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DOD Memo Implements Statutory Changes In Competition Mandates for FPI Purchases

The Defense Department recently disseminated guidance to top procurement officials in the military services and defense agencies on implementing new competition requirements that apply to procurements of products in which the Federal Prison Industries has a significant market share.

The competition mandates, set out in Section 827 of the fiscal year 2008 defense authorization act (Pub. L. No. 110-181), require competitive bidding for products in which FPI has a significant share of the DOD market; they relieve DOD from having to conduct market research beforehand to determine whether products available from the private sector are comparable to those offered by FPI and can be obtained at a better value.

Section 827 defines a significant market share as more than 5 percent. There are eight product categories, also referred to as Federal Supply Codes (FSCs), in which the FPI meets this threshold, according to the March 28 advisory from Shay Assad, director of defense procurement, acquisition policy, and strategic sourcing. These FSCs are:

- laundry and dry cleaning equipment;
- miscellaneous hardware;
- connectors, electrical;
- electrical hardware and supplies;

- cable, cord, wire assemblies--communications equipment;
- wire and cable, electrical;
- office furniture; and
- household furnishings.

These FSCs will be updated as necessary in subsequent policy memos, the DPAP director said. Because FPI's share of the DOD market for these product categories exceeds 5 percent, competitive or fair opportunity procedures must be applied to solicitations and the contracts or orders that follow, Assad said in his memo. In conducting such competitive procedures, contracting officers must consider timely offers from FPI in accordance with Federal Acquisition Regulation 8.602(a)(4).

When FPI does not have a significant market share for a particular product, DOD contracting officers are required to follow the process outlined in FAR Subpart 8.602 and conduct market research to determine whether the product is comparable to private sector products in terms of price, quality, and time of delivery. Comparability determinations "are made at the discretion of the contracting officer," Assad said.

If the FPI product is not comparable to private sector products, DOD must use competitive procedures for the procurement or make a purchase under a multiple award contract in accordance with the competition requirements of those contracts. Under Section 827, contracting officers conducting such a competition "shall include FPI in the solicitation process and consider a timely offer from FPI," Assad said in his memo.

"Likewise, if the procurement is made using a multiple award schedule, then FAR 8.602(a)(4)(iii) requires contracting officers to communicate the item description or specifications and evaluation criteria directly to FPI, 'so that an offer from FPI can be evaluated on the same basis as the contract or schedule holder.' A timely offer from FPI must then be considered," Assad said.

Revisions will be made to the Defense Federal Acquisition Regulation Supplement reflecting the revised competition requirements of Section 827 and the procedures outlined in Assad's memo. The DFARS revision "will take precedence" should it conflict with the procedures in the memo, Assad said.

The procedures and requirements set out in the memo apply to solicitations, contracts, and orders issued after March 28.

Senate Panel Moves Bill Expanding Use Of Schedules by State, Local Governments

The Senate Homeland Security and Governmental Affairs Committee April 10 reported out a bill to allow state and local governments to use the Federal Supply Schedules to purchase law enforcement, security, and other related items.

The Local Preparedness Acquisition Act (H.R. 3179) was introduced by Rep. Edolphus Towns (D-N.Y.) July 25, 2007, and passed by the House under a suspension of the rules Dec. 17. It would authorize use of the Federal Supply Schedules by state and local governments for the acquisition of alarm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purpose clothing, and related services.

The bill was introduced shortly after the General Services Administration issued a new rule allowing state and local governments to use the Federal Supply Schedules to make purchases in aid of recovery efforts following a natural disaster or act of terrorism. The interim rule, which took effect Feb. 1, 2007, implemented Section 833 of the fiscal year 2007 defense authorization act (Pub. L. No. 109-364)--a provision authorizing GSA to permit state and local governments access to the GSA contracts to purchase products or services "to facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack."

GSA noted in the rule that the Section 833 authority builds on the Cooperative Purchasing Program authorized by Section 211 of the E-Government Act of 2002 (Pub. L. No. 107-347), which opened GSA's information technology schedule, Schedule 70, for use by state and local governments. The schedules program provides federal agencies a simplified process for acquiring commonly used commercial supplies and services at prices associated with volume buying, the agency explained in the interim rule.

