Federal Acquisition REPORT

Volume XVIII Number 2 February 2001

Navy invests in reverse auctioning tool

The Navy Inventory Control Point expects to save between 10 and 20 percent every year with its new reverse auctioning tool. *See page 2.*

Army first to count its contractors

Starting immediately, Army contractors must report all contract-related work, including direct labor hours and indirect costs accrued, from October 1, 1999. *See page 3.*

"Last-ditch" effort to postpone blacklisting rules

Last month, Congressman Tom Davis requested that the Federal Acquisition Regulation Council postpone implementation of the contractor responsibility regulations for 6 months, until July 19, 2001. *See page 3.*

Gansler recommends bonuses for contractors

The Department of Defense should use monetary and non-monetary incentives to successfully attract, motivate, and reward contractors to ensure the best possible performance. *See page 4.*

A-76 produces less outsourcing than expected in DoD

Less than 1 percent of the total number of defense contracts that were outsourced in fiscal year 1999 actually resulted from a cost comparison as required by the Office of Management and Budget's Circular A-76. *See page 4.*

Contractors use online database to keep up with past performance

The Department of Defense's recently publicized past performance database will allow private sector contractors to easily keep tabs on their performance records. *See page 5.*

INSIDE

 ISSN 8755-9285

Legislative Journal

Bills Introduced

H.R. 99, Open Competition and Fairness Act of 2001. Prohibits discrimination in contracting on federally funded projects on the basis of certain labor policies of potential contractors.

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

Navy invests in reverse auctioning tool

The Navy Inventory Control Point (NAVICP) expects to save between 10 and 20 percent every year with its new reverse auctioning tool. The naval command recently awarded two 5-year contracts worth $16.134 million for reverse auctioning services. NAVICP is the largest field activity of the Naval Supply Systems Command. It is responsible for procuring, managing, and supplying spare parts for Naval aircraft, submarines, and ships around the world.

The larger award went to *e*Breviate, Inc. of Plano, TX, for $13.884 million. *e*Breviate will provide full service reverse and forward auctions from set-up to completion. They will also provide strategic sourcing support to identify new sources of supply. "We're very proud the Navy selected [us] over competing technologies and service models," said Sarah Pfaff, executive vice president of sales, marketing and strategy at eBreviate. "Our eSourcing solution has repeatedly provided dramatic savings of time and money to purchasing professionals, and now, for the first time, the American taxpayer will benefit from similar savings. We anticipate the Navy will take the lead in making auctions standard operating procedure throughout the federal government."

The second award, worth $2.25 million, went to Procuri.com of Atlanta, GA. Using their internet-based auction software tool, naval customers will be able to conduct auctions from their desktops. "Governmental agencies, like any organization, are embracing e-procurement tools and services, because of the clear efficiencies gained by their use," said Mark F. Morel Sr., President and Chief Executive Officer of Procuri.com.

The Navy expects the contracts to permit contracting activities to choose the auction method best suited for each type of procurement. Navy customers will be the primary users of the 2 contracts, but other DoD and federal agencies will be given the opportunity to take advantage of the prices and flexibility offered by the contracts.

The contracts are effective immediately. For more information, contact Mark Foster at (717) 605-7483 or via email at *mark_s_foster@navsup.navy.mil*.

The *Federal Acquisition Report*, published monthly by Management Concepts, Inc., covers news and events in federal acquisition. An index of articles is published once a year. Publisher: Jack W. Knowles; Senior Managing Editor: Steven Simpson, Esq.; Decisions Writer: Terrence M. O'Connor, Esq.; Editor: Christi Silver; Marketing Manager: Carol Wallace. This publication is designed to provide information on federal acquisition. It is not intended to substitute for legal or other professional advice. The editor welcomes readers' views.

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Army first to count its contractors

Starting immediately, Army contractors must report all contract-related work, including direct labor hours and indirect costs accrued, from October 1, 1999, going forward. The Army is the first defense agency to finalize the new reporting requirement contained in the fiscal year 2000 Department of Defense Authorization Act.

The final rule, published in the December 26, 2000, issue of the *Federal Register* (65 FR 81357), requires Army contractors to submit the number and value of actual contractor and subcontractor hours worked on an annual basis, as well as an estimate of compensation-related costs during the reporting period, including:

- salaries and wages;
- bonuses (including stock);
- incentive awards;
- employee stock options;
- employee insurance;
- fringe benefits;
- contributions to pension plans;
- other post-retirement benefits;
- early retirement plans;
- off-site pay;
- severance pay; and
- COLA differential.

Data should be submitted via the internet to *https://contractormanpower.us.army.mil*.

Although the new reporting requirement is not required by Office of Management and Budget (OMB) Circular A-76, it is meant to supplement a defense agency's determination of the potential savings that outsourcing an activity may produce.

The American Federation of Government Employees (AFGE) has praised the Army on the contractor tracking system. "The Army is to be commended for establishing a system to track the service's uncounted and unaccountable contractor work force," said Bobby Harnage, AFGE President.

"The Army has devised a methodology that can reliably and accurately collect vital information about the contractor work force and its costs, without placing an unreasonable reporting burden on contractors," Harnage noted.

The union expressed its hope that other defense agencies will soon implement their own accountability systems. The FY 2000 Defense Authorization bill requires all defense agencies to have contractor inventories in place by March 1. 🗁

"Last-ditch" effort to postpone blacklisting rules

Last month, Congressman Tom Davis (R-Va) requested that the Federal Acquisition Regulation (FAR) Council postpone implementation of the contractor responsibility regulations for 6 months, until July 19, 2001. The regulations require contractors to disclose any past violations of federal law before entering into a government contract. *See 65 FR 80255*.

