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INSIDE

Prison industries drastically need reform, Congressmen testify

The Federal Prison Industries (FPI) has the corner on the federal market, according to recent testimony in support of a newly-proposed House bill, the *Federal Prison Industries Competition in Contracting Act*, that would require FPI to compete for its contracts. Several Congressmen, along with representatives of FPI and small federal contracting firms testified last month before the House Committee on Small Business on the effect that FPI has on small business. Speakers included Small Business Committee Chairman, Don Manzullo (R-Il.), Congresswoman Carolyn B. Maloney (D-NY), FPI representative Joseph Aragon, and small business-owner Ms. Bobbie Gentile.

Manzullo reinforced his belief that all prisoners need training and education in real life skills. "However," he said, "that goal cannot overshadow the increasing impact that Federal Prison Industries has on private sector businesses, particularly small businesses seeking to sell to the federal government."

Manzullo pointed out that the government is prohibited by law from importing any goods produced by prison labor. "U.S. companies do face competition from homegrown prison labor at slave labor wages," he said. The congressman questioned whether it is advisable that "law-abiding, tax-paying citizens are forced to compete against a government subsidized, tax-exempt, regulation-exempt entity."

According to Maloney, members of her constituency in New York have nearly been driven out of business by FPI's unfair business practices. Specifically, FPI has repeatedly increased production of goods without prior clearance from the government. Agencies are required to purchase products from FPI if the products meet agency needs and if the prices

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Legislative Journal

Bills Introduced

H.R.1577, Federal Prison Industries Competition in Contracting Act of 2001. Requires Federal Prison Industries to compete for its contracts minimizing its unfair competition with non-inmate workers and the firms that employ them.

Status: Referred to the House Subcommittee on Crime. 🗁

H.R. 2055, Government Neutrality in Contracting Act. Preserves open competition and federal government neutrality towards the labor relations of federal government contractors on federal and federally-funded construction projects.

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

Status of Bills Pending

H.R. 588, Fairness to Local Contractors Act. Provides authority to, and imposes requirements on the Secretary of Defense to facilitate state enforcement of state tax, employment, and licensing laws against federal construction contractors. Specifically, the bill provides that to be considered a responsible bidder for a contract for the construction of a public building, a company must submit with the bid a tax clearance from the state, indicating that the company is in compliance with all the tax laws of the state in which the contract is to be performed.

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

H.R. 917, Federal Living Wage Responsibility Act. Requires that full-time federal government workers and workers hired under federal contracts receive wages that are above the federal poverty line.

Status: Referred to the House Subcommittee on Workforce Protections. 🗁

H.R. 1859, Construction Quality Assurance Act of 2001. Prohibits "bid shopping" between contractors and subcontractors in federal construction projects, in order to ensure that the government is getting the best value.

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

S. 734, Untitled. Expands eligibility for the award of construction contracts to persons that have performed similar construction work at United States diplomatic or consular establishments abroad under contracts limited to $5,000,000.

Status: Referred to the Senate Committee on Foreign Relations. 🗁

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do not exceed the highest rate offered by contractors. As a result, contractors have no real recourse when the prison industry decides to increase production, Maloney noted.

Both Maloney and Manzullo agreed that passage of H.R. 1577 would restore some of the balance between FPI and the private sector. In addition to requiring FPI to compete for federal work, the bill would require the government to compete other, non-mandatory source contracts for FPI, to sustain the amount of work available to federal inmates. Finally, H.R. 1577 would also foster public participation in the FPI decision-making process.

Joseph Aragon, FPI representative, agreed that the organization's policies need to be reformed. He commented that FPI has established itself as an effective method of teaching inmates valuable job training and work skills, directly impacting their ability to reintegrate into society after being released from prison. Over 95 percent of federal inmates return to the community after serving their sentences, Aragon said, so the skills taught by FPI work are invaluable.