A year after GSA issued the interim rule, no state or local government had purchased products and services for disaster recovery from the GSA Schedules, INPUT, a Reston, Va.-based consulting firm, said in a Feb. 21 report.

GAO Head Stresses Need for DOD To Improve Acquisition Workforce

The Defense Department's increasing reliance on contractors is exacerbating long-standing problems with its acquisition workforce, such as a lack of requisite skills "to effectively implement best practices and properly manage the acquisition of goods and services," the head of the Government Accountability Office said in testimony prepared for a congressional hearing last January and publicly released April 3.

David Walker, who stepped down as chief of GAO March 13, emphasized strongly in testimony to the House Appropriations Defense Subcommittee that there is a "critical need for actions to be taken to improve the acquisition workforce" within DOD. At the same time, it is imperative that there

be a "fundamental re-examination of when and under what circumstances" DOD uses contractors as opposed to civil servants or military personnel, he told the subcommittee.

Walker recounted that DOD's heightened use of contractors has raised a number of concerns. Among those highlighted in his testimony are:

- the challenge of providing the proper balance between public and private employees in performing agency missions;
- a lack of oversight and management of contractors;
- the potential risk of contractors influencing the government's control over and accountability for decisions that may be based in part on contractor work, particularly when contracts for services closely support inherently governmental functions; and
- the absence of a DOD requirement to employ personal conflict of interest safeguards for contractor employees.

Meanwhile, the DOD acquisition workforce's workload and complexity of responsibilities "have been increasing without adequate agency attention to the workforce's size, skills, and knowledge, and succession planning," Walker said. Suggesting that there is a need to "elevate the acquisition function within the department," Walker pointed out that DOD is suffering from a critical shortage of professionals in this area with technical skills related to systems engineering, program management, and cost estimation.

While shortcomings in the capabilities and accountability of DOD's acquisition workforce have come to light in such recent contingency situations as the conflict in Iraq, "they are present in non-emergency circumstances as well, with the potential to expose DOD to significant fraud, waste, and abuse," Walker warned. He cited a July 2006 GAO report finding that DOD's acquisition workforce is subject to conditions that increase DOD's vulnerabilities to contracting fraud, waste, and abuse. These conditions include:

- growth in overall contracting workload;
- pending retirement of experienced government contracting personnel; and
- a greater demand for contract surveillance because of DOD's increasing reliance on contractors for services.

"To put it another way, at the same time that procurement spending has skyrocketed, fewer acquisition professionals are available to award and--just as importantly--administer contracts," he said." Two important aspects of this issue are the numbers and skills of contracting personnel and DOD's ability to effectively oversee contractor performance.

The role of the acquisition function "does not end with the award of a contract," but rather requires "continued involvement throughout contract implementation and closeout to ensure that contracted services are delivered according to the schedule, cost, quality, and quantity specified in the contract," Walker continued. Despite some improvements, DOD still faces problems that hinder its

management and oversight of contractors at deployed locations and has not allocated the organizational resources to review and oversee issues regarding contractor support to deployed forces, he said.

On a related matter, Walker told the subcommittee that there is not sufficient data for GAO to determine whether increased service contracting has caused DOD's costs to be higher than they would have been had the contracted activities been performed by uniformed or DOD Civilian personnel. However, he pointed to what was then an ongoing examination, since concluded, by GAO of the Army's Contracting Center for Excellence that found that the Army is paying up to 26 percent more for contractor contract specialists than for government contract specialists.

The GAO testimony, "Defense Acquisitions: DOD's Increased Reliance on Service Contractors Exacerbates Long-Standing Challenges" (GAO-08-621T, 1/23/08), is available at: <http://www.gao.gov/new.items/d08621t.pdf>.

DOD IG Warns of Continued Excessive Costs With Noncompetitive Spare Part Procurements

The Defense Department's current use of exclusive distributors as a source of sole source spare parts is not an effective procurement option, and DOD needs to identify and address contractors that require contracting officers to use such distributors to obtain the needed parts, the DOD inspector general said in a report released April 8.

