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S. 3166, Information Technology Share-in-Savings Program Improvement Act of 2000. Amends the Clinger-Cohen Act of 1996 to provide individual federal agencies and the executive branch with increased incentives to use the share-in-savings program.

Status: Referred to the Senate Committee on Governmental Affairs. 🗁

S. 3185, Taxpayer Protection and Contractor Integrity Act. Ends taxpayer support of federal government contractors against whom repeated civil judgments or criminal convictions for certain offenses have been entered.

Status: Referred to the Senate Committee on Governmental Affairs. 🗁

H.R. 4148, Tribal Contract Support Cost Technical Amendments of 2000. Makes technical amendments to the Indian Self-Determination and Education Assistance Act relating to contract support costs.

Status: Received in the Senate on October 19, 2000. 🗁

H.R. 4181, Debt Payment Incentive Act of 2000. Amends title 31, United States Code, to prohibit delinquent federal debtors from being eligible to enter into federal contracts.

Status: Forwarded to the full Committee on Government Reform by the Subcommittee on Government Management, Information, and Technology on October 4, 2000. 🗁

H.R. 4897, Equity in Contracting for Women Act of 2000. Amends the Small Business Act to establish a program to provide federal contracting assistance to small businesses owned and controlled by women.

Status: Placed on the calendar in the House on September 21, 2000. 🗁

H.R. 4945, Small Business Preservation Act of 2000. Amends the Small Business Act to strengthen existing protections for small business participation in the federal procurement contracting process.

Status: Referred to the Senate Committee on Small Business on September 21, 2000. 🗁

Unless these legislative acts are reintroduced during the 107th session of Congress beginning on January 24, 2001, no further action will be taken on them.

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REFORM WATCH

Opposition to "blacklisting" grows

The Federal Acquisition Regulation Council has finalized new "contractor responsibility" regulations, dubbed "blacklisting" rules by its opponents. *See 65 FR 80255*. The rules will go into effect on January 19, 2001, and will require contractors to disclose any past violations of federal law before entering into a government contract. An initial finding from an administrative law judge or a complaint from a federal agency could constitute the "credible information" required to disqualify a contractor. Currently, contractors are only required to have a "satisfactory record of integrity and business ethics and the ability to perform the contract." *See inset for description of final rule.*

The final rule has met strong opposition from those in Congress. "The proposal changes existing regulations to give contracting officers much greater authority to disqualify a contractor from doing business with the federal government," said Congressman Tom Davis (R-Va), who has openly opposed the rules since they were originally proposed. *(See the* Federal Acquisition Report*, December 2000, page 3.)*

"The Administration's strategy is clear: publish these wrongheaded rules before President-elect Bush takes office and at a time of year when Congress will not be able to intervene. So this is how the Administration plans to welcome President-elect Bush, with a new and destructive procurement policy that hamstrings the incoming Administration? This is back-room policy-making at its worst," Davis said.

The House had attempted to delay implementation of the new regulations. It passed an amendment to the fiscal year 2001 Treasury appropriations bill that would have postponed adoption until a study on the need for it was completed. The language, however, was ultimately dropped from the bill.

Despite his opposition to the new rule, Davis emphasized that "no one [in Congress] disputes that the federal government should only do business with ethical companies that adhere to federal laws." However, he noted that existing laws already ensure that, and the Administration has not made the case that the changes are needed. Rather, the rule will have a negative impact. Due process concerns are likely to materialize since firms could be denied the chance to compete for a contract based on a decision by an administrative law judge, without a hearing. In addition, the blacklisting rules could invite mischief and abuse by third parties seeking a business advantage. Allegations could be made frivolously to place a competitor at a disadvantage.

According to David Marin, spokesperson for Congressman Davis, Congress is currently considering possible legislative fixes. "Repeal of the rules will largely depend on the Bush Administration," Marin said. "Davis is planning to act on the issue in the first days of the next Congress."

. . .in response

Federal contracting officers are extremely reluctant to disqualify a contractor based on past violations of federal law, according to the Federal Acquisition Regulation (FAR) Council. The Council believes that current language in the FAR does not provide contracting officers with a framework to judge the violations.

The FAR Council recently published a final rule on contractor responsibility, despite controversy from members of Congress. In the Federal Register notice, the FAR Council noted that the government repeatedly enters into contracts with firms that have violated procurement and other federal laws, citing the results of a study by the General Accounting Office (GAO). GAO studied the top 100 defense contractors over 4 years, finding over 100 cases where contractors had violated procurement-related law.

The final version of the rule makes 3 major clarifications to the proposed version (65 FR 40830). Specifically it

- clarifies that contractors should coordinate with agency legal counsel on nonresponsibility determinations;
- clarifies that a satisfactory record of integrity and business ethics includes compliance with the tax, labor, environmental, antitrust, and consumer protection laws; and
- provides additional guidance to contracting officers, reinforcing the link between satisfactory record of integrity and business ethics, compliance with the law, and the government's need to do business with contractors it can trust.

The Council hopes that by providing contracting officers with a more clear guidance on declining to contract with unethical firms, the government will be able to reduce the risk of fraud and increase standards of compliance with the law.

