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Over White House Objections, House Passes SBA Contract Overhaul Measure

The House passed legislation Tuesday to overhaul the way the Small Business Administration awards contracts to small businesses, especially those owned by women and disabled veterans, dismissing objections by the White House.

The bill (HR 3867), which passed 334-80, would allow sole-source contracts to be awarded to businesses owned by disabled veterans and would limit competition for certain contracts to businesses owned by women.

“This legislation will give our service-disabled veterans top priority when it comes to contracting opportunities,” Small Business Committee Chairwoman Nydia M. Velázquez, D-N.Y., said during floor debate. “For those men and women returning from Iraq and Afghanistan, many with life altering injuries, this bill will provide the tools to start a new endeavor and begin a new life.”

The bill also is intended to make sure federal dollars are properly spent. It would allow any small business to challenge an individual contract award and would require on-site reviews to verify

eligibility for certain SBA programs. But Steve Chabot of Ohio, the Small Business Committee's ranking Republican, said the bill might have unintended consequences. "Rather than growing opportunities for all small businesses, it pits all of these deserving groups against one another," he said.

The House rejected a motion to recommit, 177-240, offered by Chabot, that would have sent the bill back to the Small Business Committee to strike a provision allowing for competitive contracts in low-income and high-unemployment areas.

Chabot and the White House also have criticized a provision that would classify individuals as economically disadvantaged so long as their assets, exclusive of their primary residence and their business, do not exceed \$550,000. That would allow too many wealthy entrepreneurs to receive SBA contracts, Chabot said.

On Oct. 24, the White House voiced its concerns with the bill, saying it strongly opposes the measure. Among other things, the administration said a provision expanding eligibility for race- or ethnicity-based preferences in federal contracting "may be vulnerable to a constitutional challenge."

Among the amendments adopted was one intended to crack down on small businesses that hire illegal immigrants. Offered by Democrat Kirsten Gillibrand of New York and adopted by voice vote, the amendment could make an employer subject to being barred from future federal contracts for regularly hiring or recruiting known illegal immigrants.

Another amendment, offered by Velázquez and also adopted by voice vote, would give preference to severely disabled veterans while setting new standards of business integrity for program participants.

House Small Business Panel OKs Bill To Improve SBA Contracting Programs

The House Small Business Committee Oct. 18 endorsed legislation intended to improve federal government small business contracting programs, specifically those designed to assist small disadvantaged firms, women, service-disabled veterans, and firms located in economically troubled areas.

The committee voted 22-4 in favor of the Small Business Contracting Program Improvements Act of 2007 (H.R. 3867), which was introduced Oct. 17 by Committee Chair Nydia Velazquez (D-N.Y.). Opposing the legislation, which was approved without change, were Republican Reps. Steve Chabot (Ohio), ranking member of the committee, Roscoe Bartlett (Md.), Marilyn Musgrove (Col.), and Jim Jordan (Ohio). The Bush administration also has concerns with the measure, which were relayed by Steven Preston, administrator of the Small Business Administration, at an Oct. 4 hearing on a draft of the bill.

The bill includes changes that apply to all Small Business Act contracting programs, as well as revisions to specific programs, such as the program for small disadvantaged firms authorized under Section 8(a) of the Small Business Act and the Historically Underutilized Business Zone program.

Changes that would be applicable to all SBA contracting programs include provisions:

- barring participation in contract preference programs by business owners that have "been shown not to have integrity";
- allowing other small businesses to protest the eligibility of a company for award through an SBA procurement program;
- ensuring that federal agencies are subject to small business goals corresponding to each of SBA's various contracting programs;
- requiring annual reports on a firm's number of employees and revenue; and
- increasing from \$5 million to \$10 million the limit on the size of contracts that may be awarded to small businesses without competition.

The bill also would:

- update the 8(a) program to raise the net worth ceiling for participation from the current \$250,000 to \$750,000;
- modify the HUBZone program to address problems with contracting fraud;
- require SBA to implement the procurement preference program for women-owned business that was established by legislation seven years ago but has not yet been put into effect; and
- strengthen penalties for companies that misrepresent themselves as service-disabled, veteran-owned firms.

House Votes to Delay 3% Tax Withholding On Government Payments to Contractors

The House Oct. 10 voted 232-173 to pass legislation (H.R. 3056) that would delay for one year, until Dec. 31, 2011, a requirement that federal, state, and local governments withhold 3 percent from all payments for goods and services. The delay would allow for a Treasury Department study, called for by the bill, of the impact that the withholding requirement would have on government contractors.