Exclusive distributors--nonmanufacturers that have an agreement with parts manufacturers to be their sole representative for government sales--add a "duplicate layer of administration and shipments" to the procurement, the IG said in the redacted report dated Feb. 6. Further, their use flies in the face of the statutory prohibition on DOD payment of excessive pass-through charges on contracts when the prime contractor provides no or negligible added value and most of the work is performed by subcontractors, according to the IG. Congress enacted that prohibition in Section 852 of the fiscal year 2007 defense authorization act (Pub. L. No. 109-364).

However, the IG linked the use of exclusive distributors to the refusal by single-source manufacturers to provide direct price quotes on DOD solicitations, which leaves "contracting officers with few alternatives other than to procure the needed spare parts from exclusive distributors." The exclusive distributor reviewed for the report, Dutch Valley Supply, of Lawrenceville, Ga., contends that it provides value to DOD through reduced costs, improved readiness, and increased competition, the IG said. However, the IG was "unable to validate any of Dutch Valley Supply's claims and determined that no or negligible added value was provided by the exclusive distributor."

Rather, the IG said DOD paid \$3 million, or 75 percent, more than the fair and reasonable price for 33 noncompetitive parts that cost about \$6.9 million to procure through Dutch Valley. "If problems are not addressed, DOD will pay about \$17.8 million more than fair and reasonable prices for the same items over the next 6 years," the IG warned. In addition, the exclusive distributor model results in increased lead times and inventory levels, the report said.

The IG also criticized DOD contracting officers for relying on "ineffective tools"--such as price analysis, cost analysis of dealer costs, and dealer competition--to support price reasonableness determinations for buys from Dutch Valley. Specifically, DOD paid about \$2.2 million (83.5 percent) more than fair and reasonable manufacturer prices for 23 items for which COs used analysis of previous government prices to determine price reasonableness, the IG said. Unless it is possible to establish the reasonableness of the previous price, such an analysis is not effective, the IG said.

"In a noncompetitive environment, when the current price history is not reliable to establish fair and reasonable prices, the only way to re-establish a reliable baseline price is to perform cost analysis," according to the IG. Also, the IG said:

- DOD paid about \$362,422 (49.5 percent) more than the fair and reasonable price for four items where the contract documentation indicated cost analysis was performed. However, for three of the four items, the CO had no insight into manufacturing costs.
- DOD used dealer competition to support price reasonableness for three items valued at \$436,936. Using cost analysis, the IG calculated that the fair and reasonable price was \$191,750, for a difference of \$245,186 (127.9 percent).

The IG contrasted the problems and costs associated with use of exclusive distributors with DLA's successful use of long-term strategic contracts with key suppliers. For example, it said that a strategic supplier contract between DLA and Honeywell provides for negotiation of contract prices for noncompetitive parts based on cost data, and has significantly reduced administrative lead times. DOD should discontinue using exclusive distributors unless it can develop a business model that provides sufficient added value to justify their use, the IG said.

The IG also recommended that DLA instruct commanders of the Defense Supply Centers to discontinue granting inappropriate waivers from cost or pricing data based primarily on price analysis and to continue initiating reverse engineering efforts for items that have unreasonable pricing from single source offerors.

With regard to the DOD rule implementing the legislative prohibition on DOD payment of excessive pass-through charges, the IG pointed out that a recent Government Accountability Office report warned that the rule does not adequately take into account contractor risk.

House Votes Again to Delay 3% Withholding on Contract Payments

The House April 15 voted 238-179 in favor of a bill (H.R. 5719) that would delay for one year the implementation of a statutory requirement that federal, state, and local governments withhold 3 percent from all payments made for goods and services.

The bill, known as the Taxpayer Assistance and Simplification Act of 2008, also would repeal the authority of the Internal Revenue Service to enter into contracts with private debt collection contractors. The cost of the withholding delay provision is estimated at \$316 million and that of the private debt collection repeal is estimated at \$578 billion over ten years.