Aragon also emphasized that FPI regularly exceeds procurement goals with small, minority, or women-owned businesses, awarding 63 percent of its purchases in fiscal year 2000 – $260 million – to those firms.

The bill has been referred to the House Subcommittee on Crime, and currently has 74 cosponsors.

Congress calls for better service contracting methods

The government's methods of contracting for services lag behind those of private sector companies, according to Congressman Tom Davis (R-Va.), Chairman of the House Subcommittee on Technology and Procurement Policy. Davis raised concerns that while the government's use of service contracts has increased at the same rate as the private sector over the past decade, the private sector currently uses much more innovative practices.

Davis voiced his questions to his Subcommittee at a recent hearing which debated the need for a new Services Acquisition Reform Act. "The Subcommittee needs to determine what can and should be done legislatively to promote greater utilization of commercial best practices, increased cross-agency acquisitions, along with enhanced cross-agency information sharing, share-in-savings contracting, and acquisition workforce training," said Davis.

He also pointed out the drastic rise in federal money spent on service contracting – 24 percent since 1990. The government spent $87 billion on such agreements in fiscal year 2000, up from $70 billion in FY 1990, Davis cited. According to the latest acquisition statistics, service contracts now represent 43 percent of total government purchasing—larger than any other category.

To better meet the needs of the federal government in regards to how it contracts for services, Davis recommended that agencies strengthen their contract management and implement more innovative contracting options, by

- providing better training and education resources for the acquisition workforce, and making proper training a requirement for all employees;
- successfully implementing performance-based services acquisitions;
- extending to civilian agencies the same authority currently available to the Department of Defense (DoD) to purchase services under FAR Part 12, *Acquisition of Commercial Items*;
- implementing a horizontal, rather than vertical, integration of acquisition functions to promote higher levels of customer support as well as more efficiency in the acquisition and execution of services;
- reevaluating the role of the Service Contract Act and rewriting various out-of-date definitions; and
- reengineering technical processes to help agencies better accomplish their missions.

Davis has requested the General Accounting Office (GAO) to conduct a study to determine what steps agencies are taking to accomplish these goals. A report is expected within the next few months.

Further evidence of need for new service contracting legislation?

Poor management of service contracts undermines the government's ability to obtain good value for the money it spends, according to David E. Cooper, Director of Acquisition and Sourcing Management at the General Accounting Office (GAO). Cooper testified at the House Subcommittee on Technology and Procurement's recent hearing on service contracting – *GAO-01-753T*.

Cooper stated that federal agencies have failed to make any significant improvement in their management of service contracts, despite the prevalence of these type of agreements. Long-standing problems continue to exist, such as poor planning, inadequately defined requirements, insufficient price evaluation, and lax oversight of contractor performance.

Specific examples of poor contract management highlighted by Cooper included:

- Department of Defense (DoD) broadly defined the work descriptions for information technology service orders placed against several governmentwide contracts, making it impossible to establish firm prices for the work. The work descriptions were defined so broadly because the orders spanned several years, and contracting officials were uncertain what support they would need in future years;
- DoD's Inspector General (IG) identified problems with over 100 contract actions, worth more than $6.7 billion, for professional, administrative, and management support services. The IG found that contracting officials typically did not use experience from prior acquisitions of the same services to help define requirements more clearly;
- DoD personnel sought competing quotes from multiple contractors on only a few of the total orders for information technology services placed against the General Services Administration's (GSA's) federal supply schedule contracts. DoD's limited analysis prevented a meaningful basis for assessing whether a contractor would provide high-quality, cost-effective services;
- Department of Transportation's (DOT's) IG found that on an $875 million contract for technical support services, the Federal Aviation Administration did not develop reliable cost estimates or use the estimates to assess whether the contractor's proposed costs were reasonable; and
- Department of Energy's (DOE's) IG reported that a certain $218 million contract for security services was intended to consolidate security services under a single contractor and reduce costs by reducing staffing. However, the work was never specifically defined, and consequently, the number of security personnel actually increased, and the agency incurred an additional $7.5 million in costs instead of saving an estimated $5 million.

