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Legislative Journal

Bills Introduced

H.R. 588, Fairness to Local Contractors Act. Requires bidders to submit along with their bid, a tax clearance from the state in which the contract will be performed, indicating that they are in compliance with all applicable state tax laws.

Status: Referred to the House Committee on Armed Services. 🗁

S. 72, Energy Efficient Cost Savings Improvement Act of 2001. Amends the National Energy Conservation Policy Act to redefine "energy savings" and "energy savings contract" to include a reduction in energy costs due to construction of replacement federal buildings and facilities.

Status: Referred to the Senate Committee on Energy and Natural Resources. 🗁

Status of Pending Bills

H.R. 331, School and Library Construction Affordability Act. Waives the requirements of the Davis-Bacon Act that contractors must pay workers the locally prevailing wage rate for school and library construction and repair contracts.

Status: Referred to the House Committee on Education and the Workforce. 🗁

S. 163, Civil Rights Procedures Protection Act of 2001. Amends federal civil rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex, national origin, age, or disability.

Status: Referred to the Senate Committee on Health, Education, Labor, and Pensions. 🗁

H.R. 721, Untitled. Ensures that the business of the federal government is conducted in the public interest and in a manner that provides for public accountability, efficient delivery of services, reasonable cost savings, and prevention of unwarranted government expenses.

Status: Referred to the House Committee on Government Reform. 🗁

H.R. 99, Open Competition and Fairness Act of 2001. Prevents discrimination against any bidder on a prime contract for a federally funded project if the bidder refuses to enter into or adhere to a collective bargaining agreement as a condition of performing the contract.

Status: Referred to the House Committee on Education and the Workforce. 🗁

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REFORM WATCH

Bush administration requires FAIR Act competitions

All federal agencies must conduct cost comparisons of at least 5 percent of the full-time positions listed on their 2001 Federal Activities Inventory Report (FAIR) Act inventories, according to a recent memorandum from Sean O'Keefe, Deputy Director of the Office of Management and Budget (OMB)

O'Keefe issued the memorandum to provide guidance to agencies on the Bush Administration's acquisition reform initiatives. The initiatives are to be implemented by agencies in their FY 2002 performance plans, due to Congress by April 3.

The FAIR Act requires agencies to compile an annual report of their full-time equivalent (FTE) positions and whether or not they are eligible to be performed by the private sector. The Act, however, does not require that the jobs automatically be put up for competition. The recent reform initiatives are the first attempt to force agencies to outsource such work.

Gary Engebretson, President of Contract Services Association of America commented that "although we have seen marked improvement by the agencies with respect to the FAIR Act, we have also witnessed reluctance – reluctance on the part of some to outsource what indeed can and should be outsourced for the sake of making better government. With the new OMB goals on the table, President Bush has proved that he is serious about reforming government and making it work."

The Bush administration is stressing the expansion of A-76 competitions as part of a series of acquisition-related performance goals for fiscal year 2002, which also require agencies to (1) make greater use of performance-based contracts (PBSC); and (2) increase online procurement.

During FY 2002, agencies will be required to use PBSCs for contracts worth more than $25,000, and at least 20 percent of eligible service contracting funds. Agencies must also post notices and solicitations for purchases over $25,000 on the FedBizOpps website (*www.FedBizOpps.gov*).

O'Keefe noted that "[t]he President's commitment is to shift procurement to the Internet at the same rate as the private sector and to increase competition and accessibility."

O'Keefe's memorandum directs agency heads to outline the steps that their agencies will take to implement the President's goals in their performance plans. Agencies that will not be able to meet the goals within the FY 2002 budget period must describe what is being done to correct any problems and must submit a timeline detailing when it expects to meet the FY 2002 goals. 🗁

Final decision on FACs

As reported in last month's *Federal Acquisition Report*, the Bush Administration has delayed the implementation of all new regulations for 60 days, pending review by an agency head appointed by the President and approved by the Senate.

The delay affects Federal Acquisition Circular FAC 97-22. The Federal Acquisition Regulation (FAR) Council issued a notice in the Federal Register (66 FR 14259) on March 9, 2001, delaying implementation of the second half of that FAC. The delay affects 4 rules, as follows:

- **Definitions** (FAR Case 1999-403) – relocates definitions of terms used in more than one part to section 2.101;
- **Advance Payments for Non-Commercial Items** (FAR Case 1999-016) – permits federally insured credit unions to participate in the maintenance of special accounts for advance payments;
- **Part 12 and Assignment of Claims** (FAR Case 1999-021) – adds a prohibition against the assignment of claims when payment is made by a third party; and
- **Clause Flowdown – Commercial Items** (FAR Case 1999-023) – revises the list of clauses contractors must flow down to subcontractors to include 52.219-8, *Utilization of Small Business Concerns*.

The rules were originally scheduled to become effective on March 12, 2001. According to the Federal Register notice, the rules will now go into effect on May 11, 2001. 🗁

DLA to outsource distribution center

The Defense Logistics Agency (DLA) has announced that it will contract out the operation of its Defense Distribution Depot Jacksonville, Florida (DDJF) to Management Consulting, Inc. of Virginia Beach, Virginia.