The total \$1 billion cost of the measure would be paid for largely by a new mandate that would require substantiation for withdrawals from health savings accounts, with the requirements set to kick in after Dec. 31, 2010, the same date the 3 percent tax withholding is currently scheduled to go into effect. Republicans said the new restrictions on HSAs, approved without a hearing by the House Ways and Means Committee, would drive up administrative costs and discourage HSA enrollment. Fourteen Republicans joined 224 Democrats to support the bill, while two Democrats joined 177 Republicans in opposition.

The 3 percent withholding mandate was inserted into the conference report of the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) (Pub. L. No. 109-222) at the behest of the Senate. A provision calling for a one-year delay in the requirement, pending a Treasury Department study of its impact on government contractors, was included in the tax legislation passed by the House last year. However, the delay language was dropped from the final version (H.R. 3996) that was agreed to by House and Senate conferees and signed by the president.

The new provision is seen as a compromise that would allow lawmakers eager to repeal it altogether time to figure out how to get that done. Bills to that effect were introduced last year by Rep. Kendrick Meek (D-Fla.) in the House (H.R. 1023), and by Sens. Norm Coleman (R-Minn.) and Susan Collins (R-Maine) in the Senate (S. 2394).

The debate over whether government employees or private contractors are better suited to collect acknowledged and undisputed delinquent tax debt fell largely along party lines, with Democrats opposing the program and Republicans supporting it. Ways and Means Committee member Rep. Tom Reynolds (R-N.Y.), whose district is home to one of the two remaining private collection contractors used by the IRS, said the private contractors play a "limited, supplementary role in ensuring that undisputed tax debts are in fact paid" because otherwise, the IRS would not go after the funds.

However, Rep. Chris Van Hollen (D-Md.), also a tax-writer, said the underlying bill would "end the practice of bounty hunting." Despite GOP claims that the program will help close the \$345 billion tax gap, thus far, "it hasn't returned a single dime of additional revenue to the U.S. Treasury," he said. The private debt collection program lost \$50 million in fiscal year 2007, Van Hollen said, while if IRS beefed up its in-house staffing, the agency would have raised \$1.4 billion.

The program, said tax-writer Rep. Earl Pomeroy (D-N.D.), is in line with the administration and the GOP congressional minority's "ideological love" of private contractors. The bill is "wrong on policy, wrong on job creation and wrong on the way to mark April 15 for America's hard-working taxpayers," Reynolds concluded.

Across the Capitol, Senate Finance Committee ranking member Charles Grassley (R-Iowa) sent a letter to Sen. Byron Dorgan (D-N.D.), the sponsor of a Senate bill (S. 335) to kill the private debt collection program, saying the "relatively new" program "should have a fair chance to succeed or fail on its merits before Congress rushes to kill it in the cradle."

The Bush administration April 14 released a strongly worded threat to veto the measure. Elimination of the private debt collection program is "not consistent with the administration's commitment to a balanced approach toward improving taxpayer compliance and collecting outstanding tax liabilities," the Office of Management and Budget said in a statement of administration policy. Due to "workload demands," IRS is "very unlikely" to collect the estimated \$578 million the program would take in over 10 years, according to the statement.

The House bill also includes a provision related to domestically controlled foreign workers performing services under contract with the U.S. government. The language would treat the foreign subsidiaries of U.S. companies as American employers for the purpose of Social Security and Medicare payroll taxes. Rep. Rosa DeLauro (D-Conn.) said KBR, a large contractor providing military services to the United States in Iraq, has 14,000 American employees in that country. Of that total, 10,500 are listed as employees of two Cayman Islands "shell" companies created by KBR "solely to avoid paying payroll taxes for those workers," she said.

Democrats came to the House floor urging that the "KBR loophole" be closed. In addition to bringing in more taxes, the move would allow the employees to qualify for Social Security and Medicare, supporters said. Rep. Rahm Emanuel (D-Ill.) said the companies have post office boxes in the Cayman Islands but nothing else. "The only reason they are there is to avoid paying their fair share of taxes," Emanuel said.