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Congress asks for review of Lackland competition

Late last month, the Department of the Air Force reversed its award of 700 job contracts at Lackland Air Force Base in Texas. It awarded the contracts to Computer Services Corporation of California for the second time. *See* Federal Acquisition Report*, December 2000, page 6.*

The Air Force began the outsourcing process in January 1999, under the requirements of the Office of Management and Budget's (OMB's) Circular A-76. When the Air Force announced in August 2000 that it favored the private contractor over the department's Most Efficient Organization (MEO), the MEO appealed. The Air Force reviewed the case, and stated that it had found errors in cost calculations. As a result, the decision was reversed and the award went to the MEO.

The contractor, however, filed a protest with the General Accounting Office (GAO). During GAO's review of that case the Air Force discovered another miscalculation, which resulted in the second reversal.

Six members of Congress have expressed their concern over the way in which the Air Force has handled the contracts. In a December 15, 2000, letter to F. Whitten Peters, Secretary of the Air Force, Senators Phil Gramm and Kay Hutchinson, and Congressmen Henry Bonilla, Charles Gonzales, Ciro Rodriguez, and Lamar Smith said that they will ask the Inspector General of DoD to conduct an investigation of the Lackland A-76 action.

"To allow for an ample review period, we respectfully request your intervention to temporarily delay the signing of all contracts between the Air Force and the contractors who participated in this competition," the letter stated.

"If we fail to thoroughly review the Lackland A-76 cost comparison study to ensure that it was impartially conducted in accordance with OMB Circular A-76 as well as all other applicable regulations, then the entire A-76 process in the Air Force could be burdened by a cloud of illegitimacy," the group asserted.

EPA's website helps keep agencies "green"

The Environmental Protection Agency (EPA) has introduced a new online resource for buyers of environmentally friendly products, GreenOrder.com. GreenOrder is marketed towards government purchasers who are required by federal law to buy green.

President Clinton signed Executive Order (E.O.) 13101, *Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition*, in 1998. The directive requires federal agencies to protect the environment and promote economic

DoD reports $240 million cost increase since last quarter

The Department of Defense (DoD) has recently released the details of the major defense acquisition program cost and schedule changes within the past six months.

Cost changes between June 2000 and September 2000 are as follows:

Current estimate for June 2000 (70 programs) …….. $ 778,645.1 million

Plus one new program, CVNX (Future Aircraft Carrier) …….. + $ 3,587.6 million

Adjusted estimate for June 2000 (71 programs) …… $ 782,232.7 million

Net Cost Change …… + $ 239.5 million

September 2000 (71 progams) …… $ 782,472.2 million

According to DoD, the cost increase was due to hardware enhancements within the Army's JSTARS CGS program. A copy of the complete cost summary as of September 30, 2000 is available at *www.defenselink.mil/news/Dec2000/sar20000930.pdf*.

growth by purchasing environmentally preferable products and services.

Using the new website, buyers are able to search, compare, and purchase the broad range of products required by government regulations, from office supplies and computers to cleaners and construction materials.

The site also contains searchable data about certification, performance, and life-cycle cost. By lowering sales costs for suppliers and allowing them to buy in increased volume, GreenOrder aims to promote competitive pricing with traditional manufacturers.

The website's other features include:

- ✓ **Supplier Directory** – list of manufacturers and distributors of products that are recycled, energy efficient, or biobased. Users can browse by product category, supplier name, or geographic region;
- ✓ **Library** – collection of regulations, case studies, articles, and other materials to guide federal personnel on decisions about green purchasing; and
- ✓ **News** – daily updates on environmental regulation changes and developments.

EPA expects that GreenOrder.com will make it more economical for agencies to meet federal requirements by buying green. The agency intends to expand the site's content with information from industry sources and federal guidance as it becomes available. 🗁

DoD needs accurate data to improve A-76 credibility

Competitive sourcing studies are saving the Department of Defense (DoD) money, however, it is difficult to precisely estimate the value of those savings, according to a recent General Accounting Office (GAO) report – *GAO-01-20*.

GAO's findings are based on its assessment of a DoD report on the outcomes of the department's A-76 cost comparisons between fiscal years 1995 and 1999. DoD compiled the report at the request of Congress, to determine the results of each study, and to make recommendations to other agencies on how to conduct a cost comparison of a job that has already been outsourced.

DoD's report provided Congress with the requested information on 286 A-76 studies, according to GAO. The report excluded information on 53 studies for which the department had incomplete data, and 13 other studies that fell outside the requested time frame.

Although DoD took steps to ensure the accuracy of the information within the report, GAO stated that it cannot be sure of the reliability of the data because of historical weaknesses in defense agencies' A-76 databases.

GAO agreed that DoD had experienced savings as a result of the studies, but could not confirm the exact amounts given in the agency's report to Congress. DoD estimated that the 286 studies included in the report generated $290 million in savings during fiscal year 1999. GAO called this estimation inaccurate, citing limitations in the department's A-76 database.