Davis expressed his concerns over the January 19 deadline in a letter to the General Services Administration (GSA), Department of Defense (DoD), National Aeronautics and Space Administration (NASA), and Office of Federal Procurement Policy (OFPP). In the letter, Davis stated that enforcing the deadline would cause many contractors to cease doing business with the government.

According to Davis, "a 30-day effective date for implementation of the final rule from its date of publication in the Federal Register is both inadequate and totally impractical. Neither the government through its professional contracting officers nor private sector federal contractors will be prepared to meet the significant new obligations and responsibilities imposed by the new regulation by [January 19th].

The letter also noted that 2 weeks of the 30-day implementation period constituted holidays for the majority of federal contractors and procurement personnel. "This regulation requires that all federal contractors try to establish an infrastructure that will permit them to make these certifications accurately. Identifying these costs and accounting for them properly by January 19, 2001, is proving to be virtually impossible," Davis concluded. 🗁

Gansler recommends bonuses for contractors

The Department of Defense (DoD) should use monetary and non-monetary incentives to successfully attract, motivate, and reward contractors to ensure the best possible performance, according to Jacques Gansler, former Under Secretary of Defense (Acquisition, Technology, and Logistics). Gansler stepped down from his post at DoD last month as part of the presidential transition.

Gansler made the statement in a recent memorandum directing defense agencies to adopt commercial incentive strategies to attract non-traditional contractors. He advised DoD to rely on positive incentives, balancing them when needed with remedies for missing specific program targets or objectives. The bonuses can be based on price, cost, schedule, or performance, and should encourage and motivate optimal performance.

To reward contractors for reducing costs and cycle time while maintaining schedule, achieving performance expectations, and maximizing efficiency, Gansler recommended that agencies

- use incentives tailored to the specific business case to achieve the maximum benefit for both parties;
- assess the most critical issues related to specific acquisitions, and design incentives to ensure optimal results;
- design strategies to reflect an understanding of the business case from industry's perspective – considering profit, earnings per share, cash flow, and return on investment;
- recognize and reward contractors who strategically focus on efficient and effective management practices, thereby reducing unneeded capacity and maximizing overall value to the customer;
- match the essential program objectives and potential incentive arrangements early on, and communicate objectives to industry;
- agree on incentives and remedies to ensure successful business relationships;
- strive to be creative and resourceful, maximize continuous improvement and joint problem solving, with a focus on performance outcomes;
- integrate commercial and commercial-like best practices into defense acquisitions to the maximum extent possible to achieve efficiency and effectiveness for both parties;
- make incentives realistically reflect performance objectives and standards so that they are measurable and attainable; and
- communicate expectation, assessments, and any change in focus clearly to maximize the potential performance.

DoD is currently developing an incentive guidebook to assist the acquisition workforce in offering contractor incentives. The agency expects the guide to be released this Spring.

A-76 produces less outsourcing than expected in DoD

Less than 1 percent of the total number of defense contracts that were outsourced in fiscal year 1999 actually resulted from a cost comparison as required by the Office of Management and Budget's (OMB's) Circular A-76, according to a recent letter to Congress by Jacques Gansler, the former Under Secretary of Defense for Acquisition, Technology, and Logistics.

Under the FY 2000 Defense Appropriations Act, DoD is required to submit to the Congressional Defense Committees an annual report on department contracting costs.

Gansler emphasized, in the agency's annual report, that "contracts resulting from a cost comparison performed in accordance with OMB Circular A-76 represent an extremely small portion of the total number of service contracts awarded by the department during fiscal year 1999 (less than 1 percent). Further, these contracts represent a very small portion of the total dollars awarded by DoD to private sector contractors during fiscal year 1999."

Existing laws allow the department to award many new contracts without first performing any

cost comparison studies. For example, the FY 2000 Appropriations Act permits DoD to contract out any activity that is performed by 10 or fewer employees without a cost comparison. The Act also precludes the use of appropriated funds for outsourcing studies that take longer than 24 months for single-function activities and 48 months for multi-function activities. According to DoD, these are the average time span figures for the studies, so any study that ran over the average length would not receive funding. In addition, DoD is not required to follow Circular A-76 guidelines when outsourcing depot maintenance work, as long as contracting officials certify that the bids contain comparable estimates.

Federal labor union leaders contend that the defense department's report comprises an admission of fault – that the department has drastically increased its contracting out practices without giving federal employees the chance to compete for their jobs. "From FY 1992 through FY 1999, DoD procurement of services increased from $39.9 billion to $51.8 billion annually," said Bobby Harnage, American Federation of Government Employees (AFGE) President. "The largest sub-category of contracts for services was for professional, administrative, and management support services, valued at $10 billion. Spending in this sub-category increased by 54 percent between 1992 and 1999."

"At the same time the Pentagon undertook a drastic and unprecedented increase in service contracting, federal employees were almost never given the chance to compete in defense of their jobs and for work which they could have performed," Harnage commented.

DoD holds that it is committed to using A-76 standards to achieve cost savings; however, it has only been 3 years since it began performing the outsourcing studies. Given the average 2 to 4 year time span for each study, the department does not expect to see verifiable results for another few years. Gansler has estimated that competitive sourcing will save DoD approximately $10 billion between fiscal years 1999 and 2005.

Contractors use online database to keep up with past performance

The Department of Defense's (DoD's) recently publicized past performance database will allow private sector contractors to easily keep tabs on their performance records. The database, called the Past Performance Automated Information System (PPAIS), was released to contractors on December 1, 2000.