According to the Joint Committee on Taxation, the set-up used by KBR would result in \$846 million in lost revenue "to the government and the taxpayer" over 10 years, DeLauro said. The legislation also would change the degree of common ownership required from 80 percent to 50 percent, which DeLauro said would ensure that more companies would be subject to the new law.

Meanwhile, a Congressional Research Service report dated April 14 examined the design of the private debt collection initiative and the policy issues it raises. The report reviewed IRS's statutory authority to use private collection agencies and the steps the agency took to implement the program starting even before 2004 and going into 2008.

CRS also addressed the main arguments for and against the initiative--legality of outsourcing, protection of taxpayer rights, prevention of abusive and illegal collection practices, and cost-effectiveness of the initiative. In addition, the report reviewed legislative initiatives in the 109th and 110th Congresses to modify the initiative, along with possible policy issues for Congress to consider.

GSA Forms Advisory Committee to Review Multiple Award Schedule Pricing Policies

The head of the General Services Administration April 17 announced the creation of a new federal advisory committee that will review pricing policies related to the GSA Multiple Award Schedules (MAS) contracting program.

The MAS Advisory Panel, whose 15 members are "some of the best, brightest and most experienced procurement experts" in the country, has been tasked with providing "definitive guidance" on the MAS program's pricing policies and price reduction clauses, GSA Administrator Lurita Doan told reporters. The panel will review the most favored customer provisions, price reduction policies and provisions, and current commercial pricing practices to ensure that GSA's Federal Acquisition Service negotiates prices that enable federal customers to award orders that represent "best value" and result in the lowest overall cost alternative for federal agency purchasers.

The committee, which has a two-year charter, is expected to submit initial findings and recommendations to GSA within six months of its first meeting, which will be held May 5 in Washington, D.C. A second meeting is scheduled for May 22, also in Washington. Elliot Branch, the Naval Sea Systems Command's executive director for contracts, is chairing the committee. Ten of the other committee members come from federal agencies, and include representatives of the Chief Acquisition Officers' Council and the legal and auditing communities.

Industry members are from associations that represent companies that do business with GSA through the schedules program, namely, 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 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.

In announcing the establishment of the committee, Doan expressed concern that frustration with the schedules program--caused by "confusing" guidelines or standards that may be "applied differently or changed retroactively"--is making companies increasingly reluctant to list their products and services on the schedules. She spoke of the need for "objective recommendations" on how to handle pricing clauses and when or if to trigger price reduction clauses.

The "time is now to face the challenge" and "provide definitive guidance to clients," Doan said. At the same time, the GSA head rejected the suggestion that creation of the committee is linked to a decline in use of the schedules program. To the contrary, Doan said, "schedule sales are up," growing almost six percent in the last quarter and reaching \$36 billion annually.

David Drabkin, GSA's acting chief acquisition officer (CAO), senior procurement executive, and a member of the committee, stressed the need to address changes in the market and in how GSA does business. As an example, he cited the shift in what the government buys away from products and toward more services, and asked whether services and products should be priced the same way or differently. The advisory committee will review MAS policy statements, implementing regulations, solicitation provisions, and other related documents regarding the structure, use, and pricing of MAS contract awards. FAS policies and CAO acquisition letters, some of which have not been made public in the past, will be reviewed and publicly disclosed, Drabkin said.

The committee also will examine the GSA Acquisition Manual, which is the process of being rewritten as a result of a review of the GSA Acquisition Regulation initiated in February 2006. In response to GSA's request for public input into the process, contractor and bar groups urged GSA to make significant changes in the price reduction clause, if not eliminate the provision altogether.

Members of the MAS Advisory Panel: In addition to Branch and Drabkin, the members of the advisory committee are:

Larry Allen, president, The Coalition for Government Procurement;
Alan Chvotkin, executive vice president and counsel, Professional Services Council;
Don Erickson, director of government relations, Security Industry Association;
Thomas Essig, chief procurement officer, Department of Homeland Security;
Jeffrey Johnson, director of government operations, International Facility Management Association;
Jacqueline Jones, branch chief, consolidated and language services branch, contracting officer, GSA;
Judith Nelson, industry specialist and program analyst, office of acquisition management, GSA;
Glenn Perry, senior acquisition executive, Department of Education;
Lesa Scott, director, Integrated Technology Service IT schedule contract operations, GSA;
Thomas Sharpe, senior procurement executive, office of procurement executive, Department of Treasury;
Debra Sonderman, director, office of acquisition and property management, Department of Interior;
April Stephenson, director, Defense Contract Audit Agency; and
Thedlus Thompson, senior assistant general counsel, GSA.