GAO noted that problems exist with DoD's Commercial Activities Management Information System (CAMIS) which is used to record the results of their competitive sourcing program. Problems include

- inaccuracies in tracked baseline costs and reasons for changes;
- incomplete data on items such as program implementation and contract administration costs; and
- data that had not been modified to reflect changes or terminations in contracts.

DoD acknowledged the weaknesses in its A-76 database and has begun efforts to improve the accuracy of data for future studies. The department also stated that it believes that existing data and results of certain studies are enough to prove the substantial savings being earned through A-76 cost comparisons. 🗁

Gansler directs DoD to become a more sophisticated customer

The Department of Defense (DoD) must take advantage of performance-based payments (PBPs) in contract financing, according to a recent memorandum from Under Secretary of Defense, Jacques Gansler. By fiscal year 2002 all components

Continued on page 7

Second round of FAIR Act inventories reveals candidates for competition

The Office of Management and Budget has issued the second round of Federal Activities Inventory Reform (FAIR) Act inventories. The new documents include inventories from 39 federal agencies, including 5 additional Chief Financial Officers (CFO) Act departments. OMB has not yet released inventories from 15 CFO Act agencies, including the Departments of Defense, Energy, Housing and Urban Development, Interior, Justice, Transportation, and State, as well as the Agency for International Development, Federal Emergency Management Agency, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, Small Business Administration, and Social Security Administration. *(See* Federal Acquisition Report*, November 2000, page 4, for details on first release.)*

Under the FAIR Act, agencies are required to annually submit to OMB a list of all commercial activities being performed by federal employees. Year 2000 inventories were due to OMB no later than June 30, 2000. The agencies' inventories contain a list of full-time equivalent (FTE) positions and a corresponding reason code. The reason codes are as follows:

A – the function is performed by federal employees and is specifically exempt by the agency from A-76 cost comparison requirements;

B – the activity is performed by federal employees and is subject to the cost comparison;

C – the activity is performed by federal employees, but has been made exempt from comparison by Congress, Executive Order, or OMB;

D – the function is performed by federal employees and is in the process of being cost compared;

E – the function is retained in-house as a result of a cost comparison;

F – the function is performed by federal employees, but a review is pending force restructuring decisions (e.g., base closure, realignment); and

G – the function is prohibited from conversion to contract because of legislation.

In the second round of inventories, agencies reported a greater number of FTEs as eligible for competition – reason code B. *See table on page 7 for results.* A complete list of available inventories and corresponding website was published in the Federal Register on December 14, 2000 (65 FR 78217). 🗁

OMB considers new FAIR guidance

The Office of Management and Budget (OMB) is currently considering whether to add additional clarification on the challenge-and-appeal process to existing FAIR Act guidance. The General Accounting Office (GAO) recently found that a large number of challenges to the 1999 inventories were out of scope. *(See* Federal Acquisition Report*, November 2000, page 5).*

Although Congress defined the process in the FAIR Act itself and OMB originally issued guidance in June 1999, GAO has recommended that OMB provide the public with more help on what matters are, and are not, subject to challenge and appeal.

The FAIR Act permits interested parties to challenge only the inclusion or omission of an activity from an agencies' inventory. GAO, however, found that federal employees and contractors had submitted challenges and appeals regarding other issues. For example, contractors challenged agencies which indicated that they did not plan to consider certain eligible jobs for outsourcing.

Although these out of scope challenges did not result in changes to agencies' FAIR inventories, they did call GAO's attention to the problem. At the request of GAO, OMB is accepting comments from agencies on the proposed revision. Comments should be submitted by January 16, 2001 to the Office of Federal Procurement Policy, NEOB, Room 9013, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, or via fax to (202) 395-5105.

OMB hopes that by providing more clarification on the challenge process, it will eliminate further confusion on the subject. 🗁

will be required to use PBPs in at least 25 percent of contracts valued over $2 million.

Gansler noted that while DoD has had the authority to make performance-based payments for several years, contracting officers have rarely used the financing technique. As a result of changes to the Federal Acquisition Regulation (FAR) that removed the restriction from using the payments for research and development or competitively negotiated acquisitions, DoD stands to benefit even more from their use, Gansler said.

Towards that end, the Under Secretary has called for a transition from cost-based progress payments to PBPs, beginning with the 25 percent goal for FY 2002. PBPs will be the primary form of payment in fixed-price contracts within the agency no later than FY 2005.

Performance-based payments benefit the government and contractors by offering

- enhanced technical and schedule focus;
- broadened contractor participation;
- reduced cost of administration and streamlined oversight;
- enhanced and reinforced roles of program managers;
- competition considerations;
- cash flow advantages; and
- realistic performance milestones.

Gansler is currently working with the Under Secretary of Defense for Acquisition Reform to develop guidance for contracting officers and program managers on how to implement PBPs.

ACQUISITION ADVICE

Q: When does three-year limit on past performance information begin?

A: The three-year limit on the use of past performance information begins at the end of contract performance, not at the time of the conduct. *See D.F. Zee's Fire Fighter Catering, B-280767.4, September 10, 1999.*

In the case, the Department of Agriculture issued a solicitation for mobile food services. One of the unsuccessful offerors, D.F. Zee's Fire Fighter Catering (DFZ), learned that, in its evaluation of DFZ's offer, the government considered adverse past performance information on DFZ from the 1994 fire season. DFZ considered this to be contrary to the three-year limit specified in the FAR. The agency, on the other hand, argued that because the contract ended in 1998, DFZ's performance under the contract can be considered for three years from that date, through the year 2001.