In order for DoD acquisition personnel to gain the necessary confidence in a contractor's ability to perform the requirements of a certain contract, they evaluate prospective contractors' performance on recently completed or ongoing contracts for the same or similar goods or services. Without timely access to past performance information from other procurement contracts, there is a danger that contracting officers may select poor contractors.

Several systems have been developed by defense agencies to measure or track contractor performance. These generally fall into 2 categories:

- performance tracking systems, which use existing data to evaluate contractor performance, including the Navy's "Red/Yellow/Green" system and the Defense Logistics Agency's (DLA) Automated Best Value Model; and
- performance appraisal systems, which allow users to write "report cards" on contract performance, such as the Army's Past Performance Information Management System (PPIMS), the Navy's Contractor Performance Appraisal Reporting System (CPARS), and the Air Force's CPARS data maintained in a Lotus Notes database.

Report cards are fed into PPAIS from the various tracking and appraisal systems.

PPAIS is operated by the Joint Electronic Commerce Program Office (JECPO) and has been used by government personnel since July 2000. Specifically, it provides a single repository for contractor past performance report cards collected across DoD. The system currently contains over 9,000 reports covering $310 billion in contracts and receives more than 100 queries per week from government users.

"The use of past performance has been one of the most important reforms to our acquisition system," said Stan Soloway, Deputy Under Secretary of Defense for Acquisition Reform. "The growth of PPAIS, in a secure yet accessible environment, is a critical step forward to seeing this important reform achieve its potential. It is also an excellent example of what can happen when all of the interested and involved parties work together to find solutions that work."

To access the system, contractors must first register a past performance point of contact in the Central Contractor Registration system at *www.ccr2000.com* and generate a marketing password identification number (MPIN). Contractors use the MPIN to access their own reports in PPAIS. Government users gain access through group owners designated by each department.

Both government and private sector users have responded positively to the system. "It's very user friendly," said Sally Stanger, Science Applications International Corporation Past Performance Administrator. "We like being able to either search for a specific contract or get a complete listing of all contracts in a given category," she explained. "Housing all DoD assessments within one system was a significant breakthrough – now we don't have to chase around from agency to agency to find the status of a given report or client. The first time we used PPAIS, we found 35 new assessments we didn't know existed."

John DeForge, of NAVSEA Logistics Center Detachment, Portsmouth, NH – the agency that developed and manages the system on behalf of JECPO, said "[w]orking with JECPO has been a good partnership for us. While we are able to apply our information technology and past performance information functional expertise to develop automated systems, JECPO now brings the DoD wide perspective to our efforts to ensure that our systems integrate with other DoD initiatives. JJECPO has also been able to match us up with other organizations with past performance system needs in order to utilize our current automated systems rather than developing additional new systems."

SBA partners to create training and e-commerce opportunities

Participants in the Small Business Administration's (SBA's) 8(a), Small Disadvantaged Business (SDB), and HUBZone programs can now take advantage of emerging technologies to increase procurement opportunities with the federal government.

SBA recently signed a partnership agreement with Clark Atlanta University and Digital Commerce Corporation (DCC) to develop an e-commerce training program for SBA program participants.

Under the agreement, 8(a), SDB, and HUBZone members will have access to technology and e-commerce training from Clark Atlanta University. After completing the training program, participants will be able to utilize DCC's worldwide electronic mall to find federal e-procurement opportunities. DCC will design and maintain the website exclusively for 8(a), SDB, and HUBZone businesses.

"This partnership will dramatically change the level of procurement opportunities for small disadvantaged businesses, providing links to the 21st century," said Aida Alvarez, SBA Administrator. "The small businesses that take advantage of this program will have a chance to introduce new technologies to global markets, increasing their participation in the federal procurement arena while promoting wealth in under-represented business communities."

SBA plans to work with Clark Atlanta University to develop and facilitate the training curriculum. In addition, DCC's electronic mall will open new buyers' markets as it expands existing opportunities for small businesses, increasing their business revenue and success rate.

"This is a groundbreaking initiative that will not only open the floodgates for federal procurement dollars for 8(a), SDB, and HUBZone businesses, but will also establish a network to develop stronger and more competitive small businesses based on newly developing technologies," said Alvarez.

DOL surveys contractors' ethnicity

The Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (DOL) is currently conducting a equal opportunity survey to obtain employment information on federal contractors. The survey takes approximately 21 hours to complete and is ongoing until March 31, 2003.

The survey must be completed by companies which both

- are federal contractors or subcontractors; and
- have 50 or more employees;

AND

- have a federal contract worth $50,000 or more;
- are financial institutions that are issuing agents for U.S. Savings Bonds and Notes;
- serve as depositories of government funds in any amount;
- have government bills of lading which in any 12-month period total $50,000 or more; **OR**
- have an open-ended or indefinite quantity federal contract or subcontract that will total $50,000 or more.

The survey will require contractors to report the number of employees, applicants, hires, promotions, and terminations for full-time positions within the prior 12-month period, sorted by gender, race, and ethnicity.

DOL reminds contractors that they may ascertain the race/ethnic information necessary for the survey by visual observation or from employment records. All surveys must returned by 2003.

Decisions

Contracting officer can't rely on SBA's PRO-Net data

RULE: *SBA's PRO-Net site is not a substitute for a size-determination referral to SBA; the agency cannot rely on the PRO-Net site to reject a bidder's self-certification of its status.*

Only 2 people can decide whether a company is a small business: the small business owner or an employee of the Small Business Administration (SBA). Curiously, and significantly, a contracting officer cannot make that call. If a small business certifies that it is a small business, that's it. The contracting officer must accept that self-certification. The contracting officer has no authority to disregard it. If the contracting officer does not believe that the company qualifies as a small business, he/she must refer the matter to SBA for its decision. SBA has the final say, as is demonstrated by the following case.