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. The delay provision passed as part of a larger bill, known as the "Tax Collection Responsibility Act of 2007," offered by Rep. Charles Rangel (D-N.Y.) and considered by many to

be a poison pill. Senate Finance Committee ranking member Charles Grassley (R-Iowa) labeled the measure, which also would end the Internal Revenue Service program that uses private contractors to collect tax debts owed by delinquent taxpayers (see related story in this issue), as "dead on arrival."

However, the Information Technology Association Oct. 11 issued a statement applauding House passage of the bill, saying the action sends "a welcome signal that Congress is prepared to reconsider this hastily conceived withholding requirement." According to ITAA President and Chief Executive Officer Phil Bond, the withholding amounts to "an interest free loan from industry to IRS." Implementation "could devastate small and mid-sized companies contracting with government at all levels and drive up costs to the taxpayer," he warned.

The withholding also would substantially increase costs to companies and the government, because neither side has systems set up to accommodate the requirement, ITAA added. Moreover, because the percentage of funds withheld would be based on companies' revenues rather than their actual obligations, companies would lose control over funds that they do not actually owe the government for the 12- to 15-month period between collection and refunds, the group said.

Meanwhile, the lawmakers sponsoring separate, bipartisan legislation (H.R. 1023) to repeal the withholding requirement entirely said Oct. 11 they will pursue multiple legislative opportunities to see their measure enacted into law. A final strategy has yet to be devised but, "We're going to pull out all the stops," said Rep. Wally Herger (Calif.), the chief Republican sponsor of the bill, which would repeal Section 511 of TIPRA. The bill is co-sponsored by Rep. Kendrick Meek (D-Fla.) and another 216 House members.

The withholding provision's inclusion in the debt collection bill has caused a split among groups within the Government Withholding Relief Coalition. The U.S. Chamber of Commerce, which sponsored the coalition, for example, supports repeal of the withholding requirement and, if necessary, a one-year delay while full repeal is being worked on, but the chamber opposes ending the debt collection program. Nonetheless, Herger, who voted against the bill because he opposes ending the private debt collection program, said the bill's passage shows that word is spreading among lawmakers about the problems small businesses will face with the withholding requirement. The vote was "so dramatically positive," Herger told BNA, "that it's only a matter of time."

Herger said the coalition and small businesses in general need to turn up the heat on the Senate, where the withholding repeal legislation (S. 777) sponsored by Sen. Larry Craig (R-Idaho) has only nine co-sponsors and no new ones since July. The 3 percent withholding provision was inserted into the conference report accompanying TIPRA at the behest of then-Finance Committee Chairman Grassley who said it would help address a problem with tax-delinquent contractors. "It was a mistake to begin with; it was airdropped" into the conference report without a hearing, Herger said.

While Herger said it is good that the word is spreading, members of the coalition said one problem facing the bill's supporters is that the requirement does not go into effect until the start of 2011. Large companies that rely on federal contracts are concerned, but smaller companies are not really aware of it and therefore are not lobbying their members and senators as much individually.

Coalition members say the provision is complex to implement and costly to businesses as well as to the government, which would have to write new tax regulations, acquisition regulations, and Medicare regulations. Although the measure does not go into effect for some time, industries that enter long-term contracts are already dealing with the issue. Unless something is done, the provision will be a "grotesquely catastrophic hit" to small businesses, Herger said.

Army CO Did Not Properly Address OCI in Lockheed's TRICARE Support Order

An Army contracting officer failed to properly identify and mitigate the organizational conflicts of interest resulting from the award to Lockheed Martin Corp. of a task order for program management support services for the TRICARE Acquisitions Directorate, the U.S. Court of Federal Claims ruled Sept. 28 (*Axiom Resource Management, Inc. v. United States*, Fed. Cl., No. 07-532C, 9/28/07).

Although the Government Accountability Office in July upheld the Army's OCI determinations in deciding the third of three protests by incumbent Axiom Resource Management, the COFC reached a different conclusion. According to the court, while the contracting officer, following Axiom's protests, ultimately identified an "unequal access to information" conflict, neither the CO nor the TRICARE Management Activity (TMA) has yet identified what the court found to be an "impaired objectivity" conflict resulting from the award. This fact "significantly undermines the court's confidence, both in the CO's conflict identification and wholesale endorsement of a voluntary mitigation plan," Judge Susan G. Braden said.

After allowing supplementation of the administrative record to include testimony from former senior TMA officials, the court held that the CO abused his discretion and violated Federal Acquisition Regulation Subpart 9.5 "by awarding the Task Order to Lockheed Martin, without developing a mitigation plan that does not afford Lockheed Martin any significant competitive advantages, is enforceable, *i.e.*, subject to court order, and otherwise does not impose any anticompetitive effects on future competition." The court requested the Federal Trade Commission Bureau of Competition, by Dec. 15, to file a friend of the court brief to advise it "whether an injunction should be issued to address the competitive issues the court has identified, and, if so, what the content of any such injunction should be."