OMB to Update Guidance on Preventing Abuses in Agency Purchase Card Programs

The Office of Management and Budget is updating its guidance on preventing waste, fraud, and abuse in the government's purchase card programs following a recent report that found federal agencies have insufficient controls in place, OMB Director Jim Nussle said in an April 15 memorandum to agency heads.

According to Nussle, OMB is in the process of revising Appendix B to OMB Circular A-123, which governs the management of federal purchase card programs, "to incorporate financial reimbursement requirements for any improper purchase card transactions made by the cardholder and/or approving officials." The revisions also will enhance requirements for semi-annual reporting by each agency relating to instances of charge card waste, fraud, and abuse, including the disciplinary and other corrective actions taken by the agency.

In the meantime, he said, agencies should immediately:

- extend internal controls over purchase card activities to convenience checks and remind cardholders that the use of convenience checks should be minimized;
- require cardholders to obtain prior approval or subsequent review of purchase card activity for transactions under the \$2,500 micropurchase threshold;
- develop and implement guidance for ensuring that appropriate disciplinary actions, including dismissal, are considered and imposed for fraud and other egregious purchase card abuses;
- develop and implement guidance for documenting independent receipt and acceptance of items obtained with purchase cards, including (1) de minimis purchases that do not currently require documentation of independent receipt and acceptance and (2) responsibilities of the approving official or supervisor to ensure that items purchased were actually received; and
- develop and implement guidance for inventorying items obtained with a purchase card that are considered to be sensitive and pilferable property easily converted to personal use, such as handheld devices and small electronics.

Nussle was responding to an April 8 Government Accountability Office report that said that agencies are not doing enough to prevent fraud, waste, and abuse in their purchase card programs. According to the report, 41 percent of the sampled purchases made by federal employees using government credit cards between July 2005 and September 2006 either were not properly authorized or did not include evidence of receipt of the purchased goods and services by an independent party.

"Weak internal controls over proper authorization and independent receipt of purchase card acquisitions expose the government to fraudulent, improper, and abusive purchase card activity and loss of assets," GAO said. Nussle noted in his memorandum that federal charge card transactions totaled more than \$27 billion in fiscal year 2007. Purchase card abuse "is a very serious issue that breaches the trust of the taxpayers as well as diminishes the significant benefits that are achieved through the Federal charge card program," he wrote.

The OMB memorandum (M-08-18) is available at:
<http://www.whitehouse.gov/omb/memoranda/fy2008/m08-18.pdf>.

House Passes Three Bills Aimed At Improving Contractor Accountability

The House April 23 passed three contractor accountability bills that are intended to shed more sunlight on the backgrounds of certain companies that do business with the federal government.

The bills, which are sponsored by Democrats on the Oversight and Government Reform Committee, would require that:

- offerors or bidders seeking federal contracts disclose their involvement in administrative and legal proceedings initiated by the federal government;
- federal contractors report to agency inspectors general regarding overpayments and violations of federal criminal law relating to the award or performance of federal contracts, including those that are performed entirely overseas or involve commercial item acquisitions; and
- privately held corporations that have substantial federal contracts identify the names and salaries of top executives and directors.

The three bills, agreed to by voice vote under a suspension of the rules, received bipartisan support after being modified to meet concerns raised by Republicans as they were moved through the committee.

The "Contractors and Federal Spending Accountability Act" (H.R. 3033), sponsored by Rep. Carolyn Maloney (D-N.Y.), would require increased disclosure by offerors or bidders seeking federal contracts regarding their involvement in civil, criminal, and administrative proceedings initiated by the federal government, as well as the establishment and maintenance of a database of that information.