Cooper is reminding agencies that they must tackle their acquisition issues in conjunction with better human capital management. "One cannot be done without the other," he emphasized. "Expanding the use of performance-based contracting approaches and emphasizing strategic human capital planning are welcomed and positive steps, but sustained leadership and commitment will be required to ensure that these efforts mitigate the risks the government currently faces when contracting for services." 🗁

Follow up: A-76 outsourcing at NIMA

William Haynes, General Counsel for the Department of Defense (DoD), recently upheld the National Imagery and Mapping Agency's (NIMA's) decision to convert work at installations in Maryland and Missouri without an A-76 competition. NIMA is in the process of transferring work presently performed by federal employees to Native American tribally-owned 8(a) firms.

Haynes responded to a May 4 letter to the Secretary of Defense from House Democratic Leader Richard Gephardt (D-Mo.) and 10 members of Congress which questioned the practice. *See* Federal Acquisition Report*, June 2001, page 2.* In

Haynes' June 11 letter to Senator Jean Carnahan (D-Mo.), he defended his agency's actions. "NIMA management has determined that the IT and IS functions currently performed by approximately 1,100 government employees plus a number of contractors could be restructured to provide more efficient and less costly operations," Haynes wrote.

Haynes explained that the Small Business Administration's (SBA's) 8(a) program provides preferential procurement opportunities for small, disadvantaged businesses that meet certain social and economic criteria. The agency is considering a proposal from an 8(a) firm, and expects to make a decision by September 15, 2001.

The letter went on to express NIMA's principle concern – continued customer support and preservation of its skilled workforce. "Management recognizes that any contractor's performance would benefit from the unique qualifications of the current NIMA employees, including their security clearances," Haynes noted. As a result, NIMA is considering using voluntary separation incentive payments to assist current employees in any imminent transition.

The letter concluded that NIMA does not expect any reduction-in-force or other involuntary personnel actions as due to the conversion. "I am satisfied that appropriate legal procedures have been followed," he wrote. "[A] suspension of NIMA's activities is unnecessary."

Reader's Comments

In response to the article entitled "DoD is on the 'outs' with Congress for outsourcing," published in the June 2001 issue of the Federal Acquisition Report*, subscriber Fred Hamren, President and CEO of Akima Corporation, a Native American-owned 8(a) business, commented:*

"Directly converting Department of Defense work to the private sector is actually not a new practice. Since 1996, an amendment to DoD's Appropriations Act has permitted commanding officers to directly convert contracts to 8(a)-certified companies owned by the blind and severely handicapped, in addition to Native American, tribally-owned companies. Both Part 13 of the Code of Federal Regulations and the Federal Acquisition Regulation permit direct conversion of sole-source contracts to Native American-owned entities. That's the law. Now that companies like mine have been received certain contracts under the amendment, it seems that Congress and the labor unions are causing an uproar, when really, this is not new.

My company does work for NIMA. In reality, we are using A-76, and we are helping government workers keep their jobs, in accordance with all the laws. Civilian employees do most of the work at NIMA. Even the janitors are required to have level 5 clearances – above Top Secret – just to enter the classified areas. As a contractor, I have to negotiate an acceptable pay rate with NIMA employees in order to keep their qualified employees, from janitors to computer programmers. It would be too expensive and time-consuming to hire new employees and wait for them to receive security clearances. By directly converting certain contracts to 8(a) firms, the government has created the best situation in regard to hiring government workers into the civilian workforce that has ever existed."

DoD finds that COs often fail to determine price reasonableness

The Department of Defense's Office of Inspector General (DoD OIG) has found that agency contracting officials frequently fail to obtain sufficient information to determine whether a price for a commercial item is reasonable. According to Federal Acquisition Regulation (FAR) Part 12.209, contracting officers "must establish price reasonableness" of a commercial item before purchasing it. Several techniques may be used including soliciting several competitive offers or requiring information other than cost or pricing data.