GAO agreed with the agency that the three-year period ran from the end of contract performance. GAO noted that FAR 42.1503(e) provides that "past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance." In addition, it looked at the regulatory history of the provision and emphasized that it was lengthened from simply three years to "three years after completion of contract performance" on the belief that the retention period should exceed the length of the contract. The only way for that to happen would be to start the clock when a contract ends. Concluding that the agency properly considered the past performance information on DFZ, GAO denied the protest.

2000 FAIR Act Commercial Inventory Results: Round 2

Agency	Reason Code							Total FTEs
	A	B	C	D	E	F	G	
DOC	3,109.5	3,015	54	23	312	——	235	6,748.5
ED	268.4	390.85	206.46	5.25	——	——	——	890.96
GSA	948	3,864	——	——	——	2,526.45	——	7,338.45
HHS	62.6	278	11.9	——	——	——	——	915.9
USDA	1959.55	25,456.6	18,757.1	16	138	210.25	——	46,537.5

A-76ers use the web to share best practices

The Department of Defense has launched a new website to provide extra information on A-76 competitions. SHARE A-76! is a knowledge management site that links to DoD and other agency sites having to do with the Office of Management and Budget's (OMB's) Circular A-76.

The website, located at *http://emissary.acq.osd.mil/inst/share.nsf*, is a "one-stop shopping site for A-76 information," according to Annie L. Andrews, assistant director for competitive sourcing and privatization.

Federal agencies and the private sector have split competitions about 50-50 over the years, but the process continues to provide savings to DoD and taxpayers regardless of who is selected as the service provider, Andrews explained.

The site particularly benefits field technicians and employees involved in the cost comparison process, according to Andrews. "The process isn't easy to learn and most people go through it only once."

"The site can help field technicians who develop the various A-76 required documents, she noted. "Contracting officers and personnel officers may also find it a useful resource for A-76 information. The website should be a means to share best practices," she said.

The website encourages contracting personnel to submit their ideas about performing cost comparisons so that others within DoD can learn from their experiences.

"It can also help people who want to look at the most recent [OMB] policy update as well as recent bid protest decisions made by the General Accounting Office. Intelligent, sophisticated search tools allow users to browse and access a myriad of materials related to A-76 topics. If you want to search on performance work statements it will find all the links and all the documents," Andrews described. "It's designed for multiple organizational levels, but it's mainly focused on that field technician who needs the help the most."

Decisions

Debriefing makes a winning contractor a loser

RULE: *Although an agency must tell the winner what was said at a debriefing if the solicitation is re-opened, failing to do so will not be fatal to the re-solicitation if the winner was not harmed by the agency's failure to disclose what the FAR requires.*

Sometimes winning turns out to be losing. The debriefing process is one example. When a company loses a contract and asks the agency for a debriefing, the company gets a lot of helpful information. For example, a loser gets the winner's price, its ranking and point rating, as well as an explanation of why it lost. Naturally, the winner does not get this information – it did not lose so it doesn't get a debriefing. But winning can be losing if the solicitation goes back on the street. If the solicitation gets protested after award and the award gets overturned, the solicitation is resumed. Then the winner who has not been debriefed does not have all the information that the losers received at the debriefing. For example, all losers that had a debriefing know the winner's price, but the winner does not know the prices of the other offerors. So an important question is "what rights does a winner-turned-loser have if the solicitation goes back onto the street?" A recent General Accounting Office (GAO) decision gives some guidelines.

Norvar Health Services won a contract with the Drug Enforcement Administration (DEA). Another offeror, Hunter Medical, Inc., asked for a debriefing and learned Norvar's price. After Hunter's protest, DEA decided to put the solicitation back on the street and solicit new proposals and new prices. Norvar then became the protester. It protested the agency's decision to allow re-pricing of proposals, arguing that Hunter had an unfair competitive advantage knowing Norvar's price. Norvar also

asked that the government to tell Norvar what the government had told Hunter at Hunter's debriefing. Norvar argued that FAR § 15.507 required it.

DEA admitted that it had not given Norvar the information that the FAR says must be given to a winner upon reopening of the solicitation: Norvar's total price, its total point score (88 on a 100-point scale), or that Norvar and Hunter were the only two offerors in the competitive range. Despite not sharing the information, DEA stuck to its position on soliciting new prices. It said that the solicitation was greatly revised so it had to ask for new prices. It noted that "there were a total of 80 additions to the requirements established in the statement of work, changes to two of the evaluation subfactors, and a newly-issued wage determination applicable to the personnel covered by this contract." To DEA's way of thinking, knowing Norvar's initial proposal price was therefore of little use to any of the other offerors given that the solicitation had been greatly revised.