DLA recently made the decision after performing a detailed, 2-year cost comparison study, as required by the Office of Management and Budget's (OMB's) Circular A-76, *Performance of Commercial Activities*. Circular A-76 requires agencies to conduct cost comparisons to determine whether non-inherently governmental functions would be more cost effective if performed by the private sector.

DDJF was first announced for A-76 study in March 1999. According to DLA, its cost comparison indicated that it is more cost effective to outsource the work performed at DDJF. "This is a very thorough and competitive process which will ensure continued high quality support," said Rear Adm. Daniel Stone, Director of DLA's Logistics Operations. "The process also provides important cost savings to our customers in the years to come."

In March 1998, DLA announced that the majority of its distribution depots would undergo public-private competition. DDJF is the fourth of sixteen depots to complete the study. DLA's remaining depots will be competed in phases until the fall of 2005.

"I truly believe DDJF put forth the most competitive bid possible," said Cmdr. Steve Ellis, U.S. Navy, Commander of DDJF. "All processes of the operation were scrutinized to attain the government's Most Efficient Operation. Substantial resources were expended in this effort. However, the result of this extensive process was that a contractor was deemed more competitive. I have every confidence that the A-76 process has yielded a decision that will provide high quality support with significant cost savings to the warfighters in the years to come."

DDJF intends to work closely with Management Consulting to ensure a smooth transition, Ellis noted. "Our immediate goal now is to assist each and every employee in dealing with the inevitable change created by this decision."

Acquisition Conference

The Federal Acquisition Conference 2001

When:	April 18 & 19, 2001
Where:	Ronald Reagan Building and International Trade Center 1300 Pennsylvania Avenue Washington, DC
Contact:	*www.fac2001.com*

Panel resolves GSA warehouse impasse

The General Services Administration (GSA) will close 6 of its warehouses starting October 1, 2001, in an effort to consolidate Federal Supply Service (FSS) distribution operations. The decision was recently finalized by the Federal Service Impasses Panel, which reviewed an earlier decision to close the facilities which was disputed by the American Federation of Government Employees (AFGE) last June.

The impending closures were originally proposed in August 1999, in order to lower costs. GSA would have closed the distribution centers in Fort Worth, Texas and Palmetto, Georgia, as well as the forward supply points in Franconia, Virginia; Chicago, Illinois; Denver, Colorado; and Auburn, Washington.

Soon after it publicized the decision, however, GSA reversed itself as a result of complaints from AFGE. The warehouses provide jobs for more than 2,000 people, the union argued, and an independent arbitrator ruled that the shutdown went against GSA's agreement with the union to bargain over change initiatives. *See the* Federal Acquisition Report*, April 2000, page 5.*

The Logistics Management Institute (LMI) conducted a study in the fall of 1999, after GSA had first reversed its decision, to determine the most cost efficient and effective way for FSS to meet customers' needs. LMI found that GSA could

improve services and save money by reducing the number or distribution centers. In March 2000, GSA announced that it was reversing its decision again, and would close the 6 warehouses by April 2001.

AFGE, however, appealed to FSIP, requesting a hearing on the warehouse closures. The hearing was held on October 3 and 4, 2000, and FSIP determined that the warehouses should be closed at the start of fiscal year 2002.

FSIP stated that it is "mindful of the utmost seriousness of the matter at issue, which involves a probable reduction in force of nearly 200 employees." By delaying the warehouse closures until October 1, FSIP said, affected employees will have additional time to prepare.

The panel also expressed its hesitation to get involved in the warehouse dispute, noting that it "is not in the business of managing a multi-million dollar, national warehouse stock distribution system, and should not reasonably be expected to possess the expertise, after a one-and-a-half day fact finding hearing, to make such substantive decisions without feeling reservations."

"We realize this decision will be painful for many of our employees and their families," commented FSS Commissioner Donna Bennett. "Our objective is to give early notice to affected employees and explain their options so each person can make the best decisions for themselves."

"FSS' objective for restructuring its Supply Program is to provide customers with the most efficient and effective supply chains possible. The goal is to provide the lowest total cost price to customers while meeting or exceeding their performance requirements," said Bennett.

Despite the apparent final decision, the impasse may continue. AFGE has announced plans to encourage Congressional members to start an investigation. As of press time, no Congressional member had committed to reviewing the situation.

HUBZone program bolstered by new technology and new regulations

The Small Business Administration has recently upgraded its Historically Underutilized Business Zone (HUBZone) Program computer system. The upgrade marks the second anniversary of the program, which has certified over 2,700 small businesses.

The HUBZone upgrade includes a more streamlined presentation with pop-up menus that direct users to an online users' guide. The new system also allows users to check on the status of their applications at any time during the review process. SBA is reminding interested small companies that decisions on certifications must still be completed within 30 days of submission. Also, paper applications will continue to be accepted; however, they will not be processed as quickly as electronic submissions. The upgraded electronic application is available online at *www.sba.gov/hubzone*.

William Fisher, Acting Deputy Administrator for Government Contracting and Business Development, commented that the new system is another step towards improving SBA's customer service. "This is part of our effort to streamline our programs and reduce paperwork so that the doors of economic opportunity will be open to all Americans," he said.

SBA expects that the new electronic application will shave 10 days off the decision process time and help the agency reach its goal of certifying at least 4,000 HUBZone companies by the end of this year.