In sustaining Axiom's protest, the court emphasized that under Federal Acquisition Regulation Section 9.5, the CO was obligated to "[i]dentify and evaluate potential organizational conflicts of

interest as early in the acquisition process as possible; and [a]void, neutralize, or mitigate significant potential conflicts before contract award." While the FAR "clearly places a duty on the CO to identify, analyze, and mitigate both potential and actual conflicts," only after Axiom filed its first GAO protest "did the CO take any action to investigate even a potential OCI," the court said. Although the CO eventually undertook what the court termed a "thorough analysis" of the potential for an "unequal access to information conflict," this was "not dispositive of whether the CO exercised common sense, good judgment and sound discretion in the development of an appropriate means for resolving a conflict."

Panel Preparing to Send to Senate Revised Contracting Accountability Bill

The latest version of a Senate bill (S. 680) that would overhaul the federal procurement system makes some significant changes to the original bill introduced last February by Sens. Joseph Lieberman (I/D-Conn.) and Susan Collins (R-Maine), the chairman and ranking member of the Homeland Security and Governmental Affairs Committee.

Work on the report language to accompany the bill, which was marked up by the committee Aug. 1, has yet to be completed, but the bill is soon to be reported to the full Senate. The sponsors hope that the bill, known as the Accountability in Government Contracting Act, will go before the Senate before the end of the year. Some of its provisions are similar to ones in a bill (H.R. 1362) that was introduced by House Oversight and Government Reform Committee Chairman Henry Waxman (D-Calif.) and passed by the House March 15. A central focus of both bills is improving oversight of federal contracts and promoting competition.

Among the modifications to the original Collins-Lieberman bill that are included in the substitute that will be sent to the Senate are changes that:

- allow OFPP to issue regulations changing the value of task or delivery orders that are subject to new bid protest procedures from \$5 million to up to \$25 million if it is determined that the \$5 million threshold is "unduly burdensome on executive agencies";
- remove language designating the Government Accountability Office as the forum for deciding those protests;
- delete a provision that would have prevented contractors from using subcontracts for more than 65 percent of the cost of the contract, not including overhead and profit, and instead require the issuance of regulations to minimize excessive use of subcontractors when a subcontractor does not perform work in proportion to any overhead or profit that it receives under the contract;
- replace language calling for debarment of contractors that pose a threat to national security with language stating that agencies may consider whether a contractor poses a threat to national security when assessing whether it is responsible for purposes of being awarded a federal contract;

- require OFPP to promulgate regulations outlining the proper use of cost-reimbursement contracts rather than instructing federal agencies to develop plans for minimizing use of cost-reimbursement contract; and
- replace a requirement for regulations on appropriate use of lead systems integrators with a request for guidance in this area.

The current bill also significantly expands the directives in the original bill aimed at improving the acquisition workforce. In addition to requiring the Government Accountability Office to issue a report on the qualifications of the acquisition workforce, it adds language on the need for a governmentwide contingency contracting corps, dedicates \$5 million in appropriations for the acquisition workforce training fund in both fiscal years 2008 and 2009, and extends the direct hiring authority provided by the Services Acquisition Reform Act, scheduled to expire Sept. 30, 2007, until Sept. 30, 2010.

However, the new version of the Senate contracting accountability bill does not include a provision from the original bill requiring OFPP to establish a government-industry exchange program for acquisition professionals. Rep. Tom Davis (R-Va.), the ranking member of the House Oversight and Government Reform Committee, failed, during the markup of the House contracting accountability bill, to add similar language creating a government-industry exchange program for acquisition professionals. While the amendment was ruled non-germane, Waxman questioned the wisdom of having employees of private contractors performing procurement work within the government.

The Collins-Lieberman bill also:

- requires a business case analysis justifying the award and administration of multi-agency contracts;
- tightens contract definitization requirements;
- calls on OFPP to review all indefinite delivery, indefinite quantity contracts to determine if they are cost effective or duplicative of other available contracts;
- specifies that regulations are necessary to implement a provision requiring that task or delivery order contracts in excess of the simplified acquisition threshold be awarded on a competitive basis and set forth criteria the regulations must meet;
- adds a provision calling on OFPP to establish governmentwide guidelines to ensure that inherently governmental work is performed by federal employees;
- requires GAO to issue a report on implementation of the recommendations of the congressionally mandated Acquisition Advisory Panel;
- mandates that OFPP develop guidance on contracting for mapping and surveying services to ensure they are procured through appropriate competitive procedures; and
- directs heads of executive agencies to ensure accuracy of information submitted to the General Services Administration for entry into the Federal Procurement Data System.