GAO agreed with the agency but only after acknowledging the problem presented by a re-solicitation after a debriefing. GAO commented that "Norvar's complaints highlight a tension between the information provided during postaward debriefings, and subsequent competitions resulting from a decision to reopen a procurement or to conduct a new competition. This tension arises because the same information that makes an unsuccessful offeror's postaward debriefing meaningful – such as, for example, the successful offeror's price and its technical score or ranking – could be considered to provide a competitive advantage in any subsequent recompetition or reopened competition held soon after the initial competition."

But the issue is not whether there is "a competitive advantage." The issue is whether there is an **unfair** competitive advantage. An unfair competitive advantage arises only if this advantage "results from preferential treatment or other improper action by the government." Here, the debriefing, or lack of one, did not harm Norvar because the new solicitation was so different from the old one that the debriefing information about Norvar's original price was old and worthless.

Nor did harm to Norvar arise from the agency's failure to follow the FAR's requirements on releasing debriefing information to Norvar. The reason GAO gave here was the same, that "Norvar cannot (and did not) claim any meaningful prejudice arising from preparing a response to a significantly revised solicitation without knowing its total point score under the earlier competition, or without being expressly advised that there was only one other offeror in the competitive range."

GAO denied the protest.

Norvar Health Services—Protest and Reconsideration, B-286253.2; B-286253.3; B-286253.4, December 8, 2000. 🗁

When can an agency properly refuse an offeror a chance to rebut adverse past performance?

RULE: *When an agency wants to award a contract without discussions, it can refuse a vendor a chance to rebut adverse past performance information. An agency properly exercises its discretion to not allow a contractor to rebut adverse past performance if it has no clear reason to question the adverse past performance information or if the government uses a valid data base containing information that the offeror has previously had the chance to rebut.*

If an agency will be using adverse past performance information against an offeror, the offeror wants to know about it and be given a chance to rebut it. While this seems like simple fairness, the FAR does not demand that an agency always give the contractor an opportunity to rebut adverse past performance information. FAR has a "shall" provision and a "may" provision. The "shall" is for adverse past performance information keeping an offeror from the competitive range. FAR 15.306 (b)(1)(i) requires an agency to tell a vendor about the adverse past performance if that information is keeping the vendor from the competitive range and give the vendor a chance to rebut it.

That's not the rule, however, when the agency wants to award on the basis of initial offerors. The FAR has a "may." FAR Part 15.306(a)(2) deals with award without discussions. It says that when an

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award will be made without conducting discussions, "offerors **may** be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors." If an agency does not give a contractor the chance to rebut adverse past performance, all GAO looks at is how wise was the agency's decision to not get a rebuttal. In legalese, GAO looks to see if an agency "abused its discretion" in not asking a contractor about adverse past performance.

Recently, GAO found 2 examples of an agency properly exercising its discretion in not asking an offeror to rebut adverse past performance. In one case, the government had already given the vendor a chance to rebut the adverse past performance information. So refusing to give a vendor another chance in that case was a proper exercise of discretion. In another, where the government had not given the offeror a previous chance to rebut the information, there was no "clear reason" to question the information available to the government. So refusing to give an offeror a chance to rebut was proper.

Corps of Engineer's data base okay-prior chance to challenge past performance. The Corps of Engineers keeps a database on construction projects called the Construction Contractor Appraisal Support System (CCASS). In this process, a Corps project gets evaluated by the contracting agency within 60 days of substantial completion. This evaluation is reviewed by someone else who must be familiar with the contractor's performance on the project and must be one level above the evaluator. A contractor must get a copy of the evaluation. If the evaluation is "unsatisfactory," the contractor gets a chance to address the report and respond to it, making comments that should be included in and addressed by the government in the final evaluation. A contractor who gets a final unsatisfactory report gets a chance to appeal that evaluation to someone above the contracting officer. Similar opportunities to comment on interim performance evaluations are available although no appeal is allowed.

In a recent solicitation, the Corps relied on evaluations included in the CCASS to get past performance information on offerors. The solicitation told offerors that the Corps would use this system. TLT Construction protested the government's use of this database, arguing that TLT should have been given an opportunity to rebut adverse past performance evaluations found in that system.

Because offerors had been given a chance to rebut information in the CCASS, another chance to rebut was not necessary, according to GAO. GAO reviewed how the past performance information in the database was collected and checked by both the government and a contractor. GAO concluded that the data base had sufficient validity to be relied upon by the government in obtaining and using past performance information. GAO did not believe that the government had to give offerors another chance to rebut information found in that database. Offerors had been given one chance to do so during that system's evaluation process so another chance during a later solicitation process was not necessary.

TLT Construction Co., B-286226, November 7, 2000. 🗁

No rebuttal necessary because agency has no clear basis to question adverse past performance. What happens when the government has not given an offeror a prior chance to rebut adverse past performance? An agency properly exercises its discretion in denying a chance to rebut in that case if the agency sees no clear reason to question the information.

NMS Management, Inc. wanted to submit an offer for a Navy contract. It teamed with MC Contracting. Past performance was a big evaluation factor in the solicitation process. Unfortunately, one reference gave MC a "marginal" evaluation on a previous contract But the reference did not stop there, however. The reference went on to describe in detail why MC had re ceived that evaluation. The narrative description of MC's performance matched her "marginal" evaluation.