During fiscal year 2000, about $646 million in federal contracts were awarded to HUBZone-certified small businesses.

In addition to the new online access features, SBA has implented several other substantial revisions to the program as a result of its Fiscal Year 2000 Reauthorization Bill. Revisions include:

- a 3-year "Grandfathering" provision which permits areas that lose HUBZone designation to extend area participation for 3 years after a change in status;
- clarification on ownership which expands the definition to ensure that Native American tribes are approved for participation;

- extension of the program's geographical scope to include property designated as Indian Trust Lands; and
- certification eligibility for small businesses owned whole or in part by Community Development Corporations, the groups often linked to local economic enhancement initiatives.

Finally, the Federal Acquisition Regulation (FAR) Council recently issued regulations that will encourage more widespread participation in the HUBZone Program. Federal Acquisition Circular (FAC) 97-23

- expands the pool of potential participants to many more resellers and retail firms;
- changes the definition of "principal office" to accommodate special circumstances facing service and construction firms that assign personnel to onsite locations;
- removes a provision that limited participation by small businesses with affiliates – other companies with common ownership or management; and
- clarifies the program's impact on federal contracting and potential use by state and local governments.

SBA expects that the new online features and regulatory revisions will increase participation and the total contract dollars awarded under the program. 🗁

What about the President's moratorium?

FAC 97-23 was originally scheduled to become effective on February 20, 2001, but would have been delayed by the President's January 20, 2001 memorandum. The Office of Management and Budget (OMB), however, obtained a waiver for the FAC on February 15, exempting it from the delay. The FAC, therefore, became effective on February 20, 2001 including those provisions directly affecting SBA's HUBZone program. *See the* Federal Acquisition Report*, March 2000, page 13.* 🗁

DoD's initiative to accurately report on contract costs threatens A-76 process

Unless the Department of Defense (DoD) takes immediate steps to improve the accuracy of its contract service cost reporting, the agency's annual report will underestimate how much it is paying for services, according to a report by the General Accounting Office (GAO) – *GAO-01-295*. Such information is critical in determining the need for additional privitization of various tasks performed by government personnel under Office of Management and Budget's A-76 Circular, *Performance of Commercial Activities*.

GAO is required by Congress to annually assess DoD's actions to correct contract service cost reporting problems. The requirement arose because of longstanding concerns that the agency's expenditures were being improperly justified and classified and that accounting systems used for reporting were inaccurate.

GAO first reviewed DoD's actions in October 1999, finding that the agency's data contained inconsistencies in reporting by the military services. Last year, DoD announced that it would submit a proposal to Congress on revising its reporting system. The agency, however, failed to follow through on its pledge. In fact, the report emphasized that DoD has made no effort to create any sort of proposal whatsoever. According to agency officials, "the momentum to develop a proposal to improve the reporting of contract services costs has subsided."

Inaccurate reporting information on DoD's activities has had a substantial negative impact on Congress' ability to make informed decisions on the agency's spending needs and has undermined the effectiveness of outsourcing initiatives. Already organizations opposed to the Bush administration's directive to increase outsourcing have cited DoD's shortcomings as evidence to curtail such efforts. Specifically, the report raises questions on the legitimacy of forcing agencies to contract out even more work, when DoD, the largest federal spender, has had no success at tracking the costs involved.

To address these problems once and for all, GAO has recommended that the Secretary of Defense

- assign responsibility for working with the Office of Management and Budget (OMB) in developing an action plan;
- establish time frames for completing the action plan; and
- assign responsibility for implementing the plan.

A complete copy of GAO's report is available at *www.gao.gov*. 🗁

Most agencies fall short of women-owned small business contracting goals

The government's ability to meet its 5 percent women-owned small business (WOSB) contracting goal hinges on the Department of Defense (DoD), according to a recent report by the General Accounting Office (GAO) – *GAO-01-346*. DoD achieved less than half of the 5 percent goal for WOSB prime contracts in FY 1999, making it virtually impossible for other federal agencies to meet the governmentwide goal since DoD accounts for nearly two-thirds of all federal contracts.

GAO compiled the report at the request of Congress which has expressed concerned that WOSBs are receiving less than half of the 5 percent governmentwide contracting goal. Congress directed GAO to review agencies' progress in increasing their contracting with WOSBs and recommend what could be done to help agencies improve their performance.

The report focused on data collected since fiscal year 1996 from the Small Business Administration (SBA) and the General Services Administration's (GSA's) Federal Procurement Data

ACQUISITION ADVICE

Q: May an agency assign work to its employees that should have been performed by a contractor under a requirements contract, even if working with the contractor is so difficult that it is disrupting progress on the contract?

A: No. A requirements contract obligates the government to give all its work to the requirements contractor. "All" means "all." Diverting work to the government's own employees is not justified, even when the requirements contractor is so troublesome to work with that administering the contract becomes burdensome. *See* Bryan D. Highfill, HUDBCA No. 96-C-118-C7, March 31, 1999.

In the case, Bryan Highfill was an employee with the Department of Housing and Urban Development (HUD) who competed for the position of Chief Appraiser at HUD. He lost that position to James Arthur. Highfill later left HUD and won a requirements contract for appraiser services "as needed" by HUD. As luck would have it, James Arthur was the government's technical representative on Highfill's requirements contract.