The Forest Service issued a solicitation for mine reclamation work. The solicitation favored HUBZones. All bids would be evaluated by adding 10 percent to their bids, except for bidders located in a HUBZone. HUBZones are Historically Underutilized Business Zones identified by SBA. To be considered eligible for HUBZone procurement contracts, a small business has to meet the size standard for standard industrial classification (SIC) code 1629 (not more than an average of $17 million in annual receipts for the preceding 3 fiscal years).

The second lowest bidder was AMI Construction; however, if the 10 percent HUBZone factor was added to the other bidders' prices, AMI's would have been the lowest. SBA had certified AMI Construction as a HUBZone small business concern under SIC code 1629. The Forest Service did not want to simply believe the self-certification of AMI so it checked SBA's PRO-*Net* database, which helps small business market themselves to the government. PRO-*Net* also shows government agencies whether a company is a HUBZone small business for that procurement's SIC code. PRO-*Net* showed that AMI was HUBZone-certified but it did not identify that it was qualified under SIC code 1629. Based on that information, the Forest Service decided that AMI did not meet the size standard and therefore would not increase the other bids by

10 percent. AMI lost the contract and protested to the General Accounting Office (GAO).

GAO said that the agency was wrong. The issue was not whether AMI was a HUBZone small business. The relevant issue was whether AMI was a small business for that particular procurement, in other words, whether or not AMI met the SIC code standard. And in fact, the more relevant question was "who makes that decision?"

Not the contracting officer, according to GAO. "However well intentioned the contracting officer's action, it was an improper usurpation of SBA's authority. SBA, not the procuring agency, has conclusive authority to determine size status matters for federal procurements." The contracting officer has two alternatives – either accept the company's self-certification or bring in SBA and let it decide. If a contracting officer did not believe the self-certification, all he/she could do is refer the issue to SBA for a final decision, since the contracting officer does not have authority to reject the self-certification.

GAO added that an agency should not rely solely on PRO-Net. "While an agency may find it helpful to review the PRO-*Net* site, that review is not an adequate substitute for referral to the SBA; the procuring agency does not have the authority to rely upon the PRO-*Net* site to reject a bidder's self-certification of its status."

AMI Construction, B-286351, December 27, 2000.

Bidder should have acknowledged amendment making solicitation more accurate

RULE: *A bidder must acknowledge all solicitation amendments that are "material." An amendment that corrects inaccurate information is material. If it was not acknowledged by the bidder, that bidder cannot win the contract.*

You cannot be sure that the parties to a contract have had a "meeting of the minds" unless both show that they know about an amendment to the offer. If one party does not show that it realizes that the other party has changed its offer, you cannot have a binding contract in almost all cases. However, what if the amendment is minor? What difference does it make? As long as both sides know the essence of the deal, that's all that's important.

This is the approach the government takes in contracting. When the government sends out an amendment to a solicitation, a bidder must acknowledge that the amendment was received if the bidder wants to get the contract. This applies only to "material" amendments, whatever that is. The General Accounting Office (GAO) recently dealt with the issue of what is "material." After starting off with a not-very-helpful "it all depends on the facts of the case," GAO went on to show what a material amendment looks like.

The Navy issued a solicitation for a wide range of fire safety work. Included were easy to price tasks like quarterly maintenance of a known quantity of fire sprinkler heads (280) as well as harder to price tasks like emergency service calls for which the Navy gave only an estimate. The contract would be a firm fixed price contract for all items. The Navy even warned bidders that the Navy would not increase the fixed price if the winning bidder had to do more service calls than the Navy had estimated. The bidders had to be right on their prices from the start.

The Navy amended the solicitation and increased the estimated number of service calls and added a wet chemical extinguishing system to the maintenance requirement.

When Christolow Fire Protection Services submitted its bid, it failed to include the standard acknowledgment that it had received all amendments including Amendment No. 1. To complicate matters, it was the low bidder. The contracting officer believed that the amendment was important because it increased the scope of work. The contracting officer concluded that the bidder's failure to acknowledge was material and did not award Christolow the contract. The company protested to GAO.

GAO agreed with the contracting officer.

Without an acknowledgment of a material amendment, "acceptance of the bid would not legally

obligate the bidder to meet the government's needs as identified in the amendment." The issue was "material." "An amendment is material where it imposes legal obligations on the prospective bidder that were not contained in the original solicitation, or would have more than a negligible impact on price, quantity, quality, or delivery. No precise rule exists to determine whether an amendment is material; rather, that determination is based on the facts of each case."

Here, the amendment corrected information in the original solicitation regarding estimated service calls. The amendment more than doubled the amount.

It was not simply the fact, however, that the work had been changed and corrected. Money was at stake. "This information was especially important given the solicitation terms providing that the contractor would be paid for the number of service calls set forth in the schedule at the price bid, regardless of how many service calls the contractor actually performed. In the absence of amendment No. 0001, the winning contractor ultimately could have argued that it was entitled to a price increase because the number and types of service calls set forth on the schedule were inaccurate."

GAO also noted that an agency should not have to "buy a lawsuit." It should try to avoid situations that might produce litigation. "A procuring agency is not required to enter into a contract which presents the potential for litigation stemming from an ambiguity or inaccuracy in the solicitation. Rather, an agency has an affirmative obligation to avoid potential litigation by resolving solicitation ambiguities or inaccuracies prior to bid opening. Amendments clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged."