The bill would fill the need for a centralized, comprehensive database allowing contracting officers to review information regarding contractors' past performance, Maloney said during House floor action. The database would give COs more information about the qualifications and track records

of bidders and make it easier to prevent contracts from being awarded to poor performers, she said. Maloney's bill was modified before going to the floor to ensure that information in the database does not include incidents based on mere allegations of wrongdoing, but rather only ones involving "concluded" state and federal civil, criminal, and administrative proceedings that resulted in findings of fault, fines, or federal suspension.

Language that would have triggered debarment proceedings when a company had been subject to two or more adverse actions was replaced with a requirement that COs carefully examine firms with multiple infractions to determine their present responsibility, and document why they awarded contracts to contractors that, within a three-year period, committed two or more offenses for which they could be debarred.

This change won the support of Rep. Tom Davis (R-Va.), ranking Republican on the committee, who objected that the original "two strikes and you're out" language "smacks of punishment," which is not the purpose of contract suspension and debarment procedures. Committee Chairman Henry Waxman (D-Calif.) called the bill a "common-sense initiative" to "track fraudulent contractors" and "stop them from moving from agency to agency after they have been debarred."

Following the House vote, Sen. Claire McCaskill (D-Mo.) announced she was introducing a companion measure in the Senate April 23 that she hoped to move quickly as an amendment to the fiscal year 2009 defense authorization bill, for which markups are expected to begin April 29. Commending Maloney for starting the ball rolling, McCaskill said the "bill will put in place the necessary infrastructure to ensure that federal spending goes to businesses that work within the law, not outside it." The Congressional Budget Office estimates that implementing H.R. 3033 would cost \$5 million in 2009, about \$20 million over the 2009-2013 period, and would not affect direct spending or revenues.

The House also approved the "Close the Contractor Fraud Loophole Act" (H.R. 5712), sponsored by Rep. Peter Welch (D-Vt.). The bill incorporates the mandate of a proposed Federal Acquisition Regulation rule that would require contractors to notify contracting officers and agency inspectors general of overpayments and violations of criminal law in the award or performance of a contract, but extends that notification requirement to cover contracts performed overseas and contracts for commercial items.

A draft revised version of the proposed rule that similarly extends coverage to overseas and commercial item contracts is under review at the Office of Management and Budget. Welch's bill won bipartisan support after it was amended to make clear that the intent of the bill is to establish congressional policy that any disclosure requirement should apply to overseas and commercial contracts, while recognizing that the regulatory process is the appropriate venue for formulating implementation details. Welch was particularly incensed by the exemption in the initial proposed rule for contracts performed overseas, given what he believes is a pervasive problem with contracts intended for the support of military troops in Iraq and Afghanistan. Whether inserted "by mistake" or "by sleight of hand," the loophole must be closed, he said.

As passed, the bill would mandate that any FAR amendment that requires timely notification by contractors of violations of federal criminal law or overpayments in connection with covered contracts or subcontracts must include "those performed outside the United States and those for commercial items."

The third bill approved by the House, the "Government Contractor Accountability Act" (H.R. 3928), would require contractors that are not publicly traded and that receive more than 80 percent of their annual gross revenues from federal contracts to disclose the salaries of their most highly compensated employees and their directors when they have contracts worth more than \$25 million in any fiscal year.

Rep. Christopher Murphy (D-Conn.) introduced the bill Oct. 23, 2007, in reaction to the refusal by Blackwater USA founder Erik Prince to provide the House Oversight and Government Reform Committee information on the company's profits and his own compensation. Murphy amended his bill prior to markup by the committee to increase the original \$5 million threshold to \$25 million. In addition, the bill was revised to cover not just recipients of federal contracts, but also those that receive federal funds in other forms, such as grants and cooperative agreements.

Murphy said on the floor that the effect of his bill would be "limited" because publicly-held companies, which already are required to disclose information regarding executive compensation, perform the "lion's share" of government contracts. He defended applying the compensation disclosure requirements to privately-held companies like Blackwater that are dependent on federal contracts for significant business, saying "it's our money, we deserve to know how it is being used." The executive compensation information required under the bill would be included on an existing database of all government contracts that was recently created by OMB, Murphy said. The Web site--www.USASpending.gov--is the result of legislation enacted in 2006, the Federal Funding Accountability and Transparency Act, which requires that detailed information on all government transactions that exceed \$25,000 be made publicly available.