To HUD's way of thinking, Highfill was a handful. HUD personnel listened to Highfill criticize Arthur and HUD. Moreover, Highfill made comments to HUD personnel (like he "would take that man out") that led them to believe Highfill was threatening Arthur. Eventually, HUD found it easier to do the appraisal work with its own employees than to deal with Highfill. Finally, HUD terminated Highfill's contract for convenience because the time it took to administer the contract had "become too great."

Highfill challenged the termination as being in bad faith, and claimed that the diversion of work to HUD employees was a breach of the requirements contract.

The HUD Board of Contract Appeals found no "bad faith" termination. When the business relationship between the government and a contractor deteriorates, the contract may properly be terminated for convenience.

The Board did, however, find that HUD had breached its contract with Highfill by diverting to HUD employees work that should have gone to Highfill before HUD terminated the contract for convenience. A requirements contract requires that the government give all the work to the contractor. HUD did not do that. If HUD had terminated the contract for convenience earlier, before it gave Highfill's work to HUD employees, there would have been no breach.

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System (FPDS). GAO also interviewed several officials involved in federal contracting, to determine the obstacles impeding WOSB contracts.

GAO found that most agencies had more success meeting their WOSB subcontracting goal than their prime contracting goal over the 4-year period. One-half of agencies met the subcontracting goal each year, while only one-third met the prime contracting goal, the report noted. Three agencies did meet or exceed both goals in each of the years, including the Department of Veterans Affairs, Department of State, and National Aeronautics and Space Administration.

These agencies' successes, however, were not enough to compensate for DoD. Since DoD made 64 percent of federal procurements in FY 1999, the report explained, the governmentwide goal for contracting with WOSBs could not have been met even if every other federal agency had reached its prime contracting goal.

In response to its dismal contracting record with WOSBs, DoD explained that the low percentage was the result of

- most WOSBs not being located near agency installations; and
- many WOSBs not offering the products or services required by the agency.

In addition to these DoD-specific obstacles, the report identified several other hurdles all agencies faced in contracting with WOSBs, including

- numerous and complex contracting programs for small businesses that reduce the number of contracts available for WOSBs and the time available for contracting officers to reach out to WOSBs; and
- the absence (at the time of GAO's interview) of a targeted government program for contracting with WOSBs.

To remedy the problems, the report noted that agencies should programs targeting them WOSBs. Also, agencies should

- improve the focus and delivery of agency outreach to identify and encourage qualified WOSBs to participate in federal procurement;
- promote contracting with WOSBs through incentive and recognition programs for their contracting personnel;
- implement mentor-protégé programs that include WOSBs;
- inform WOSBs of the possible use of teaming arrangements in certain procurements to enhance their competitiveness; and
- expand access to contract financing such as through higher progress payment rates.

A complete copy of the report is available online at *www.gao.gov*. 🗁

EPA's new online directory helps agencies reduce waste

The Environmental Protection Agency's (EPA's) WasteWise Program has recently implemented an online directory of waste reduction resources. The directory is available to all federal agencies and is aimed at helping contracting personnel meet the requirements of Executive Order (E.O.) 13101, *Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition*.

E.O. 13101 was signed by President Clinton in 1998 and requires agencies to protect the environment and promote economic growth by purchasing environmentally preferable products and services.

EPA's WasteWise Program was established in 1994, as a voluntary partnership of public and private-sector organizations which

- provides information and experience on waste prevention, recycling collection, and buy-recycled programs;
- provides technical assistance to set goals, track results, and report annual progress;
- offers a well-developed approach to program design and implementation; and
- organizes local and national events to recognize members' successful efforts.

WasteWise has compiled a list of resources to assist organizations prevent waste and practice sustainable procurement. Recently, the information has been compiled into a single, searchable database,

available online at *www.ergweb.com/wwta/intro.asp*.

The WasteWise database permits users to search by material, product, and activity; audience; information type; and keyword.

EPA expects that the WasteWise database will make it easier for agencies to utilize its collection of fact sheets, guides, articles, and reports on various environment-related topics, to comply with the requirements of E.O. 13101. 🗁

DoD counts its acquisition ranks

The Department of Defense (DoD) has recently published a report detailing its acquisition and technology workforce members for fiscal year 2000. The report was compiled by Jefferson Solutions and is based on data from the Defense Manpower Data Center (DMDC).

Jefferson Solutions determined that during FY 2000, DoD's civilian and military acquisition and technology personnel totaled 135,014. *See table for details.* The FY 2000 data indicates a continued reduction in workforce over the past 3 years. Jefferson Solutions estimated FY 1998 and 1999 personnel at 146,071, and 138,851, respectively.

DoD initiated the review as a result of concerns raised by Congress that the agency lacked a consistent approach to determining the size and skill sets of the acquisition and technology workforce.

Jefferson Solutions utilizes an algorithm developed by the President's 1986 Blue Ribbon Panel on Defense Management and refined by a DoD Acquisition Workforce Identification Working Group, to calculate the workforce. The algorithm uses occupations and organizational placement to determine whether an individual should be counted.