Language in the original bill addressing the independence of agency inspectors general and U.S. Agency for International Development assistance programs in Afghanistan has been dropped from the substitute bill.

The Acquisition Reform Working Group, an umbrella group of 11 associations representing government contractors, has endorsed some of the changes in the modified bill, including the revisions to language intended to prevent excessive subcontracting, deny contracts to companies that pose a threat to national security, and reduce the use of lead systems integrators. Another change, however, went in the wrong direction in the view of the contractor group, which complained about the move to require regulations on appropriate use of cost-reimbursement contracts, rather than agency plans to minimize use of such contracts.

COFC Upholds FSS Task Order Award, Finds Evaluation Within Agency Discretion

The U.S. Court of Federal Claims Sept. 24 upheld the award of a task order under a General Services Administration schedule contract, finding that the "partially subjective" evaluation of the awardee's corporate experience by the National Archives and Records Administration was within the agency's discretionary judgment (*Data Management Services Joint Venture v. United States*, Fed. Cl., No. 07-597C, 9/24/07).

The court also rejected the allegations by protester Data Management Services Joint Venture that the agency treated offerors unequally in evaluating oral presentations, and improperly ordered services from awardee ALON Inc. that were not equivalent to those offered by the company on its contract under GSA Federal Supply Schedule 70, which encompasses a variety of information technology products and services. Before reaching the merits, however, the court clarified what Judge Eric Bruggink termed "a past inconsistency" in the court's treatment of the issue of jurisdiction as to task order protests, even though the government did not challenge jurisdiction here.

In a footnote, Bruggink said that in *Group Seven Associates LLC v. United States*, 68 Fed. Cl. 28 (2005), he "suggested that 'jurisdiction [was] doubtful' with respect to protests of task orders placed against a GSA contract". "That conclusion was based on the fact that the court's protest jurisdiction does not extend to the issuance of all task and delivery orders," he said.

The Federal Acquisition Streamlining Act authorized a new type of multiple award contract, called either a "task order contract" or a "delivery order contract," Bruggink continued. These contracts, which may be issued by any executive agency, are different from GSA schedule contracts, even though both types of contracts use task or delivery orders to trigger performance or delivery. One of the ways FASA sought to streamline the government's acquisition of supplies or services was to prohibit protests of task or delivery orders, except in limited circumstances.

This limitation on protests applies only to orders issued under the newly authorized "task order contracts" or "delivery order contracts" established by FASA, not orders placed against GSA schedule contracts, Bruggink said. "The court's reservations with respect to jurisdiction in Group Seven were therefore unfounded," he explained.

Finally, the court rejected Data Management's argument that, in awarding the contract to ALON, NARA improperly ordered services that were not within the scope of ALON's schedule contract. Specifically, the protester contended that ALON proposed a labor category from its GSA schedule that was not the equivalent of the solicitation's "Senior Risk Management Specialist" labor category, thus making ALON ineligible to receive the award.

ALON's Senior Requirements Analyst description did not specifically mention the task of risk management, the court said, but "it is certainly plausible" that a requirements analyst would be in a position to manage the risks related to the development of NARA's electronic records archives (ERA) program to be supported under the contract. The court also found that "both positions require an understanding of the system requirements of the ERA program." In concluding that NARA's requested position was, "broadly speaking," within the scope of ALON's schedule contract, the court found "little difference in the way Data Management matched its equivalent labor category" to that of the solicitation, when compared to ALON.

Centech May Challenge Rescission Of Air Force Contract Following GAO Protest

A small business offeror whose contract was rescinded by the Air Force in implementing a recommendation made by the Government Accountability Office following a bid protest may challenge that rescission and the issuance of an amended solicitation, the U.S. Court of Federal Claims ruled Sept. 27 (*Centech Group Inc. v. United States*, Fed. Cl., No. 07-513C, 9/27/07).

In denying the government's motion to dismiss the action by Centech Group Inc., the court ruled that the company has standing because it is an actual offeror with direct economic interest in the challenged procurement actions--the rescission of its contract award, the reopening of discussions, and the evaluation of revised proposals. Further, the court said, the case is justiciable because Centech is lodging a preaward protest against the implementation of Amendment 3 to the solicitation, which will lead to a new award.