Christolow Fire Protection Systems, B-286585, January 12, 2001. 🗁

Agency properly used consensus evaluation process

RULE: *A consensus evaluation process is not improper simply because the consensus differs from the scoring of individual evaluators. The issue is whether the consensus score adequately reflects the merits of the proposals.*

Sometimes an agency will evaluate offerors' proposals using individual evaluators as well as a team composed of these individual evaluators. The result is an individual score and a consensus one. Whenever the consensus score differs from the scores of the individual evaluators, a protester might try to use that variation as evidence that the agency's scoring of the proposal was not done correctly. Recently, the U.S. Court of Federal Claims addressed the issue and concluded, as does the General Accounting Office (GAO), that differences between the consensus and individual scores don't automatically signal an improper agency evaluation. The real test is whether the consensus score makes sense.

The Army Corps of Engineers issued a solicitation for dredging in Florida. The best value procurement had a number of technical evaluation factors. All proposals were evaluated first by individual evaluators and then as a group by all evaluators. All evaluators reached a consensus score. The proposal of Bean Stuyvesant, LLC received a consensus score that in several categories was way off the average score of all evaluators. For example, on one factor worth 85 points, individual evaluators gave Bean's proposal scores of 70, 20, 30, 30, 65, and 40, but the consensus score was 20. Averaging these scores would put Bean over 40. After Bean lost the contract, it protested to the court.

The court had no problem with the scoring used by the Corps. It started with the basic proposition that "the mere fact that a consensus score may deviate from the agency's individual evaluators' scores, does not, per se, render the final consensus rating questionable." The rationale it gave was the one used by GAO, that consensus scores "generally operate to correct mistakes or misperceptions that may have occurred in the initial evaluation. The overriding concern in the evaluation process is that the final scores assigned reasonably reflect the actual merits of the proposals, and not that they be

mechanically traceable back to the scores initially given by the individual evaluators."

The court then dealt with the primary issue before the court: "whether the consensus scores for plaintiff's proposal reasonably reflect the merits of plaintiff's oral presentation on its Technical Approach." Looking at Bean's presentation of its proposal to the Corps, the court found the downgrading by the consensus evaluation to be reasonable. "Given that Bean was on notice that [one specific evaluation subfactor] was a significant subfactor, it is not unreasonable that the evaluation team significantly downgraded plaintiff's oral presentation score in the absence of a detailed discussion by Bean on matters directly related to this subfactor." The court denied Bean's protest.

Bean Stuyvesant LLC, U.S. Court of Federal Claims No. 00-604C, December 1, 2000. 🗁

Appeals court overturns breach decision by board on ID/IQ contract

RULE: *An indefinite delivery/indefinite quantity contract is binding so long as the government buys the minimum quantity promised by the government.*

Over a year ago, the General Services Board of Contract Appeals (GSBCA) concluded that the government breached an indefinite delivery/indefinite quantity contract when the government knowingly failed to include in the solicitation for the contract updated information showing that part of the promised work would never materialize. The board found that to be bad faith, entitling the contractor to damages. Recently, the U.S. Court of Appeals for the Federal Circuit (CAFC) overturned this decision, finding that the government had honored its obligation under the indefinite delivery/indefinite quantity contract to order at least $100 of travel services. Unfortunately, in its decision, the court avoided an issue at the heart of the board's decision: the fact that the government knew part of the estimate was wrong before the solicitation was issued. All the court said on this issue was that there was no breach of contract "regardless of the accuracy of the estimates" in the solicitation.

GSA issued a solicitation for an ID/IQ contract for travel services. It knew but did not tell any of the bidders that one of largest users of the previous contract would get travel services under another contract. GSA never told the bidders about this despite the fact that this information seriously contradicted the estimated level of services GSA had advised the bidders to expect. Travel Centre, the winner of the solicitation, got a lot less business than expected but it did get at least the $100 minimum guaranteed. In fact, the company had gross sales of over $500,000 on which it made commissions between 5 and 10 percent. However, when it learned about the other contract that had taken much of its expected business, it sued GSA for breach of contract.

It won before the board but lost on appeal to the CAFC.

The court said there was no breach by the government. The contract guaranteed the contractor at least $100 worth of business and the contract got at least that amount.

The court based its ruling in part on the difference between "a" and "the." It noted that the contract referred to Travel Centre as "a preferred provider" and not "the preferred provider."

It concluded that "[r]egardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the IDIQ contract, Travel Centre could not have had a reasonable expectation that any of the government's needs beyond the minimum contract price would necessarily be satisfied under this contract."

Travel Centre v. GSA, U.S. Court of Appeals for the Federal Circuit, No. 001054, 00-1126, January 4, 2001. 🗁

Contractor's "blunderbuss exception" in release excepted nothing

RULE: *If a contractor wants to keep possible claims alive and still sign a release, the exceptions the contractor states must be specific.*

After a contract is finished, the contractor must sign a release that says the contractor has no claims against the government. Releases put an end to the contract and allow the parties to get on with their lives. If a contractor is not sure whether it wants to file any claims in the future, it will identify in the release any claims that are to be excepted from the release. In the past, some contractors have used "blunderbuss exceptions." This kind of exception releases the government from any future claims except those that may arise later. In other words, it is really not an exception because the exception is so broad as to be meaningless. A tricky issue is "how specific must an exception be?" Recently the Interior Board of Contract Appeals handed down a decision that has an excellent discussion of these "blunderbuss exceptions." The bottom line is that a contractor might be better off not signing a release until it knows the nature and value of any possible claim.