DoD Key Acquisition and Technology Workforce

By Occupation

Engineers	**36,790**
Contracting	**19,078**
Management	**15,567**
Business & Industry	**11,502**
Comm/Computers	**9,101**
Admin. & Programs	**6,004**
Financial Management	**3,970**
Scientists	**3,401**
Auditing	**2,605**
Math & Statistics	**2,411**
Procurement Asst.	**1,912**
Purchasing	**1,388**
Supply Mgmt.	**1,830**
Other	**3,580**
Total Civilians	**120,139**
Total Military	**14,875**
Total DoD A&TWF	**135,014**

According to DoD, the approach allows it to uniformly identify its workforce and to increase its ability to manage its human capital. Specifically, the precise description of skills, size, and location of the workforce offers DoD greater insight into planning for recruitment, retention, and training. 🗁

Decisions

Cereal needs can be made very specific

RULE: *An agency may tailor its solicitation needs based on demonstrated problems with a prior procurement.*

One of the basic principles of government procurement is that the government wants "full and open competition." Occasionally, however, the competition cannot be full because the government discovers that it has a special need that can only be met by some providers. An agency can tailor its needs somewhat but it cannot do so completely. At what point does full and open competition become unduly restrictive?

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The Food and Nutrition Service (FNS) in the Department of Agriculture runs domestic feeding programs that provides ready-to-eat (RTE) food. One of the foods provided is cereal. The agency received complaints about some of the cereals provided and did a report on the quality of them. The report found problems with the cereals of several manufacturers — they were hard, did not soften in milk, and tasted bland. One of the report's recommendations was that "only commercial labeling be allowed for RTE cereals. This simple step would change the perception that commodity cereals are somehow different or lesser quality than cereal in the retail grocery stores."

The next time the cereal solicitation was issued, FNS made several changes. First, it required cereals to be commercially labeled.

A second change dealt with the hardness problem. The agency learned from an internet site of a professor from Cornell University's Department of Food Science that a different process makes better cereal. As stated at this site, there was a report that "it appears that at present the continuous extrusion process may offer some economic advantages, while the conventional batch process results in a superior product. You can probably test this for yourself by taste testing a generic store brand cornflake, which is probably extruded and a Kellogg's cornflake, which is batch cooked. Notice the color, texture, and surface blistering of the products. You probably also notice that either one of these becomes fairly soggy in milk in a matter of seconds. However, consumers can apparently detect the difference." Another report noted that the batch method produced better tasting cereal. Based on this information, the agency wrote the new solicitation to require the cereal to be batch processed and sold commercially in supermarkets.

One of the unsuccessful offerors protested the terms of the solicitation, arguing that the "exclusion of the 'extrusion' process and the requirement for a commercial product unduly restricted competition." Although acknowledging the existence of complaints, the company argued that the small number of them did not warrant restriction in view of the large amount of cereal it sold to the agency.

GAO did not agree. First, it stated that "the determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion. However, where a protester challenges a requirement as unduly restrictive of competition, we will review the record to determine whether the restriction imposed is reasonably related to the agency's needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny." In the past, GAO has allowed "restrictive" products "where the record demonstrates that they are necessary to ensure adequate performance or that a particular design is reasonably related to the agency's aesthetic needs."

"We think the agency acted reasonably here. The record shows that the agency received specific complaints that provided sufficient notice of dissatisfaction with the protester's product to justify an examination of its RTE cereal program and ultimately to justify the revisions to the solicitation." In addition to the complaints, which did not mince words, the agency report gave further justification for the restrictions.

"Here, in these circumstances involving aesthetics such as taste, appearance, and texture, we think the agency may specify a manufacturing process that addresses these concerns."

GAO also noted that the protester did in fact sell its product under several commercial names like "Perky's Nutty Rice" and "Perky's Nutty Corn." "Consequently, it would appear that the protester could meet the commercial-labeling packaging requirement," GAO concluded.

GAO denied the protest.

ACH Food Companies, Inc., B-286794, February 12, 2001.

GAO has limited role in reviewing past performance

RULE: *GAO will not independently review past performance information a contracting officer uses to award a contract.*

One of the most important recent changes in construction contracting has been the use of past performance as an evaluation factor. In the past, a construction contract was generally a sealed bid contract with the lowest responsible, responsive bidder getting the contract. Whether the winning contract had done poorly on previous government jobs was not really a factor. A consistently poor performer could be found non-responsible but one with an inconsistent past performance record could generally be assured of getting more government contracts.

Enter past performance as an evaluation factor in a negotiated procurement. Now the poor performers could be identified and their poor past performance factored into the equation. It could result in a low score used to keep them from getting a contract.

Now that past performance is so important, however, the performance information a reference from a previous job gives becomes critical. What if that past performance reference does not tell the truth? What if the information the reference gives is simply wrong? Can bad information used by a contracting officer cause the award to be overturned? What is the role of the General Accounting Office (GAO) when it hears that a contracting officer did not do the past performance evaluation correctly? Can GAO make an independent review of the past performance information? No, according to a recent GAO decision. All GAO looks for is whether the contracting officer's decision was reasonable. Contracting officers do not have to look beyond what they have in front of them.

The Air Force issued a solicitation for gate construction. The solicitation said that an offeror would be given one of 6 ratings for performance risk assessment: exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, or unsatisfactory/no confidence. A higher rated performer with a higher price could win, according to the solicitation. To help the agency in measuring performance/risk, the agency asked offerors to describe in detail its past performance, including a description of how that past performance experience was relevant to the Air Force's project.

