124.504, including an adverse impact determination," Braden said.

Further, the court pointed out that SBA's consent to a contract modification is not required if SBA has delegated contract administration to the procuring agency and the modification is within the scope of the original contract. The modification here was within the scope of the initial CCSI contract and was not a separate 8(a) procurement, the court found. The modification did not change the purpose of CCSI's contract, which is to provide help desk services for HUD's Real Estate Assessment Center; rather, it merely added "a comparatively small unit" of help desk services for PIC, which is part of the Real Estate Assessment Center. Based on the overall contract, the modification represents a 24 percent price increase.

"More importantly, the initial CCSI Contract provided that 'HUD may subsequently include additional programs and processes as deemed necessary to operate a [Technical Assistance Center, *i.e.*, help desk]," the court said. Finally, the court determined that SBA delegated administration of the CCSI contract to HUD, thereby authorizing the agency to execute the in-scope modification. SBA's letter to HUD not only authorized the agency "to negotiate and contract directly" with CCSI, but it also stated that SBA would be available, on request, to "assist the program participant in contract administration."

Close to Two-Thirds of Firms Selected By NASA for IT GWACs Are Small Businesses

The National Aeronautics and Space Administration's renamed Solutions for Enterprise-Wide Procurement program recently announced that small businesses received 21 out of 37 newly awarded governmentwide acquisition contracts (GWACs) to provide information technology products to federal agencies.

The latest round of awards took place under what was formerly the Scientific Engineering Workstation Procurement (SEWP) program, which NASA has managed since 1992. NASA renamed the program after being designated in December 2006 to continue as executive agent for SEWP IV--a five-year contract with a \$6 billion ceiling--which provides other federal agencies online tools and training to help them access high-end IT product solutions. SEWP III expired in January 2007.

Of the companies selected to provide products and services under SEWP IV, eight are service-disabled, veteran-owned small businesses, four are small minority-owned businesses, two are women-owned, and five are small disadvantaged firms eligible for contracts under the Small Business Act Section 8(a) set-aside program.

On its SEWP Web site, NASA boasted that the latest version of its IT GWAC program offers a vast selection of advanced technology for federal agencies and their authorized contractors at prices that are generally less than General Services Administration Schedule prices and with a surcharge of only 0.6 percent. According to NASA, SEWP is the "easiest and fastest ordering procedure using pre-competed contracts."

The Office of Federal Procurement Policy's designation of NASA to continue running the SEWP program ruffled feathers at GSA last December, prompting agency head Lurita Doan to complain of a proliferation of duplicative government contract vehicles and a resulting escalation of the costs for government goods and services. Doan had lobbied against NASA's request for renewal of the SEWP contract.

In explaining the new name behind the SEWP acronym, NASA said on its Web site that the term workstation "does not encapsulate both the higher end competitive systems and extensive solution based supporting equipment available through SEWP. The new meaning evokes two key elements of the SEWP contracts: IT product solutions and a program infrastructure that can support the use of contracts for site or even agency-wide procurement activities."

Senate Passes \$123B War Supplemental Without House Contract Reform Provisions

The Senate March 29 passed, 51-47, a \$123.2 billion fiscal year 2007 supplemental spending bill (H.R. 1591) that does not include the acquisition reform provisions contained in Title V of the bill as passed by the House.

Those House provisions--which were taken from portions of the "Accountability in Contracting Act" legislation offered by Rep. Henry Waxman (D-CA) as a freestanding bill and passed by the House March 20 --were among those struck out when the Senate adopted an amendment in the nature of a substitute offered by Sen. Robert Byrd (D-WV). However, the supplemental bill passed by the Senate includes a provision (Section 569) that would require federal contractors that employ illegal immigrants to be debarred for 10 years from receiving future federal contracts. The provision, based on language approved by the Senate in January during its consideration of the minimum wage bill, would provide for a seven-year debarment for employers that do not hold federal contracts when they are found to have violated the Immigration and Nationality Act.