Eagle Asphalt and Oil had a road construction contract with the Bureau of Indian Affairs. At the end of the contract, the contracting officer asked the contractor to sign a release. The release drafted by the government read as follows: "NOW THEREFORE, in consideration of the above premises and payment by the United States to the contractor of the amount now due under the contract, to wit, the sum of Six Thousand Thirteen Dollars and Sixty-eight cents ($6,013.68), the contractor hereby remises, releases, and forever discharges the United States, its officers, agents and employees, of and from all manner of debts, dues, liabilities, obligations, accounts, claims and demands whatsoever, in law and equity, under or by virtue of the said contract except:" At this point, the contractor wrote in the following: "We Eagle Asphalt reserve the right to submit a claim on the above-referenced contract. And to submit for any taxes due. [sic]" Later, the contractor wanted to file claims against the government. The contracting officer considered all claims to have been released because the exception was so broad as to be worthless. The contractor appealed to the Board.

The Board agreed with the contracting officer. The contract in question said that an exception in a release had "to be specifically excepted and in stated amounts." The contractor here did not do that. "Exceptions to releases are strictly construed against the Contractor, because the purpose of a release is to put an end to the matter in controversy. The exception noted by Appellant in its release, even if it had specifically referred to its prior letters, is likewise a 'blunderbuss exception,' which does nothing to inform the government about the source, scope or substance of Eagle's contentions. Vague, broad exceptions are insufficient as a matter of law to constitute 'claims' sufficient to be excluded from the required release. To allow Appellant's exception to govern would not only permit it to resurrect a submission that did not constitute a claim either prior to the release, or in the release itself, but which would enable it to assert no more than a naked intention to file an indeterminate future claim in an undetermined amount as a precursor to subsequent development of arguable and previously unknown claims."

The Board dismissed the claims because the contractor had not reserved the claims properly.

Eagle Asphalt & Oil, IBCA No. 4173-1999, 4174-1999. 🗁

Contracting officer cannot deal with wage rate issue

RULE: *Contract issues simply involving Davis-Bacon Act matters may be heard by the contracting officer; however, matters directly involving Davis-Bacon Act issues must be heard by the Department of Labor.*

A confusing, gray area in claims is the relationship between claims directly involving labor standards laws like the Davis-Bacon Act and claims indirectly involving these laws. Procurements are often impacted by the various labor standards laws like the Davis-Bacon Act, Service Contract Act, and other specialized laws. Deciding whether a claim involving, for example, a Davis-Bacon Act issue, can properly be heard by a contracting officer or must be referred to the Department of Labor (DOL) gets confusing. The government recently asked the Armed Services Board of Contract Appeals (ASBCA) to throw out a claim involving Davis-Bacon. The board agreed, concluding that the issue was one for DOL.

The Navy had a contract with Thomas and Sons Building Contractors to remove and replace the roof at the Naval Marine Corps Reserve Center, Wilmington, DE. The contract required the payment of Davis-Bacon wages. Specifically, the contract required Thomas to pay the basic hourly wage rates and fringe benefits for laborers and roofers. As the project went along, the Navy got concerned that the employees were being paid the lower wages as laborers and not the higher wages as roofers. The Navy believed that the wage determination of DOL did not include in its laborers' definition a work procedure involving roofing. The contractor believed that it was paying the proper wages, and informed the Navy that the union agreed with its finding. DOL disagreed and said that "laborers are used only for the total demolition of a roof or for tending and clean-up duties performed on the ground."

DOL eventually found that Thomas had been paying the wrong wages on not only the Navy contract but also on an Air Force contract also involving roofing.

Thomas filed a claim with the Navy asking that it release contract payments that the government had withheld pending resolution of the wage rate issue. When the contracting officer did not resolve it, Thomas appealed to the Board.

The Board said it did not have jurisdiction over this issue. The claim involved "roofing contracts in which the misclassification of employees performing roofing work was alleged. Here, as there, "the essence of [appellant's] complaint relates to the wage rate it had to pay all workers doing roofing work, and the listing of job categories and wage rates in the contract is surely one of the labor standards provisions." Therefore it is one for DOL, not the contracting officer, to resolve.

Thomas and Sons Building Contractors, Inc., ASBCA No. 51590, January 4, 2001. 🗁

Rules

FAR Council

FAC 97-22 issued

The Federal Acquisition Regulation (FAR) Council has issued Federal Acquisition Circular (FAC) 97-22. The document contains 4 final rules and one interim rule covering advance payments, assignment of claims, and commercial items.

Definitions (FAR Case 1999-403). Amends the FAR to

- relocate definitions of terms that are used in more than one part with the same meaning to 2.101;
- relocate other definitions of terms to the "Definitions" section of the highest level of FAR division the term as defined is used in; and
- add cross-references to definitions of terms in FAR 2.101 that are defined differently in other parts.