Boland submitted a proposal and gave the Air Force 10 references. The Air Force got responses from 4. The responses rated Boland well but each reference dealt with a Boland contract for landscaping services, not gate construction like the proposed Air Force contract. Under Federal Acquisition Regulation 15.305(a)(2)(iv), an offeror with no relevant past performance cannot be rated either favorably or unfavorably. Also, the prices of these landscaping contracts were significantly less than the government estimate for the Air Force contract. The perceived irrelevance of Boland's experience led the Air Force to rate Boland as "neutral/unknown confidence." Boland lost, even though it had submitted the lowest priced offer. The company filed a protest with GAO.

Boland argued that installing the required gate was not rocket science. It was a simple project requiring little or no experience. The company believed that any construction or farm worker could do the work. Also, Boland told the contracting officer of its previous experience with this type of work with another company.

GAO ruled that the Air Force had acted properly in acting on what Boland's proposal said. Boland had not put all of this information in writing in the proposal.

First, GAO saw a limited role for itself in this process. "It is not the function of our Office to evaluate past performance information de novo. Rather, we examine an agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror's past performance information is primarily a matter within the contracting agency's discretion."

Here, the contracting officer's decision was reasonable based on the paperwork submitted by Boland. "Notwithstanding the protester's argument that Boland verbally advised the contracting officer of its president's experience in installing the gates, the record shows that although required by the RFP to do so, the protester failed to establish in its proposal or through its past performance references that it had actual experience installing gates. The record shows that the prior contracts listed by

Boland to establish past performance were all landscaping projects. In our view, the agency reasonably concluded that the landscaping contracts were not relevant to the current requirement for gate replacements."

GAO noted that the contracting officer had tried to verify the information Boland had given about the previous experience. But "that the agency official could not find that individual's name in the employment records for contracts awarded by the base for gate installation."

"In sum, Boland simply did not provide in its proposal or at any time during the conduct of the procurement evidence establishing that the company had relevant past performance. While the protester argues that the requirement is simple and that any construction worker could perform it, the solicitation specifically advised offerors that award would be based on the [past performance tradeoff] technique and that a performance risk assessment would be performed to identify and review relevant present and past performance in order to make an overall risk assessment of an offeror's ability to perform the requirement." The Air Force did this and Boland lost.

Boland Well Systems, Inc., B-287030, March 7, 2001. 🗁

Agency can pay protest costs without GAO recommendation

RULE: *An agency has authority of its own to pay protest costs in certain protests. While GAO may recommend them in some cases, an agency has its own authority to do so even without a GAO recommendation.*

Over the years, Congress has sought to discourage an agency from wasting a protester's time and money. If an agency unduly delayed finding a protest to be valid, Congress said that GAO could recommend that the agency pay protest costs including attorneys fees. But can an agency do that on its own, when there is no GAO recommendation? Yes, according to a recent decision of GAO. The decision also shows another example of GAO using its alternative dispute resolution (ADR) process to get a protest settled without going through the entire protest process with all its costs, time, and effort.

The Department of State (DOS) issued a solicitation for uniformed protective services for its buildings in the United States. After a company was selected for the contract, a protest was filed by two unsuccessful offerors. GAO held an ADR session that looked at how the price evaluation was done by DOS. In GAO's words, it found that there were "core problems" with the price evaluation and that it had "significant concerns" with the way the agency conducted discussions during the solicitation. GAO told the parties that its likely recommendation would be to re-open competition and do another round of discussions. In other words, that the agency would lose the protest. The agency did the right thing by cancelling the award and re-opening the competition. The agency, however, had legal concerns about its authority to pay attorneys fees and protest costs. The agency said it could pay these costs where GAO made a recommendation to do so, however, it did not know if it could pay these expenses without one.

GAO said an agency has the necessary authority to pay these costs. GAO pointed to the Federal Acquisition Streamlining Act, 41 USC 253b (1) as the authority to make these types of payments. This law "provides the agency with [permission] for the payment of costs in connection with a protest even in the absence of a recommendation from our office."

Inter-Construction Security Systems, Inc., B-284534.7, B-284534.8, March 14, 2001. 🗁

Agencies can require construction contract bidders to own the building site

RULE: *In a solicitation for the design, build, and lease of space, the contracting agency can reasonably require post-award evidence that the awardee has site control.*

Leasing contracts have specific requirements which must be followed, including the submission of evidence regarding site control. Such requirements must be followed or a contractor runs the risk of not receiving the contract, as is demonstrated by the following case.

The General Services Administration (GSA) issued a solicitation for offers (SFO) for the design, build, and a 10 year lease of space for a headquarters building for the Department of Transportation

(DOT). The building would be approximately 1.35 million square feet of space. GSA wanted to be sure that the winning landlord actually owned or controlled the site the building would go on, so GSA required offerors to provide evidence of site ownership and control. Specifically, GSA wanted "evidence by the Offeror, acceptable to the [contracting officer], of site ownership, access to ownership through held options, ground lease, or other evidence that ownership or access to ownership will be achievable by the due date" for submissions. The reason for the site control requirement was stated in a footnote to the decision – "Requiring evidence of site control within 30 days after lease award lowers the risk to the government that there will be construction delays arising from problems with site control. We disagree with Parcel's view that site ownership by itself guarantees that there will be no problems arising from a lessor's ability to obtain site control. Even accepting Parcel's argument that an owner can obtain site control by legal recourse, the likely delay while the site control dispute is litigated or otherwise settled could adversely affect lease performance. The government is not required to assume that risk, but may properly require resolution of site control shortly after award."