Finally, the controversy is ripe for review, the court determined. "If the Court were to refuse to address this preaward challenge now and force Plaintiff to await an award under Amendment 3, it would deprive Plaintiff of the potential remedy it seeks--an invalidation of Amendment 3 and a declaratory judgment that the rescission of its earlier award was unwarranted," Judge Mary Ellen Coster Williams said.

Although the government and intervenor Tybrin Inc., which filed the successful protest at GAO, also suggested that the Air Force's corrective action in the bid protest was unreviewable, the court disagreed. While the court does not review GAO decisions, "[t]he fact that an agency procurement action was taken as corrective action resulting from a GAO protest does not immunize that action from judicial review," the court said.

Finally, the court rejected the assertion that Centech was essentially raising a Contract Disputes Act claim seeking termination for convenience costs. "Rather, Plaintiff has challenged the agency's conduct in an ongoing procurement which has yet to result in an award--an amendment to the solicitation and the de facto rescission of its contract," the court said. "As such the Court views the action as a bid protest."

In March 2007, GAO sustained Tybrin's protest of the award to Centech of a small business set-aside contract, finding that Centech's proposal failed to comply with the solicitation's Limitations on Subcontracting (LOS) clause, which required that at least 50 percent of contract personnel costs be expended for employees of the concern submitting the proposal.

In making the award to Centech, the Air Force interpreted the clause to permit satisfaction of the 50 percent requirement by the cooperative efforts of the small business prime contractor and its small business subcontractors. However, the Small Business Administration advised GAO that this interpretation was in violation of the Small Business Act. Although SBA subsequently issued a certificate of competency to Centech after concluding that the firm would satisfy the requirement in performing the contract, GAO said that because the proposal, on its face, did not comply with a material term of the solicitation, the proposal could not form the basis for award.

GAO recommended that the Air Force reopen discussions, request and review revised proposals, and make a new source selection decision. Although SBA requested that GAO reconsider its decision and asserted that SBA, rather than the procuring agency, should determine whether a proposal for a small business set-aside contract complies with applicable limitations on subcontracting, GAO refused the reconsideration request and rejected SBA's argument.

Subsequently, the Air Force issued Amendment 3 to the solicitation. That amendment sought updated proposals and clarified that at least 50 percent of contract personnel costs must be expended for employees of the offeror submitting the proposal. Centech filed a COFC action challenging the "de facto" rescission of its award and the Air Force's implementation of GAO's recommended corrective action. The government and Tybrin moved to dismiss.

The court rejected the government's contention that Centech lacks standing because it remains the successful awardee and has not been injured. According to the government, the contract was not rescinded, but suspended, and remains in place. The court disagreed, saying that this

characterization "ignores the reality of what transpired here." The court explained that because the Air Force issued Amendment 3, solicited what could be substantially revised proposals, and impaneled a new evaluation team, "the former award to Centech is a nullity--the terms of the solicitation under which that contract was awarded are no longer viable, and the previous evaluations are of no consequence." Centech lost its status as the successful awardee by being "relegated to competing anew," the court said. Centech clearly satisfies the criteria for standing, since it was "an actual offeror and has a direct economic interest affected by the Air Force's rescission of its award and revamped solicitation effort."

The court also rejected the argument that because the Air Force is taking corrective action, Centech lacks a justiciable claim. It is that corrective action that is the focus of Centech's challenge, the court said, in that the contractor asserts that the Air Force erred in rescinding the award and in improperly evaluating the LOS clause in the solicitation. Centech maintains that under this partial cost-plus contract, the precise tasks and percentages of work to be completed by its own personnel could only be determined after award when the tasks were ordered, making preaward compliance with the LOS clause impossible to evaluate. Centech argues that failure to comply with that clause cannot serve as a basis for disqualification, but is instead a matter of contract administration. Therefore, Centech contends, the Air Force should not have issued Amendment 3 and Centech should receive the award again. For these reasons, the court agreed that Centech's action was not moot.

Further, the court said that the fact that Centech might receive the new award in February 2008 does not render its current protest premature. The protest challenges preaward conduct--"the issuance and implementation of Amendment 3 taken as corrective action." To refuse to address this challenge now would deprive Centech of the remedy it seeks, the court explained. Further, deferring judicial review until after award would render the current protest untimely, the court said. Citing *Blue & Gold Fleet LLP v. United States*, 492 F.3d 1308, 1313 (June 26, 2007), the court said the U.S. Court of Appeals for the Federal Circuit has recognized that the challenge to terms of a solicitation containing a patent error must be raised preaward or the ability to raise such an objection is waived.