FAR Parts Amended: 1.401. 2.000, 2.101, 3.302, 3.401, 3.501-1, 3.502-1, 3.901, 4.501, 4.901, 5.202, 5.501, 6.000, 6.003, 6.302-1, 6.302-3, 7.101, 7.501, 8.501, 8.701, 8.601, 8.1101, 9.101, 9.201, 9.301, 9.400, 9.403, 9.501, 9.601, 9.701, 11.601, 13.001, 13.501, 14.203-3, 15.001, 15.301, 15.401, 15.402, 15.403-1, 15.403-4, 15.406-2, 15.407-2, 15.408, 15.601, 15.604, 17.103, 17.201, 17.501, 19.001, 19.101, 19.701, 19.703, 19.902, 22.103-1, 22.401, 22.1001, 22.1102, 22.1202, 23.503, 23.802, 23.904, 24.101, 26.301, 27.301, 27.401, 28.001, 28.308, 29.301, 31.001, 31.205-17, 21.205-18, 31.205-32, 31.205-33, 31.205-39, 31.205-47, 32.001, 32.006-2, 32.113, 32.202-2, 32.202-3, 32.301, 32.801, 32.902, 32.1102, 33.101, 33.201, 34.001, 35.001, 35.017, 36.102, 36.601-3, 37.101, 37.103, 37.104, 37.201, 37.502, 39.002, 42.001, 42.302, 42.503-2, 42.701, 42.1201, 43.101, 43.103, 44.101, 46.101, 46.701, 46.710, 47.001, 47.201, 47.401, 47.501, 48.001, 49.001, 50.001, 52.101, 52.202-1, 52.212-3, 52.214-21, 52.215-1, 52.219-1, 52.219-23, 52.223-6, 52.223-11, 52.226-2, 52.232-25, 52.232-26, 52.232-27, 52.242-3, 52.246-17, 52.246-18, 52.246-19, and 52.246-20.

Final Rule. Contact: Contact Jeremy Olson at (202) 501-3221. 66 *Federal Register* 2117, January 10, 2001. 🗁

Applicability, Thresholds, and Waiver of Cost Accounting Standards Coverage (FAR Case 2000-301). Amends the FAR to

- remove the requirement in 52.230-1 that a contractor or subcontractor must have received at least one cost accounting standard (CAS)-covered contract ("trigger contract") exceeding $1 million to be subject to full CAS coverage since the CAS Board removed this "trigger contract" amount from its corresponding solicitation provision; and
- increase the dollar threshold for full CAS coverage from $25 million to $50 million.

The rule was originally issued as an interim one on June 6, 2000 (65 FR 36028). It has been converted to a final rule without change.

FAR Parts Amended: 30.201-1, 30.201-4(b), 30.201-5, 52.230-1, and 9903.201-3.

Final Rule. Contact: Linda Nelson at (202) 501-1900. 66 *Federal Register* 2136, January 10, 2001. 🗁

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.

The rule was originally proposed on May 2, 2000 (65 FR 25614). It has been adopted without change.

FAR Parts Amended: 32.407, 32.408, 32.409-3, 32.410, 32.411, 32.412, and 52.232-12.

Final Rule. Contact: Jeremy Olson at (202) 501-4755. 66 *Federal Register* 2137, January 10, 2001. 🗁

Part 12 and Assignment of Claims (FAR Case 1999-021). Revises FAR 52.212-4(b) to add a prohibition against the assignment of claims when payment is made by a third party. The rule corrects the inconsistency between FAR 52.212-4(b) and 52.212-5(b)(25).

FAR Parts Amended: 52.212-4.

Final Rule. Contact: Victoria Moss at (202) 501-4764. 66 *Federal Register* 2139, January 10, 2001. 🗁

Clause Flow down — Commerical Items (FAR Case 1996-023). Revises the list of clauses contractors must flow down to subcontractors to include 52.219-8, Utilization of Small Business Concerns.

FAR Parts Amended: 52.219-8.

Final Rule. Contact: Victoria Moss at (202) 501-4764. 66 *Federal Register* 2140, January 10, 2001. 🗁

FAC 97-21 issued ("Blacklisting" Rule)

The FAR Council has issued FAC 97-21. The document revises the requirements contractors must meet to have a satisfactory record of integrity and business ethics.

Currently, agencies may only award contracts to "responsible" sources. A "responsible" source is a contractor, that, among other things, has a satisfactory record of integrity and business ethics. Unfortunately, the FAR does not define what constitutes a "satisfactory" record.

The Council has noted that the lack of a clear definition has frequently prevented contracting officers from exercising their discretion in determining that a firm is not responsible. As a result, contracts have been awarded to firms that have violated procurement and other federal laws.

To prevent this in the future, the new rule

- clarifies that contracting officers should coordinate nonresponsibility determinations based upon integrity and business ethics with agency legal counsel;
- clarifies that a satisfactory record of integrity and business ethics includes satisfactory compliance with the law, including tax, labor and employment, environmental, antitrust, and consumer protection laws;
- provides an expanded guidance statement to contracting officers that (1) reinforces the link between a satisfactory record of integrity and business ethics, compliance with law and the government's interest in contracting with responsible reliable, honest and law abiding contractors; (2) requires contracting officers to consider all relevant credible information but states that the greatest weight must be given to offenses adjudicated within the past 3 years; (3) explains that a single violation of law will not "normally" give rise to a determination of nonresponsibility, and that the focus of the assessment should be on "repeated, pervasive, or significant" violations of law; and (4) requires the contracting officers to take into account any

 ISSN 8755-9285

administrative agreements entered into between the prospective contractor and the government;

- requires prompt notification to unsuccessful bidders and offerors after a nonresponsibility determination is made;
- makes costs incurred for activities that assist, promote, or deter unionization unallowable;
- makes costs incurred in civil or administrative proceedings brought by a federal agency where the contractor violated, or failed to comply with a law or regulation unallowable; and
- requires offerors to certify whether they have had any violations of tax, labor, environmental, antitrust, or consumer protection laws within the last 3 years.

The rule was originally proposed in July 1999 (64 FR 37360) and again in June 2000 (65 FR 40830). The final rule differs from the June 2000 proposal in that it

- clarifies that a "satisfactory record" of integrity and business ethics is one that indicates that the prospective contractor possess basic honesty and trustworthiness and that the government can rely on the contractor to perform the contract;
- establishes a hierarchy of violations for consideration by contracting officers; and
- directs contracting officers to give the greatest weight to adjudicated matters where there is a history of repeated, pervasive, and significant violations.