Several other provisions of the SFO were important. One required that "less than 10 working days prior to Lease award, the Government shall notify the preferred Offeror of its intent to award the Lease to that Offeror. During the subsequent 10 days, the Offeror shall either deposit or post an irrevocable letter of credit in an amount equal to $20,000,000." Also, within 5 working days of the lease award, the proposed awardee had to demonstrate, "[t]o the extent control of all or a portion of the site was evidenced by purchase contracts or other agreements" that "required closing(s) have occurred and that title is unconditionally and irrevocably vested in the Lessor." If these were not done, the government could terminate the lease for default.

One of the offerors was the Portals, named after its location near the 14th St. Bridge in Washington at the entrance from Virginia to the District of Columbia. Portals owned this site but the premises was subject to the "pre-existing use of the property by GSA for a coal shaker and by the Bureau of Engraving and Printing for an ink storage building." These pre-existing uses were no surprise to GSA. When the SFO was issued, the GSA contracting officer wrote Portals saying that it knew of the uses and that GSA believed that Portals had sufficient evidence of site control.

Later, during discussions, GSA told Portals that the company owned the site but did not control it because of the GSA and BEP uses on it. GSA told Portals that it wanted a "legal document executed by all parties showing control and an ability to consummate the transaction."

To make things clear, GSA issued an amendment which substituted a post-award requirement. "Notwithstanding any other provisions of this Solicitation for Offers, Offerors of privately owned sites shall provide, not later than thirty (30) days after Lease award, evidence acceptable to the [contracting officer] that the Offeror has obtained (a) site ownership or control so as to permit its development, construction and lease of the DOT Headquarters facility as required by this SFO and as proposed in its offer, or (b) access to such ownership or control through fully executed agreements that vest the Offeror with the ability to obtain such ownership or control in a timeframe consistent with the requirements of this SFO and its offer." GSA did not want to award a lease to a company that did not control the site and therefore could not start building on it right away.

This brought a protest from Portals. It claimed that the post-award site control requirement was not necessary because the SFO, as issued, contained sufficient protection for GSA. For example, the SFO required a $20 million irrevocable letter of credit which would require the lessor to make progress in the design and construction of the building.

GSA said the requirement was necessary since "an offeror's lack of site control could adversely affect the lessor's ability to satisfactorily perform its lease obligations."

GAO agreed with the agency. "The determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion, which we will question only if the agency's judgment is shown to be

unreasonable. Here, we conclude that GSA reasonably found that the imposition of a post-award requirement for evidence of site control satisfies an actual need of the government. The essential purpose of the lease is to obtain the design and construction of a building that can then be leased to provide DOT with a new headquarters facility. Unquestionably, one of the government's needs is to have this done in a timely fashion. It is also indisputable that a lessor's failure to have site control can affect the lessor's ability to timely construct the building. Although Parcel argues that other SFO provisions (e.g., section D of the SFO) protect the government's interest in timely performance of the lease, we think that GSA could reasonably conclude that these provisions do not suffice." GSA wanted little risk and was allowed to make that choice.

Parcel 47C LLC, B-286324; B-286324.2, December 26, 2000. 🗁

Agency errs in considering prices of two option items

RULE: *It is not in the best interest of the government to add to the base bid price two option items when the government could only exercise one or the other.*

When the government puts a bid out, it often does not know how much work it can get done for the money available. One way to handle this is to have bidders give prices for the basic work and then add on option items which might or might not be done, depending on the bids actually received. If all the bids are low and all the work can be done, good. If not, only some of the option items will be awarded.

The problem remains, however, of how to decide what the prices are. Do you add all option items, even though they may not be awarded? Generally, the Federal Acquisition Regulation (FAR) allows an agency to simply add up the option items to see who is low bidder, regardless of how much work will actually be awarded. The FAR, however, authorizes an exception when it's in the best interest of the government to not count all items. Recently, an agency did not use this exception and GAO told the agency it should have.

The Agricultural Research Service, Department of Agriculture, issued a sealed bid solicitation for construction services at the Plum Island Animal Disease Center, in Greenport, New York. The IFB had five option items covering additional services. Option items Nos. 4 and 5, however, raised concerns. "Option Item No. 4 – Hazardous material abatement and demolition of Building 103; Option Item No. 5 – Same as Option Item No. 4 above except include crushing building rubble (concrete and CMU) and stockpiling on the island in lieu of removal from the island." As one of the bidders told the agency, you can't do both. Building 103 could not be demolished twice. Nonetheless, bidders were told to bid on all line items.

The IFB included the standard Evaluation of Options clause, FAR 552.217-5, which provides: "Except when it is determined in accordance with FAR 17.206(b) not to be in the Government's best interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the options."

When both options were considered, Kruger Construction lost; if one or the other option items was considered, it would win. The agency did not use the "Government's best interest" exception, and gave the work to another bidder. Kruger protested.