CBCA Finds No T for C, Allows Recovery For Losses Due to Faulty Agency Estimates

A contractor that was required to maintain a minimum number of mechanics on site at all times to perform elevator maintenance at two Social Security Administration facilities is entitled to recover for losses suffered due to the agency's erroneous estimates as to the time elevators would not be in service due to building renovation, the Civilian Board of Contract Appeals decided Sept. 19 (*Admiral Elevator v. Social Security Administration*, CBCA, No. 470, 9/19/07).

The board rejected the agency's contention that the circumstances resulted in a "partial constructive termination for convenience" of the contract such that contractor Admiral Elevator was precluded from recovering anticipatory profit or lost revenue. In *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), the U.S. Court of Appeals for the Federal Circuit explained that "a governmental breach of contract may be construed as a termination for the convenience of the government when changed circumstances justify the reallocation of risk to the contractor." "Here, no circumstances existed which might have justified the reallocation of risk to Admiral," Board Judge Stephen Daniels said. "The sole purpose of the purported partial termination was for SSA to unilaterally renegotiate the contract, after years of performance by Admiral which were sufficiently good that SSA exercised its options to continue the contract, so as to reduce SSA's financial liability." The board cited several cases in which an agency was found responsible for the losses suffered by a contractor because the contractor reasonably relied on material but incorrect agency representations involving pricing. Admiral's position "is even stronger in this case than it was in those, because here the contractor not only was expected to rely on the key information, but was also told to rely on that information," the board said.

Questions of SSA's negligence in estimating the amount of time for renovations or when SSA knew the estimates were incorrect were "immaterial" and "unimportant," according to the board. "What is critical is that the agency's representations were erroneous, that the agency directed offerors to rely on them in constructing their pricing schemes, and that the successful offeror did indeed rely on those misrepresentations," the board stated. When offerors asked questions about the solicitation's per-unit pricing structure and minimum contract personnel requirement before submitting proposals, SSA stated its intent that there would "always be a sufficient number of elevators to be maintained" despite planned renovations that would make maintenance unnecessary for periods of time. The board found that "SSA intended that offerors use the agency's estimates as a basis for their contract pricing and additionally expected offerors to construct their pricing on the assumption that the costs of the mandated on-site personnel would be recovered, under the per-unit, per-month pricing structure, no matter how many elevators were to be maintained in a particular month."

While deferring the determination of damages to which Admiral is entitled pending further development of the record, the board said the objective of that determination will be to put the contractor in just as good a position as the one it would have been in had the elevators been returned to the contractor's maintenance responsibility according to SSA's estimates. A claim based on per-unit, per-month charges involves whatever labor, materials, overhead, and profit Admiral had factored into its prices, the board said.

DHS Chief Procurement Official Addresses Concerns Over Agency Contracts for Services

The Department of Homeland Security's chief procurement official Oct. 17 told the Senate Homeland Security and Governmental Affairs Committee that she believes the department is primed to better address in the future the risks posed by its contracting for professional and management support services.

Elaine Duke said she shares the concerns of the Government Accountability Office and Congress about contractors providing services that closely support mission-critical functions. She also assured the panel that she is working to balance requirements performed by federal employees and contractors. Duke attributed the department's reliance on contractors to the absence of an infrastructure to build on when the agency was established in 2003 by bringing together 22 existing organizations, and to governmentwide shortages of federal employees in a range of critical functional areas.

Concerns about the adequacy of DHS oversight of contracts for services were the focus of a GAO report released last month and summarized at the hearing. As a result of its review of 117 statements of work and detailed studies of nine contracts for services awarded in fiscal year 2005, GAO determined that DHS is not adequately addressing the risks that government decisions may be influenced by the contractors providing services that closely support the performance of inherently governmental functions. "The level of oversight DHS provided did not always ensure accountability for decisions or the ability to judge whether the contractor was performing as required," GAO said in its report.

Specifically, GAO found that:

- more than half the 117 statements of work provided for reorganization and planning activities, policy development, and acquisition services, all of which closely support performance of inherently governmental functions;
- program officials on the nine contracts reviewed in detail did not assess the risk that government decisions might be influenced by contractor judgments when the services contracted for had the potential to increase this risk; and
- contracting officers and program officials did not see a need for greater oversight, increasing the "potential for a loss of management control and the ability to ensure intended outcomes are achieved."

However, Duke took issue with GAO's assertion that DHS is not adequately dealing with the risk of contractor influence on government decisionmaking regarding inherently governmental functions. This is a "difficult objection to reconcile," she said, given that a purpose of many of the contracts is to "provide services that involve analysis, feasibility studies, and strategy options to be used by

agency personnel in developing policy." She further observed that agency officials have discretionary decisionmaking authority and "are not limited to analyses, studies, and options presented by contractors." Duke also noted that the nine contracts for professional and management support services that GAO chose for case studies "were from the early days of DHS existence; most are no longer in existence."