After NMS lost the contract, it protested, arguing that the agency should have given NMS a chance to

rebut the adverse past performance information on MC that the government used in the solicitation process.

GAO said that was not necessary. It then set some guidelines for agencies to use in deciding whether to allow offerors an opportunity to rebut previously-unrebutted adverse past performance. "With regard specifically to clarifications concerning adverse past performance information to which the offeror has not previously had an opportunity to respond, we think that for the exercise of discretion to be reasonable, the agency must give the offeror an opportunity to respond where there clearly is a reason to question the validity of the past performance information, for example, where there are obvious inconsistencies between a reference's narrative comments and the actual ratings the reference gives the offeror. In the absence of such a clear basis to question the past performance information, we think that, short of acting in bad faith, the agency reasonably may decide not to ask for clarifications."

The agency passed this test here. First, NMS did not challenge the evaluator's comments on the "marginal" evaluation. It never argued that the evaluation was wrong. Second, "there is no inconsistency between the reference's narratives and the overall 'marginal' rating assigned for MC's performance of the particular contract." Third, NMS had a higher price, so the lower-priced, more highly rated competitor would still have won. So no matter what NMS would have said to challenge the "marginal" rating, it still would have lost the contract.

NMS Management, Inc., B-286335, November 24, 2000. 🗁

Bad facts sink agency suspension of contractor

RULE: *Before an agency suspends a contractor it must have accurate information.*

A suspension is a temporary debarment. It allows the government to keep a contract from a company it thinks has done something wrong while the government decides whether to debar the vendor. Because suspension is so serious a penalty, an agency can suspend someone only if it has good proof of wrongdoing.

The Department of Housing and Urban Development (HUD) had a contract with Mistick Construction to modernize a public housing project in Pennsylvania. Testing showed that levels of lead paint were not too high. One of the subcontractors, J&L Renovation Co., dumped the lead paint chips at a normal, not hazard, waste site. Further testing showed that the lead chips were not hazardous and that the normal waste site could be used. Nevertheless, a government auditor from HUD Inspector General's Office and a government lawyer did an investigation. The auditor was told by an official of the housing project that there was lead based paint at the project, but the levels were not hazardous. The auditor got copies of the tests done at the site but was not qualified to judge whether the levels were too high. His report claimed that lead based paint chips at a public housing construction site were being illegally dumped. HUD suspended the company.

After getting J&L suspended, HUD tried to get the firm disbarred. An administrative law judge refused to do so and, moreover, told HUD to end the suspension. The judge, however, would not order the suspension to run from the very beginning, as though there never had been a suspension in the first place. The judge erroneously thought that the contract required the contractor to treat the waste as hazardous. Getting the suspension declared improper *ab initio*, or from the very beginning was important to the contractor. If the suspension had been ruled improper from the beginning, the company could say that it had never been suspended.

The contractor sued the government in federal court. The court agreed with the contractor that the company should not have been suspended, and, more importantly, the suspension should have been overturned from the very beginning. HUD did not have adequate evidence to suspend the company.

A suspension requires "adequate evidence." Courts have defined such proof as not the kind necessary for a successful criminal prosecution or a formal debarment. Rather, the matter may be likened to the probable cause necessary for an arrest, a

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search warrant, or a preliminary hearing. This is less than must be shown at the trial, but it must be more than uncorroborated suspicion or accusation.

The court said there was no adequate evidence here. "The hearing made it clear that the initial finding of probable cause was flimsy at best, riding on the heels of a hastily-conducted and technically-flawed audit."

The government had argued that it was justified in suspending the contractor because the vendor was to blame for the misunderstandings that lead to the suspension. The court rejected the government's position. It emphasized that "the suggestion that appellants should bear the onus of HUD's poor investigatory work is ridiculous."

The court held that the suspension was improper from the beginning.

Leon Sloan, Sr. and Jimmie Lee Furby v. Department of Housing & Urban Development, et Al., No. 99-5146, United States Court of Appeals for the District of Columbia Circuit, November 14, 2000. 🗁

FAA's unique protest process passes muster with court

RULE: *Decisions by the FAA's Office of Dispute Resolution for Acquisition on protest-type issues must be supported by substantial evidence and must not be arbitrary and capricious.*

Several years ago, Congress wanted to try something new. It wanted to let an agency throw out the rule book on procurements (FAR) and work without it. The agency to be used in this experiment was the Federal Aviation Administration (FAA). One of the rules thrown out was the protest process involving the General Accounting Office (GAO). Taking its place was the FAA's Office of Dispute Resolution for Acquisition (ODRA). That office's decisions, however, remained subject to the review of a federal court, as a recent decision of the US Court of Appeals for the District of Columbia shows. In reviewing ODRA decisions, the court expressed a dislike to second-guess an agency on technical issues. In the end, a reviewing court looks for the reasonableness of the decision – which is what GAO looks for when it reviews an agency's contract award decisions.