Kruger argued that the agency should have used the exception because as the agency admitted, it could not do both. Thus, counting one or the other option would be in the government's best interest.

Agriculture, in the words of GAO, "argues that it is proper to include the prices of both option item Nos. 4 and 5 in its total evaluated price because it did not know (and still does not know) which of the two options will be exercised."

GAO agreed with Kruger. "We find that Agriculture could not reasonably determine that it was in the government's best interests to evaluate both of these alternate options to determine the total evaluated price. In this regard, as noted above, Agriculture knew it would not exercise both options. Given that Kruger's bid price would be low, regardless of which option is evaluated and exercised, we conclude that only Kruger's bid could be determined most advantageous to the government, considering price and price-related factors."

Kruger Construction, Inc., B-286960, March 15, 2001. 🗁

Agency improperly orders out-of-scope work from ID/IQ contract

RULE: *When the government has a contract for noncomplex integration services for off-the-shelf items, an order for management services is beyond the scope of the contract.*

With the increase of multiple award, indefinite definite/indefinite quantity (IDIQ) contracts, Congress wanted to keep protests to a minimum. Since these contracts had been competed at the start, the extent to which task orders under these contracts would be competed was not as great. So Congress limited protests of task orders. One exception that allows a protest of a task order is when the task order is beyond the scope of the IDIQ contract.

Whether a task order is beyond the scope is a tricky question. The General Accounting Office (GAO) dealt with a good example of this in a computer contract recently, finding that the agency had gone beyond its scope.

For several years, the Army got information technology resources under an interagency agreement with the General Services Administration (GSA). Last year, the Army wanted to get services referred to as "collaboration and distance learning/mentorship management" services. Technology was clearly involved in the buy. The scope of services read: "The Contractor shall provide management services in support of the [Army's] Collaboration and Distance Learning and Mentorship product lines. [The Army] projects represent both prototyping and research projects and emerging technology projects which have a concentration in technology development and demonstration/validation, and maturation." The need, however, was for warm bodies, not cold hardware or software.

For various reasons, the solicitation was canceled. GSA tried again later. The agency had a task order contract for "non-complex systems integration services." It provided that "the Contractor shall integrate commercially available off-the-shelf hardware and software resulting in a turnkey system for the GSA client agency." Under this contract, it placed an order for the Army's requirement.

A protest followed and was successful. GAO noted that protests of task orders are limited to include protests on the "ground that the order increases the scope, period, or maximum value of the contract under which the order is issued are authorized. In determining whether a task order is beyond the scope of the original contract, this Office considers whether there is a material difference between the task order and that contract. Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. The overall inquiry is whether the modification is of a nature which potential offerors would reasonably have anticipated."

GAO concluded that the buy went beyond the scope. "This task order, on its face, does not call for or apparently include hardware/software integration services. Instead, under this task order, the contractor is required to provide management services to assist [the Army] in support of [its] Collaboration and Distance Learning Mentorship product lines. There is no indication that this task order entails integrating hardware and software, but by its terms it includes such activities as assisting in publicity; identifying federal, state and private opportunities for potential collaboration/partnership with the [Army], and monitoring, tracking, and overseeing the execution of new initiatives involving e-health."

GAO conceded that the tasks "involve the use/application of information technology to improve healthcare or access to healthcare, as posited by GSA, and that the management support under the task order relates to information technology because the project involves web-based tools, from our review we find no tasks or subtasks included in the SOW for this order that are susceptible of being classified as non-complex integration services."

GAO sustained the protest.

Floro & Associates, B-285451.3; B-285451.4, October 25, 2000. 🗁

Rules

Office of Management and Budget

Pay and supplies costs projection are revised for A-76

The Office of Management and Budget (OMB) has revised the annual pay raise assumptions and non-pay costs in Circular A-76. The figures are used in computing and comparing the costs of performing a job with internal staff as compared to outsourcing to a commercial business.

The new rates are as follows:

Pay Raise Assumptions

- January 2001: 3.7 percent
- January 2002: 3.6 percent
- January 2003: 3.9 percent
- January 2004: 3.9 percent
- January 2005: 3.9 percent
- January 2006: 3.9 percent

Non-Pay Costs (Supplies and Equipment)

- Fiscal Year 2001: 1.9 percent
- Fiscal Year 2002: 2.1 percent
- Fiscal Year 2003: 2.1 percent
- Fiscal Year 2004: 2.1 percent
- Fiscal Year 2005: 2.1 percent
- Fiscal Year 2006: 2.1 percent

Issuance of Transmittal Memorandum No. 23 Amending OMB Circular A-76. Contact: David Childs at (202) 395-6104. 66 *Federal Register* 14943, March 14, 2001. 🗁

Small Business Administration

SBA proposes elimination of nonmanufacturer rule

The Small Business Administration (SBA) has proposed to establish a waiver of the nonmanufacturer rule for aerospace ball and roller bearings for small businesses. The waiver would permit regular dealers to supply these products from any domestic manufacturer on a federal contract set-side for small business through the 8(a) Progam.

Proposed waiver of the nonmanufacturer rule. Contact: Edith Butler at (202) 619-0422. 66 *Federal Register* 14865, March 14, 2001. 🗁