John Hutton, GAO's director of acquisition and sourcing management, outlined for the Senate panel several GAO recommendations to improve DHS contracting for services and address the attendant risks. He said the GAO report calls on DHS to:

- establish strategic-level guidance for determining the appropriate mix of government and contractor employees;
- assess the risk of using contractors for selected services;
- more clearly define contract requirements;
- assess the ability of the government workforce to provide sufficient oversight when using selected services; and
- review contracts for selected services as part of the acquisition oversight program.

It is DHS's position, he said, that the agency's planning guidance already sufficiently addresses the specific risk of services that closely support the performance of inherently governmental functions--an assessment with which GAO disagrees. "Until the department provides greater scrutiny and enhanced management oversight of contracts for selected services," Hutton said, "it will continue to risk transferring government responsibility to contractors."

Grassley Says GSA Officials Made Charges Against IG as Cover for Sun Contract Issues

Sen. Charles Grassley (R-Iowa) Oct. 17 said that General Services Administrator Lurita Doan and GSA's Federal Acquisition Service Commissioner Jim Williams may have fabricated charges of intimidation against the agency's inspector general to cover up their improper involvement in renewing a contract with Sun Microsystems Corp.

Grassley, who has previously maintained that the agency proceeded with the renewal despite indications that Sun had been overcharging the government for the information technology services provided under the contract, made the fabrication allegation when speaking on the Senate floor regarding three investigative reports on the matter. The Iowa senator, the ranking Republican on the Senate Finance Committee, said the "evidence suggests" that the allegations of intimidation by the IG "were a smokescreen to hide the actions" of GSA management in "ramming through a contract that may be bad for taxpayers."

However, Grassley said he would not make the reports public because they "contain proprietary and privacy-protected information." Instead, he has forwarded them to the White House chief of staff, the House and Senate committees charged with oversight of GSA, and the GSA administrator. "The reports provide in great detail the results of these significant investigations into the allegations of inspector general auditor intimidation and top-level GSA management intervention in the Sun Microsystems contract negotiations," Grassley said. The contract for computer products and services for federal agencies was initially awarded in 1999 and was renewed for five years in September 2006, despite concerns of the IG that Sun was failing to report discounts provided to its commercial customers, but not to government customers.

Sun cancelled the contract in September after Grassley in June asked the IG to examine whether the price reduction clause included in the extension could have been more favorable to the government. GSA IG Brian Miller had already conducted pre- and post-award audits of the contract, and Grassley had earlier launched a staff investigation after GSA made a move in 2006 to cut the IG's budget and Doan publicly complained about the aggressive nature of the IG's auditing approach.

"In the end, my staff could find no evidence whatsoever to support" the administrator's allegations that the IG "was abusing its power by threatening and intimidating government contracting officers and vendors," Grassley said on the Senate floor. "Sadly, it appears that one specific allegation was fabricated to cover up intense top-down pressure on contract auditors to award a contract that was detrimental to the taxpayers." The charges that Sun was withholding information about the discounts to commercial customers, which it was required to produce under its contract with GSA, were referred to the Justice Department and are currently being litigated in federal district court, Grassley said. In his floor remarks, the senator criticized Sun for resisting audits of the contract "tooth and nail" and for cancelling the contract before the audits had been completed.

He also charged GSA top management, including Doan and Williams, with attempting to "short-circuit" the contract negotiations by replacing a contracting officer who sought to address the pricing problems before the Sun contract was renewed and by "communicating directly" with Sun and its "lobbyists" during contract negotiations. "Interference in the process as evidenced by the Sun negotiations may not violate the law, but it is not right and it does not protect the taxpayers," Grassley said.

Grassley denied that he is engaging "in some sort of witch hunt for the administrator of GSA," but said he is conducting oversight and investigation "for the purpose of seeking solutions." "One of the possible culprits here may be the industrial funding fee structure" used to fund GSA, he suggested. The fees GSA charges other agencies that use the governmentwide contracts it

negotiates are the "lifeblood" of its budget and create "a perverse incentive," Grassley said. Getting the best deal for the government and the taxpayers "gets lost in the drive for more contracts that generate more fees to fill that agency's coffers." "GSA procurement officials have a lot of work to do to make sure these situations are corrected," Grassley asserted. "They certainly have to clean up their act, and they will need to make hard choices to fix these problems."