The provision also would exempt from these debarment penalties employers that are participating in the government-provided automated electronic verification system for worker eligibility that was established as a pilot program under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. During Senate floor action on the supplemental measure, the Senate also approved an amendment offered by Sen. Hillary Clinton (D-NY) to link award fees under Department of Homeland Security contracts to successful acquisition outcomes under such contracts.

As these contracting-related provisions differ from those in the \$124 billion bill passed by the House March 23, they will be among the issues to be resolved by House and Senate conferees charged with ironing out the differences between the two versions of the measure.

Because the Senate bill, like the House bill, contains language to force U.S. troops out of Iraq and to authorize billions of dollars in domestic program spending, President Bush immediately reiterated his plans to veto any final bill that the Democratic-controlled Congress sends to him that puts restrictions on the military's operations in Iraq and greatly exceeds his own \$103 billion supplemental spending request.

But Senate Majority Leader Harry Reid (D-NV) signaled that he and House Speaker Nancy Pelosi (D-CA) will not easily abandon any of the offending provisions when lawmakers begin negotiations on a final conference agreement that Congress will consider in April. Reid, who said the day before, with Pelosi, that Congress had done its job in providing Bush with the war funding he requested, remarked March 29 that he is anxious for conference negotiations to begin on the bill in order for lawmakers to be able to consider it soon after they return from recess.

Reid said he would like negotiations on the bill to begin as soon as March 30. "While people may not agree as to what's in the bill, we all agree that it's something that needs to be done very quickly and we will move this just as quickly as we can," he said. Senate Minority Leader Mitch McConnell (R-KY) said he agreed with the plans Reid outlined. He predicted that the final product will not look much different from what passed the Senate and the House and said he is confident it will be vetoed. McConnell told reporters he also is confident that Republicans in both chambers "have more than enough votes" to sustain Bush's veto.

Across Capitol Hill, House Appropriations Defense Subcommittee Chairman John Murtha (D-PA) said March 29 that staff-level negotiations with the Senate would begin in earnest April 2. But Murtha suggested it will take a month to iron out a final bill, saying the goal will be to have a conference report ready for a final vote April 25 or 26. If for some reason Congress cannot reach a deal by then, Murtha told reporters he is contemplating month-by-month emergency supplemental resolutions, similar to the stopgap continuing resolutions Congress utilizes when unable to finish the annual appropriations cycle by the start of the fiscal year.

Proposed FAR Rules Redefine Requirements For Data to Support Price Reasonableness

Federal Acquisition Regulation changes proposed April 23 are intended to resolve what the rule writers term "confusion" regarding the requirement that contracting officers obtain contractor cost or pricing data to enable the government to determine whether a contract price is fair and reasonable.

The proposed rules were drafted to make clear that "the contracting officer should be free to ask for any information necessary to determine the price to be fair and reasonable," the rule writers said in proposing to revise the current regulatory scheme in the area.

Under some circumstances, the Truth in Negotiations Act may require that cost or pricing data be certified as accurate, current, and complete--and provide for a contract price adjustment and potential penalties when the data is "defective"--but even when TINA certification requirements do not apply, contracting officers nonetheless may require detailed cost or pricing data if they are necessary to determine price reasonableness, according to the proposed rules.

In fact, when TINA certification is not required, the proposed rules would allow the contracting officer to obtain more data than contemplated by TINA requirements, which expressly focus on "facts" and exclude "judgmental" data. The proposed rules would amend the definitions at FAR 2.101 to add new a term, "data other than certified cost or pricing data," which would mean "any data, including cost or pricing data and judgmental information necessary for the contracting officer to determine a fair and reasonable price or price reasonableness."

This term would replace the current term "information other than cost or pricing data" in order to make the regulations more consistent with 10 U.S.C. 2306(a) and 41 U.S.C. 254b, the rule writers said. Contracting officers would be instructed to obtain "data other than certified cost or pricing data" when certification is not required. The definition of "cost or pricing data" in FAR 2.101 also would be revised to remove the reference to certification, while an additional definition of "certified cost or pricing data" would be added.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council explained that they considered revising the terms to "certified cost or pricing data" and "noncertified cost or pricing data," but they rejected this approach, saying that "if the FAR authorized the contracting officer only to obtain 'noncertified cost or pricing data' when a certificate is not required, the FAR would not contain authority to obtain detailed cost estimates plus the noncertified cost or pricing data; it would only contain authority to obtain 'cost or pricing data' that is not certified."