The FAA issued a solicitation for information technology support. The contract would be a best value with technical factors more important than price, but, as technical scores became more equal, price would become more important. The 5-member technical evaluation team (TET) found Informatica to have technical superiority and recommended to the Integrated Products Team (IPT). The IPT, however, found the proposals of Multimax and Informatica to be essentially equal, but since Multimax would cost almost $1 million less over the life of the contract, the FAA awarded the contract to that company.

Informatica protested to ODRA, arguing that the best value procurement had become a lowest-priced technically acceptable procurement. ODRA agreed, finding that price had taken an unannounced deciding role in the award. The Administrator of the FAA agreed with the ODRA and terminated the contract with Multimax and awarded it to Informatica.

The appeals court said that the ODRA had acted properly. It found that its review of the contract award did not second-guess the award decision – ODRA did not substitute improperly its judgment for the awarding official – it only looked to see if it was reasonable, which was its job.

The appeals court also found that there was enough evidence, in legalese "substantial evidence," to support the FAA's decision to overturn the award. "Substantial evidence is defined as more than a 'scintilla,' but less than a preponderance of the evidence. The question is not whether [the protester's] view of the facts supports its version of what happened, but rather whether the [agency's] interpretation of the facts is reasonably defensible." The appeals court found substantial evidence primarily on the fact that the TET found superiority while the IPT found the proposals equal. Because the ODRA based its decision on this unexplained shift, the court said the ODRA had "substantial evidence" to overturn the award.

Multimax, Inc., v. Federal Aviation Administration et al., No. 99-1515, United States

Court of Appeals for the District of Columbia Circuit, November 21, 2000. 🗁

Agency's needs change — new procurement need not follow prior procurements

RULE: *Because each procurement is different, an evaluation done for an earlier procurement has no relevance to a later evaluation.*

A common argument from an incumbent contractor is that, because it once satisfied an agency's needs, it will always satisfy an agency's needs. Although this defies common sense, the argument continues to be made. One type of procurement in which this argument is often made is in leasing. A landlord for the government seems to think that the government cannot change its mind. If the government finds that the landlord's property is no longer suitable for the government, that conclusion must be unreasonable. This losing argument was recently made to the General Accounting Office (GAO) which rejected it again. The importance of the decision is the reminder that an agency can reasonably change its needs without fear that the "it was 'ok' last time" argument will work. It's acceptable for the government to have a short memory. So a contracting officer should not hesitate to change a specification to meet the agency's current needs.

The Natural Resources Conservation Service had been leasing space from Sockey Real Estate for years. When Sockey wanted more that the government was willing to pay to renew the lease, the government issued a solicitation for offers (SFO) for new space. Sockey submitted an offer but lost. It then protested to GAO.

One of Sockey's arguments was that the agency's evaluation of its proposal was unreasonable. Sockey's logic went this way. Last time the government needed space, Sockey built the space to suit the government's exact needs, a so-called build-to-suit. The space at that time met the government's needs. Therefore, according to Sockey, an evaluation that finds Sockey's building inadequate for the government's current needs must be unreasonable.

GAO denied the protest. The fact that space was once acceptable to the government was irrelevant. It's the government's current needs that are important. The agency in fact had changed its approach — to a service center configuration which Sockey's building could not meet. In addition, Sockey's representative cut off negotiations soon after the negotiations had begun. As a result, Sockey had in effect forfeited its right to complain about the government's changed configuration and whether it's building could meet the new government needs.

R.L. Sockey Real Estate and Construction Co., B-286086, November 17, 2000. 🗁

Correction

The December Acquisition Advice column *(See the* Federal Acquisition Report*, December 2000, page 7.)* incorrectly stated that the "government mishandling" exception for late proposals applies to commercial item solicitations even though the FAR does not specifically authorize the exception. In response to the decision cited in the column, Russo & Sons, Inc., B-280948, December 11, 1998, the late bid rule at 52.212-1, 52.214-7, and FAR 52.215-1 was revised by FAC 97-14 to contain the exception.

FAR 52.212-1(f)(2)(i) now reads:

Any offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and—

(A) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of offers; or

(B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or

(C) If this solicitation is a request for proposals, it was the only proposal received.

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Rules

FAR Council

Council needs data and copyrights

The Federal Acquisition Regulation (FAR) Council has requested the Office of Management and Budget (OMB) to extend the information collection requirement concerning rights in data and copyrights.

Currently, firms are required to

- identify in their proposal any proprietary data they would use during contract performance;
- deliver proprietary data to the government for use in evaluation of work results; and
- certify that the data delivered under a contract is complete, accurate, and compliant the terms of the agreement.

The FAR Council is seeking comments on whether the collection of this information has practical utility and how the burden of providing such information may be minimized through the use of appropriate technology.

Submit written comments by January 30, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension to an existing OMB Clearance. Contact: John Blumenstein at (202) 501-2373. 65 *Federal Register* 75243, December 1, 2000. 🗁

Subcontractors need information to choose a prime

The FAR Council has requested OMB to extend the information collection requirement regarding subcontractor payments.

Currently, contractors must provide subcontractors and suppliers, upon their request, a copy of the payment bond the contractors furnished the government. The information is used by subcontractors and suppliers to determine if they should work with the prime contractor.