GSA strongly disagreed with Grassley's remarks. "Senator Grassley has his facts about Sun Microsystems wrong," a GSA official said in a statement provided to BNA Oct. 22. Calling the senator's assertions "false innuendo," the official said Grassley's investigation of the Sun Microsystems matter "appears to be a conspiracy looking for a theory." GSA also reiterated its long-standing assertion that "the Sun contract was a good deal for the taxpayer." "The Administrator has already told Senator Grassley that she would not allow anyone to inappropriately intervene in a decision reached by a federal warranted contracting officer," the statement said. "The Administrator will also be working hard to repair the damage caused by the Senator's vilification of a warranted, federal contracting officer and the men and women at GSA."

Two-Year Delay in Contract Start Date Was Not Cardinal Change Or CICA Violation

A two-year delay between the award of five military travel services contracts and their actual start date, and the potential price changes resulting from this delay, did not constitute cardinal changes necessitating recompetition of those contracts, the U.S. Court of Federal Claims ruled Oct. 2 (*CWT/Alexander Travel Ltd. v. United States*, Fed. Cl., No. 07-0612C, 10/2/07).

Nor did the delay--which was occasioned by a settlement agreement in an earlier bid protest arising from the same solicitation--result in the procurement of five new sole source contracts in violation of the Competition in Contracting Act, the court said. Adopting the test used in *CESC Plaza Ltd. Partnership v. United States*, 52 Fed. Cl. 91 (2002), the court held that the protesters "cannot prevail on their CICA violation or cardinal change claims because they cannot demonstrate that the delays in commencement of the contracts or the possible price increases are materially outside the scope of the contracts and were not foreseeable to the offerors."

The solicitation did not provide a definite commencement date or date for completion of the base period, and provided that the base period would begin upon issuance of a contract modification for commencement of services. Moreover, "the solicitation contemplated price changes and authorized price negotiations to deal with changes in ticket volume requirements and technology." Therefore, price changes were authorized and foreseeable and did not constitute a cardinal change or CICA violations, Judge Nancy B. Firestone said. Accordingly, the court awarded the government judgment on the administrative record.

Protesters CWT/Alexander Travel Ltd. and CWT/EI Sol Travel Inc. challenged the Army's March 2005 awards of five contracts for the provision of travel management and related services for travel originating at Military Entrance Processing Stations (MEPS) throughout the country. However, in 2002, CW Government Travel (CWGT)--which is a partner of the protesters here--had been awarded a contract to provide travel services to 54 MEPS, and in April 2004, one year after issuance of the solicitation for the services at issue in the current protest, CWGT filed a protest in the COFC, contending that its contract gave it the exclusive right to provide travel services to those 54 MEPS. If all of the options were exercised on CWGT's contracts, they would expire Sept. 30, 2007.

In June 2005, CWGT and the government entered into a settlement agreement that in essence provided that performance of the five contracts at issue in the current protest could not begin until performance commenced on certain other contracts or the final option period on CWGT's contracts expired. As a result of the CWGT protest, the five contracts at issue here were modified three times to extend the scheduled start date of performance, with the final extension establishing a start date of Oct. 1, 2007. The two protesters filed an unsuccessful agency-level protest, and then filed their complaint in the COFC.

The court explained that *CESC Plaza* provides that a contract modification that "materially departs from the scope of the original procurement violates CICA by preventing potential bidders from participating or competing for what should be a new procurement." It also held that in order to determine whether a modification is outside the scope of the original contract, a court must look to the "cardinal change" doctrine. A cardinal change "occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for."

The protesters here argued that the commencement date modifications were cardinal changes because the solicitation and procurement were explicitly tied to the price data provided by the government to the offerors, and the delay in commencement of the contracts made that price data, and the offerors' reliance on the data, moot. The *CESC Plaza* plaintiffs made similar allegations, the court said. Rather than contending that specific changes were out of scope modifications, they contended that the sum of the contract changes there materially altered the contract. The court in that case held that the plaintiffs had to establish that "the sum of the modifications were 'materially outside the scope of the [solicitation] and that these modifications were not foreseeable to the bidders."

However, the protesters here could not demonstrate that the solicitation specified a definite start date for commencement or specific dates for completion. Rather, the solicitation stated that the base period "begins with the issuance of a contract modification for commencement of services through 24 consecutive months . . ." Since the solicitation only stated that performance would occur "some time after the award date," the court determined that the modifications were foreseeable.

In addition, the court decided that the proposed price modifications "are not enough alone or in combination with the commencement date modifications to establish a cardinal change or violation of CICA." The court recognized that the solicitation contemplated price changes and authorized price negotiations, and "given the nature of the travel services required under the contract, price changes were viewed as inevitable." In fact, "authorization for price changes in what was otherwise a fixed-price contract was written into the solicitation to meet the Army's needs," the court observed.