According to the councils, "The distinction between detailed cost estimates and 'cost or pricing data' is that 'cost or pricing data are defined in TINA, and they are limited to a subset of the information that Table 15-2 requires. The 10 U.S.C. 2306(a)(h)(1) definition of cost or pricing data states 'the term does not include information that is judgmental, but does include the factual information from which a judgment was derived.' Therefore, if a contracting officer needs a complete cost estimate and supporting judgments, the contracting officer needs more than just the noncertified cost or pricing data."

Also, the councils are proposing to revise FAR Subpart 15.4, on contract pricing, "in order to clarify the need and authority to obtain a detailed cost estimate, including cost or pricing data, when there is no other means to determine fair and reasonable pricing during price analysis even though the cost or pricing data will not be certified."

As part of this clarification, the councils said they also propose to revise the contract clauses at FAR 52.215-20 and 52.215-21 to incorporate the instructions in Table 15-2 of FAR 15.408 as "a mandatory format" for the submission of required data when TINA applies. The significance of this table was a key issue in a recent controversy cited by the FAR councils as an indicator of the confusion they hope the proposed rules will address.

According to introductory information accompanying the rules, in 2005 "Congress expressed concern regarding an Air Force defective pricing case related to judgmental factors as cost or pricing data. Based on the legal issues raised in the case, Congress is concerned that FAR regulations are ambiguous, especially in the definition of cost or pricing data in FAR 2.101 and the discussion of cost or pricing data in Table 15-2."

The case referred to involved Science Applications International Corp., and contractor groups argued at the time that Air Force documents in the case misstated and significantly expanded TINA requirements for disclosure and certification of cost or pricing data. "Cost or pricing data is defined in FAR 2.101 and not by Table 15-2," the National Defense Industrial Association asserted in letters to senior Air Force officials.

Other developments cited by the councils as signaling a need for regulatory "clarification" included a May 2001 report by the Defense Department inspector general identifying situations in which contracting officers did not obtain adequate pricing information or "information other than cost or pricing data" for justifying price reasonableness, and a March 2002 memorandum by the DOD's director of defense procurement reiterating the need for the defense agencies and military services to obtain sufficient pricing or cost data to justify price reasonableness.

The rule writers explained that, in drafting the proposed rules, they consulted with the Air Force general counsel and the DOD IG. The DOD IG recommended that the FAR be revised to:

- track the mandate, included in TINA, that contracting officers obtain, "at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price"; and
- include a separate section addressing the pricing of sole source commercial items.

The proposed rules adopt the first recommendation but not the second. The councils said that, with the clarifications provided by the proposed rule, the FAR 15.402 hierarchy of data to be used in determining price reasonableness continues to apply and "clearly provides the contracting officer with the authority to obtain whatever data is necessary to determine whether the proposed prices are fair and reasonable, up to and including a detailed cost estimate or cost or pricing data (but excluding a certificate)--whether a sole source or other situation is involved."

Issuance of the proposed FAR rules follows several DOD actions that similarly demonstrate the government's continuing concern regarding its ability to determine the reasonableness of contract prices. DOD March 28 submitted to Congress a legislative proposal to amend the TINA exception for commercial items in order to permit the government to obtain commercial data when procuring sole-source items, and on March 23 Director of Defense Procurement and Acquisition Policy Shay Assad issued an internal memorandum to tighten up on the use of TINA waivers.

Comments are due June 22 (72 Fed. Reg. 20092, 4/23/07). The proposed FAR rule on cost or pricing data is available at:

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-1927.pdf>.

Contract Bundling Definition Debated During House Small Business Panel Hearing

The question of whether the current definition of contract bundling needs to be changed to reduce the practice of consolidating federal requirements into large packages that discourage small business competition was debated during an April 19 hearing of the House Small Business Committee.