FAR Parts Amended: 9.103, 9.104-1, 9.104-3, 14.404-2, 15.503, 31.205-21, 52.209-5, and 52.212-3.

Final Rule. Contact: Ralph DeStefano at (202) 501-1758. 65 *Federal Register* 80256, December 20, 2000.

Signing and retention bonuses are proposed

The FAR Council has proposed to revise the FAR to permit agencies to offer signing and retention bonuses to recruit and keep employees with critical skills such as scientists and engineers in the software and systems integration fields.

Submit written comments by February 26, 2001, to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.2000-014@gsa.gov*.

FAR Parts Amended: 31.205-34.

Proposed rule. Contact: Jeremy Olson at (202) 501-0692. 65 *Federal Register* 82876, December 28, 2000.

Council issues proposed changes to FSS open market orders

The FAR Council has proposed to revise the FAR to

- permit the ordering contracting officers to issue final decisions on disputes pertaining solely to the performance of schedule orders;
- eliminate the requirement that agencies report to the General Services Administration (GSA) when a Federal Supply Schedule (FSS) contractor has refused to honor an order placed by a government contractor under an agency authorization; and
- permit ordering office contracting officers to add open market (noncontract) items to FSS blanket purchase agreements or individual task or delivery orders if: (1) all applicable regulations have been followed: (2) the ordering office contracting officer has determined the price is reasonable; and (3) the items are clearly labeled as open market on the orders.

Submit written comments by February 20, 2001, to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.1999-614@gsa.gov*.

FAR Parts Amended: 8.401.

Proposed rule. Contact: Linda Nelson at (202) 501-4755. 65 *Federal Register* 79702, December 19, 2000.

New commercial items rules are proposed

The FAR Council has proposed to revise the FAR to

- authorize the use of noncost-based incentives such as award fees and performance or delivery incentives for commercial item acquisitions; and

- provide that noncost-based award fee and performance or delivery incentives may be used in commercial item acquisitions with firm-fixed price contracts (FFP) and fixed-price contracts (FP) and economic price adjustments (EPA) without changing the FFP or FP/EPA nature of the contract.

Submit written by February 27, 2001, to the General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.2000_013@gsa.gov*.

FAR Parts Amended: 12.207-1, 12.207-2, 16.202-1, and 16.203-1.

Proposed rule. Contact: Victoria Moss at (202) 501-4764. 65 *Federal Register* 83292, December 29, 2000. 🗁

Contractors must verify use of proper clauses

The FAR Council has requested the Office of Management and Budget (OMB) to extend the information collection requirement for Standard Form 1413, Statement and Acknowledgement. The form is used to determine whether contractors have included the proper clauses in subcontracts.

Submit written comments by March 13, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB clearance (9000-0014). Contact: Linda Nelson at (202) 501-1900. 66 *Federal Register* 2888, January 12, 2001. 🗁

Utility firms must provide rate and term information

The FAR Council has requested OMB to extend the information collection requirement on the scope and duration of utility contracts. Currently, utility companies contracting with the government must provide agencies a complete set of rates and terms and conditions as well as any subsequently approved or proposed revisions.

Submit written comments by March 13, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB clearance (9000-0122). Contact: Julia Wise at (202) 208-1168. 66 *Federal Register* 2889, January 12, 2001. 🗁

Agencies must still get "credit"

The FAR Council has requested OMB to extend the information collection requirement on capital credits.

Currently, when the government is a member of a cooperative, the cooperative must provide it an accounting of capital credits it is due.

Submit written comments by March 13, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB clearance (9000-0124). Contact: Julia Wise at (202) 208-1168. 66 *Federal Register* 2890, January 12, 2001. 🗁

Utility firms must continue to provide compliance information

The FAR Council has requested OMB to extend the information collection requirement on electric service territory compliance representation.

Currently, the representation at FAR 52.241-1 is required when proposed alternatives of electric utility suppliers are being solicited.

Submit written comments by March 13, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB,

 ISSN 8755-9285

Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB clearance (9000-0126). Contact: Julia Wise at (202) 208-1168. 66 *Federal Register* 2891, January 12, 2001.

Department of Energy

New DEAR edition is released

The Department of Energy (DOE) has reissued its acquisition regulation (DEAR). The majority of revisions remove obsolete provisions or renumber various parts. The new edition, however, contains 5 new clauses which prescribe uniform departmental policies for: (1) cooperation between DOE and its contractors in disseminating information to the public; (2) technical direction provided to contractors by a designated contracting officer's representative; (3) collaboration to identify, evaluate, and institutionalize processes that will improve the effectiveness or efficiency of any aspect of contract performance; (4) implementation of FAR 35.017 regarding the establishment, use, review, and termination of federally funded research and development centers which are sponsored by DOE; and (5) outreach to the local communities in which the agency conducts business.

Final Rule. Contact: Michael Righi at (202) 586-0545. 65 *Federal Register* 80994, December 22, 2000.

National Aeronautics and Space Administration

NASA establishes training requirements for purchase card

The National Aeronautics and Space Administration (NASA) has revised its acquisition regulation (NFS) to provide guidance on what should be addressed in the agency's governmentwide purchase card training for cardholders and approving officials. Specifically, the rule requires that all cardholders and approving officials must receive training on prohibited purchases, purchase limitations, sources of supply, and responsibilities before receiving a card.

Final Rule. Contact: Celeste Dalton at (202) 358-1645. 65 *Federal Register* 82296, December 28, 2000.