The DoD OIG based its finding on a review of 145 contract actions between fiscal years 1998 and 1999. Specifically, the OIG found that contracting officials

- lacked valid exceptions from obtaining certified cost or pricing data and failed to obtain required data in nearly half of the actions it reviewed;

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- failed to adequately document their finding of price reasonableness in almost all cases;
- did not challenge items categorized as commercial and instead simply accepted prices based on contractors' catalogs and price lists; and
- used questionable competition as a basis for contractor prices and relied on unverified prices from prior contracts as the basis for determining that current prices were reasonable.

As a result of these problems, the DoD OIG calculated that the agency paid nearly 25 percent higher prices for most of the items it purchased.

To remedy the problem, the OIG recommends that DoD

- initiate price trend analyses for sole-source and competitive acquisitions where only one offer is received;
- emphasize the proper process for dealing with contractors that refuse to provide needed data when requested by the contracting officer;
- emphasize better procurement planning to avoid the conditions that lead to unnecessarily urgent procurements;
- obtain cost or pricing data when needed;
- utilize the Defense Contract Audit Agency for pricing assistance;
- establish controls on the use of exceptions for not obtaining cost or pricing data; and
- establish a process to identify sole-source and competitive one-bid contracts with unreasonably high-priced items.

A complete copy of the audit report can be obtained from DoD OIG's website at *www.dodig.osd.mil*. 🗁

GAO identifies MAA implementation obstacles

Only 2 out of the 14 contracts that have been authorized under the General Services Administration's (GSA's) Metropolitan Area Acquisition (MAA) contract program since last October have been implemented, according to a recent report from the General Accounting Office (GAO) – *GAO-01-798T*. All of the 37 contracts awarded by GSA under the program require customers to be transitioned from their old contracts within 9 months of final authorization from GSA.

In April, Congressman Tom Davis (R-Va.) requested that GAO investigate ongoing delays in implementing the MAA program. *See* Federal Acquisition Report*, May 2001, page 4.* GSA initiated the MAA program as a result of the Telecommunications Act of 1996, which originally called for local service competition. The program 's objective is to increase competition and reduce local telecommunication prices for the entire government. Each MAA contract that GSA awards is fixed-price, indefinite-delivery, indefinite quantity, with a base term of 4 years from date of award, with 4 one-year options.

GAO found that issues such as the recent deregulation of local telecommunications services in New York have presented unexpected obstacles that will take time to resolve. Other hurdles include

- contractor performance;
- MAA contractor marketing;
- customer budgets; and
- the process GSA uses to allocate business among contractors in multiple cities.

GAO has recommended that GSA take steps to improve the quantity and quality of its communications with MAA contractors to alleviate future transition delays. 🗁

DoD recalls contractor cost sharing

Contractors should not have to make significant monetary investments in Department of Defense (DoD) research and development contracts, according to a recent memorandum from Pete Aldridge, Undersecretary of Defense for Acquisition and Technology. Aldridge called the practice short-sighted and said that instead, DoD should allow contractors to earn money on the contracts in exchange for good performance.

Toward that end, the Undersecretary has instituted a new policy which will be incorporated into the DoD 5000 series directives. Specifically, contractors will no longer be permitted to

- use their independent research and development (IR&D) funds to subsidize defense contract research and development;
- accept cost ceilings that in essence convert cost-type contracts to fixed-price contracts;
- undergo unreasonable capping of annual funding increments on research and development contracts; and
- accept development contracts at prices lower than the probable cost of performance.

An exception exists, however, for "unusual situations" where there is a reasonable probability that the contractor would produce a commercial application as a result of the research and development effort.

JECPO gets new name, new focus

The Department of Defense (DoD) has renamed its Joint Electronic Commerce Program Office (JECPO) the Defense Electronic Business Program Office. The name was changed to recognize the office's ongoing expansion from electronic commerce to electronic business, but the change will not affect operations.