Submit written comments by January 30, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension to an existing OMB Clearance. Contact: John Blumenstein at (202) 501-2373. 65 *Federal Register* 75244, December 1, 2000. 🗁

Contractors are still required to provide recovered material information

The FAR Council has requested OMB to extend the information collection requirement regarding environmentally sound products.

Currently, contractors must provide information on the amount of recovered material used in a contract when the price of the material exceeds $10,000 or when the aggregate amount paid for the material in the preceding fiscal year was $10,000 or more.

Submit written comments by February 5, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension to an existing OMB Clearance. Contact: Laura Smith at (202) 208-7279. 65 *Federal Register* 75925, December 5, 2000. 🗁

Contractors must explain compensation plans

The FAR Council has requested OMB to extend the information collection requirement for professional employee compensation plans.

Currently, contractors must submit total compensation plans, including proposed salaries and fringe benefits, for professional employees with supporting data to contracting officers for evaluation.

Submit written comments by February 5, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension to an existing OMB Clearance. Contact: Linda Nelson at (202) 501-1900. 65 *Federal Register* 75926, December 5, 2000.

Department of Defense

DoD prohibits foreign acquisitions

The Department of Defense (DoD) has amended the Defense Federal Acquisition Regulation Supplement (DFARS) to restrict the acquisition of roller bearings and vessel propellers to those produced by a domestic source. The restriction, however, does not apply if the material is purchased as commercial items.

Submit written comments by February 12, 2001, to Amy Williams, OUSD (AT&L) DP (DAR) IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; Fax: (703) 602-0350; or electronically at *dfars@acq.osd.mil*. Please cite DFARS Case 2001-D301 in all correspondence.

Interim rule with request for comments. Contact: Amy Williams at (703) 602-0288. 65 *Federal Register* 77827, December 13, 2000.

DoD changes profit policy

DoD has amended the DFARS to revise the regulation's profit policy. Specifically, the rule

- amends the weighted guidelines method of profit computation at 215.404-71 to combine the management and cost control elements of the performance risk factor;
- establishes a new "technology incentive" range for technical risk;
- modifies the cost control standards; and
- requires defense agencies to use a structured approach for developing a prenegotiation profit for fee objective on any negotiated contract action when cost or pricing data is obtained.

The rule was originally proposed on May 22, 2000 (65 FR 32066). The final rule differs from the proposed one in that it

- permits the use of the technology incentive range for acquisitions that include application of innovative new technologies; and
- specifies that the new technology incentive range does not apply to efforts restricted to studies, analyses, or demonstrations that have a technical report as their primary deliverable.

Final Rule. Contact: Amy Williams at (703) 602-0350. 65 *Federal Register* 77829, December 13, 2000.

DoD opens acquisitions to foreign sources

DoD has amended the DFARS to phase out restrictions on the acquisition of PAN carbon fiber from foreign sources. Currently, PAN carbon fiber may only be purchased from domestic or Canadian sources. By May 31, 2005, however, the prohibition will be completely eliminated, although solicitations and contracts issued before May 31, 2003, will continue to contain the restriction.

Final Rule. Contact: Amy Williams at (703) 602-0288. 65 *Federal Register* 77832, December 13, 2000.

DoD issues new MMAS rules

DoD has amended the DFARS to change the criteria for determining when review of a contractor's material management and accounting system (MMAS) is needed. Under the new rule, reviews will be conducted only in cost-reimbursement and fixed-price contracts with progress payments made on the basis of costs incurred by the contractor. Reviews will not be conducted under contracts with small businesses, educational institutions, and nonprofit organizations.

The rule also eliminates the requirement that contractors conduct a MMAS "demonstration" and instead requires them to

- have policies, procedures, and operating instructions that adequately describe its MMAS; and
- provide to the government, upon request, the results of internal reviews that they have conducted to ensure compliance with established MMAS policies.

Finally, the dollar threshold for conducting an MMAS review of contractor insurance/pension plans has been changed to $40 million of qualifying sales to the government during the contractor's preceding fiscal year.

Final Rule. Contact: Rick Layser at (703) 602- 0350. 65 *Federal Register* 77833, December 13, 2000. 🗁

DoD establishes indemnity rules for contractors

DoD has amended the DFARS to permit the Under Secretary of Defense (Acquisition, Technology, and Logistics) to indemnify a contractor against unusually hazardous or nuclear risks.

Final Rule. Contact: Rick Layser at (703) 602-0293. 65 *Federal Register* 77835, December 13, 2000. 🗁

National Aeronautics and Space Administration

Contractors must provide security for their own employees

The National Aeronautics and Space Administration (NASA) has proposed to amend its acquisition regulation (NFS) to add a new clause governing the emergency evacuation of contractor employees from foreign locations.

Specifically, the proposal would require contractors to make all arrangements for providing emergency medical services and evacuation for their employees when performing agency contracts outside the United States. If the government provides such services, contractors would be required to provide reimbursement.

Submit written comments by February 5, 2001, to Joseph LeCren, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546; or electronically at *jlecren@hq.nasa.gov*.

Proposed rule. Contact: Joseph LeCren at (202) 358-0444. 65 *Federal Register* 76600, December 7, 2000. 🗁