At issue was a recently introduced bipartisan bill, the "Small Business Fairness in Contracting Act" (H.R. 1873), which is intended to make contract bundling more difficult for federal agencies. The bill was introduced late April 18 by Rep. Bruce Braley (D-IA), chairman of the Small Business Subcommittee on Procurement and Technology, and will be marked up by the committee April 24.

According to Braley, government agencies have "greatly increased" contract bundling over the past five years, so that contracts to small businesses have fallen even while federal contracting has risen significantly. Calling the situation "unacceptable," Braley said during the hearing that his bill would "unbundle" many existing contracts and "level the playing field for small businesses."

More specifically, the measure would call for greater analysis of bundled contracts to make sure that they meet prerequisites for bundling under existing law, according to a summary of the bill. It also would broaden the current definition of contract bundling by removing the requirement that limits application of the definition to situations in which one of the contracts was previously performed by a small business.

Instead, the bill would define "bundling of contract requirements" to mean "the use of any bundling methodology to satisfy two or more requirements for new or existing goods or services, including any services for construction, that is likely to be unsuitable for award to a small business concern" due to:

- the diversity, size, or specialized nature of the elements of the performance specified;
- the aggregate dollar value of the anticipated award;
- the geographical dispersion of the contract or order performance sites; or
- any combination of these factors.

Todd McCracken, president of the National Small Business Association, told the committee his group has "long advocated an expansion of the term" contract bundling "to include any instance where two or more contracts are combined." The existing "overly-narrow definition warps the government's calculations on the prevalence of contract bundling in the federal procurement arena," he said.

Contract bundling, which is "central to the question of small business opportunities," is "still not readily recognized or identified," according to Emily Murphy, who recently left her post as chief acquisition officer for the General Services Administration to join the law firm Miller & Chevalier in Washington, D.C. Murphy cited statistics showing that only 43 contracts over \$5 million were reported as bundled or consolidated in fiscal year 2006; these reported bundled contracts accounted for \$5.7 billion of the more than \$417 billion spent in that period through nearly 8.3 million contract actions.

There needs to be at least "additional clarification" with respect to the current definition of contract bundling contained in the Small Business Reauthorization Act of 1997, which requires that the work have been previously provided or performed, Murphy said. "Likewise, the current definition does not sufficiently recognize the complexities inherent in construction contracts," she said. Murphy suggested that "including construction services, combined with deleting the requirement that work have been previously provided or performed, will better address this important sector of small business." Murphy, who said her testimony was based on her personal opinion of how bundling should be addressed, also said the current definition is "further confused by separate procedures in place for contract consolidation" at the Defense Department. "Separate policies for different agencies addressing the same problem do not make sense."

However, Paul Hsu, the new associate administrator of the Small Business Administration's Office of Government Contracting and Business Development, questioned the view that the current definition of contract bundling needs to be changed. "While I share the committee's concern about the impact of bundled contracts, I do not agree that the definition is the problem," Hsu said. "The issue is enforcement," he said, and it is one that President Bush, the Office of Federal Procurement Policy, and SBA "are all focused on addressing."

Hsu's comments were not well received by members of the committee, particularly its chairwoman, Rep. Nydia Velazquez (D-NY), who demanded that the Bush administration "better take action" to address the bundling problem, particularly after it pledged to do so when making the matter the first priority of a small business agenda issued in 2002. In the past few years, "we have seen substantial increases in contract bundling," she said, describing the practice as " 'public enemy number one' for small businesses that are trying to penetrate the federal marketplace."

Over the last five years, according to Velazquez, total government contracting dollars have increased by almost 60 percent, while the number of contract actions to small businesses declined by 55 percent. "Fewer contract actions combined with greater procurement spending is proof of contract bundling," she said. Rep. Steve Chabot (R-OH), the ranking member of the committee and a co-sponsor of Braley's bill, said that the government's approach to contract bundling is "an area of demonstrated weakness" on the part of SBA. "As the primary engine of innovation and job creation, small businesses should be receiving a fair proportion of the total prime contracts for property and services as required by the Small Business Act. Contract bundling is a barrier to achieving this goal," he said.

In addition to addressing contract bundling, Braley's bill would increase the governmentwide federal small business contract goal from 23 percent to 30 percent and would apply that goal to overseas contracts for work outside the United States