JECPO was originally organized as a joint project between the Defense Logistics Agency (DLA) and the Defense Information Systems Agency (DISA) in April 1998. DoD's Chief Information Officer (CIO) is in charge of all basic functions of the electronic business program, while DLA

- coordinates the full business cycle requirements;
- identifies best business practices; and
- provides functional industry outreach.

DISA is responsible for

- leading the technical architecture;
- coordinating standards;
- developing technical solutions;
- developing enterprise licensing approaches;
- conducting tests;
- carrying out technical cross functional integration; and
- systems engineering.

Since the office was established 2 years ago, it has consistently gained momentum, according to Scottie Knott, Director of the newly renamed Defense eBusiness Program Office. All DoD organizations will be integrating electronic business tools into their business and management practices in the near future, she said.

"The use of electronic business technologies within DoD has skyrocketed over the past several years especially in the traditional areas of 'Buying and Paying,'" commented Knott. "Now the challenge is for the Department of Defense to harness this enormous potential into the acquisition, logistics, human resources, health care, financial management and other functional areas, creating a seamless flow of enterprise information. This expansion from electronic commerce to electronic business is a natural and necessary progression in support of the revolution in business affairs."

Decisions

Parties change common law duty to mitigate damages

RULE: *The typical common law provisions in a contract can be changed if the parties want to change them.*

In many cases, certain aspects of contract law are do-it-yourself. Over the centuries that the common law involved, one of its hallmarks was its philosophy that businesspeople should be given a lot of freedom to structure their business deals the way they wanted. For example, state partnership laws often simply fill in the gaps that partners did not address in their partnership agreement. We saw this "roll your own" practice at work in a recent decision involving timber sales. The Court of Federal Claims

concluded that the common law duty to mitigate damages had been drafted out of the agreement.

Capital Development Co. had a number of timber sale contracts with the U.S. Forest Service. These contracts gave Capital Development the right to cut and remove timber from Forest Service land. The contractor breached a number of the contracts so the government sold the timber to other parties but did not get as much as it would have if Capital Development had bought them. The government then tried to get the difference from the defaulting Capital Development.

The contractor argued that the method the government used for determining the value of the timber, stated in the contract, was established by a discredited appraisal method that had been changed in later contracts. The contractor argued that because the appraisals had not been done properly, the appraisals did not reflect fair market value, the standard that should have been used by the government. The government did not use an accurate appraisal method, resulting in its failure to mitigate the contractor's damages.

The court did not agree. The contract language detailing how damages would be calculated and how the appraisal would be done trumped the common law duty to mitigate damages that would have required the government to use an accurate appraisal system. "The contract here directs the Forest Service to credit the defaulted contractor by using the then standard appraisal method. That happened. The criticism that the method contracted for does not produce the fair market value figure is thus irrelevant." Turning the "general principles of contract law" concept around, the court observed that "one of the general principles of contract law is that contracts are enforced according to their terms, even if the effect is to blunt what would otherwise be an obligation to mitigate." The court concluded that the government had no duty to mitigate damages and had calculated damages properly because it had used the calculation method stated in the contract, despite the fact that the method had been discredited and did not calculate fair damages.

Capital Development Co. v. United States, US Court of Federal Claims No. 750-87C, April 18, 2001. 🗁

The government's failure to carry out promised evaluation is not breach

RULE: *Even though the government's contract promised an evaluation of the contractor's performance, the government's failure to evaluate the contractor is not a breach of contract. The evaluation provision was for the benefit of the government and therefore can be waived by the government without breaching the contract.*

Past performance evaluations are increasingly becoming a critical part of contract performance, and in fact, of winning the next contract. Ever since Congress made past performance a mandatory evaluation factor in negotiated procurements, and particularly now that many construction contracts are using the negotiated method, past performance evaluations can be life or death for contractors. What happens if the government promises to do an evaluation of a contractor's past performance, but doesn't? It would seem clearly to be a breach of contract – the government promised evaluation but did not do it. Why isn't that a breach of contract? The answer given recently by one court is that the promised past performance evaluation was solely for the government's benefit, not the contractor's. Since it was for the government's benefit, the government could waive the requirement without breaching the contract. The test, therefore, is "whose benefit is the past performance evaluation?"