Requirements similar to those in Murphy's bill were included in a wide-ranging bill (S. 2866) recently introduced by Sen. Hilary Clinton (D-N.Y.) to require greater disclosure of corporate executive compensation practices. The "Corporate Executive Compensation Accountability and Transparency Act," introduced April 15 and referred to the Finance Committee, would add a new section to the Federal Property and Administrative Services Act of 1949 on requirements for certain federal contractors to disclose executive compensation structures. Under the Clinton bill, contracts for the procurement of property or services entered into by an executive agency with covered contractors would require disclosure to contracting officers of an "accounting of the compensation structures" for the contractor's chief executive officer, chief financial officer, five most highly compensated executive officers, and each member of the contractor's board of directors.

The bill also would require that, within 90 days of entering into a contract, a contractor provide the CO with a "compensation discussion and analysis that justifies the compensation structures for the individuals identified ..., including a good faith analysis and comparison of prevailing industry and

market compensation structures with the compensation structures for such individuals." The bill mandates that this information be updated annually for the life of the contract,

The requirements would apply to contractors that received more than \$5 million in annual gross revenues from federal contracts or subcontracts at any tier during the preceding fiscal year. The bill would provide an exemption allowing a contractor "unable to provide the information" to instead provide the CO with:

- a certification that it received less than 50 percent of its annual gross revenues from federal contracts during the immediate preceding fiscal year; and
- an accounting of the compensation structures of its three most highly compensated executive officers.

This exemption also applies to a contractor that is not publicly held and is a small business concern owned and controlled by veterans, women, or socially and economically disadvantaged individuals. Information on contractors' compensation practices collected under these requirements is to be used by executive agencies "in justifying and determining the value of future contract awards" and made publicly available in searchable form through the Federal Procurement Data System, according to the Clinton bill.

LEGISLATIVE ACTION

Bill Number	Sponsor	Description	Action
H.R. 2830	Oberstar	To reform the Coast Guard Deepwater fleet modernization program	House passed, 395-7, 4/24/08
H.R. 3033	Maloney	To require increased disclosure by offerors or bidders seeking federal contracts regarding their involvement in civil, criminal, and administrative proceedings initiated by the federal government, as well as establishment and maintenance of a database of that information	House passed by voice vote 4/23/08
H.R. 3928	Murphy	To require contractors that are not publicly traded and that receive more than 80 percent of their annual gross revenues from federal contracts to disclose the salaries of their most highly compensated employees and their directors when they have contracts worth more	House passed by voice vote 4/23/08

		than \$25 million in any fiscal year	
H.R. 5712	Welch	To mandate that any amendment to the FAR requiring contractors to notify contracting officers and inspectors general of overpayments and violations of criminal law in the award or performance of a contract or subcontract cover contracts performed overseas and contracts for commercial items	House passed by voice vote 4/23/08
S. 2324	McCaskill	To strengthen the federal inspector general system	Senate passed by unanimous consent 4/23/08
S. 2892	Leahy	To improve prosecution of fraud associated with procurements for wars in Iraq and Afghanistan by expanding coverage of 1942 law allowing government to investigate and prosecute contracting fraud after the end of a war and extending that period from three to five years	Introduced 4/18/08; referred to Judiciary
S. 2904	McCaskill	To improve federal agency awards and oversight of contracts and assistance and to strengthen accountability of the governmentwide suspension and debarment system	Introduced 4/24/08; referred to Homeland Security & Governmental Affairs
S. 2905	McCaskill	To require disclosure by federal contractors of certain violations relating to the award of performance of federal contracts	Introduced 4/24/08; referred to Homeland Security & Governmental Affairs
S. 2916	Clinton	To ensure greater transparency in the federal contracting process, and to help prevent contractors that violate criminal laws from obtaining federal contracts	Introduced 4/24/08; referred to Homeland Security & Governmental Affairs