The U.S. Department of Agriculture (USDA) hired Ms. Ho as an Agricultural Marketing Specialist for its agricultural trade office in China. She would be a contract employee, not a federal employee. The contract was for a base year with four one-year options. The contract said that she would receive a written evaluation of her performance 60 days prior to the end of each contract. Also, a satisfactory performance evaluation was required, or the contract would not be renewed. USDA renewed her contract for two option years but not for the third option year. She received no performance evaluation

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Lesson Learned: It pays to review an 8(a) firm's qualifications as thoroughly as possible

Late last month, William Starling, president of S&A Contracting, Inc., plead guilty to defrauding and making false statements to several agencies. Starling had received several contracts under the Small Business Administration's (SBA's) 8(a) Program.

Unfortunately, S&A was a company in name only. S&A was established on paper as a general construction company. In fact, however, it was a "storefront" operation run out of an apartment on Clinton Avenue in Newark. S&A never had any employees, equipment or experience necessary to be a viable construction company. When Sterling applied for the 8(a) Program, his application included fictitious resumes for individuals purported to be key employees of S&A, documents purported to be corporate minutes containing false signatures of the corporate officers, and false statements regarding the number of S&A employees and types of construction equipment the company owned.

In reliance on the false documentation, SBA assisted S&A in obtaining 7 government contracts. Starling brokered the contracts to non-minority owned construction companies in return for 10 to 15 percent of the total contract value. The other companies completed the actual work while Starling processed the paperwork with SBA, making it appear that S&A was performing the work, and collected contract payments.

Several years after the charade started, Starling began to progressively keep larger portions of the contract payments for himself. He began to fall behind on paying the companies that performed the actual work. As a result, they ceased work on the contracts and abandoned the job sites. S&A defaulted on several contracts. Soon after, his fraud was discovered.

LESSON: Although under the 8(a) Program SBA certifies to an agency that it is competent and responsible to perform a specific contract, *See FAR Part 19.800(c)*, it may be still in interest of the contracting officer to investigate the competency of a contractor. FAR Part 19.809 provides that contracting officers should request a preaward survey of an 8(a) contractor whenever considered useful. The survey may review a contractor's overall capabilities, including those regarding technical skills, production, and quality assurance. Specifically, the survey should seek to answer those questions which are applicable to any other responsibility determination, including whether a contractor

- has adequate financial resources to perform the contract, or the ability to obtain them;
- is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- has a satisfactory performance record;
- has a satisfactory record of integrity and business ethics including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws;
- has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors);
- has the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
- is otherwise qualified and eligible to receive an award under applicable laws and regulations.

An additional review by an agency of S&A's competency as part of a responsibility determination may have revealed the true nature of the company's stature.

prior to the end of the base year or prior to the end of the first option year. She did get an evaluation during the second option year. Toward the end of the second option year, she and her supervisor had a dispute over whether to send a film crew of the Chinese television station to the United States to make a documentary about USDA. The supervisor decided against the idea and several days later told her that he would not renew the contract for the third option year. When USDA did not pick up the third option year, she sued the agency, arguing among other things, that USDA breached the contract she had by not doing a performance evaluation either at the end of the base year or at the end of the first option year.

The US Court of Federal Claims said there was no breach of contract. The court pointed out that she was given one evaluation after the base year ended and the first option year began. But in any event, whether she was given an evaluation or not didn't matter. The court started with the proposition that a plaintiff can't win a breach of contract suit "when the provisions alleged to have been violated were not inserted into the contract for the benefit of the plaintiff." The court then pointed out that "a party to a contract can waive provisions included in the contract for that parties benefit without incurring liability." The court said that the evaluation requirement was in the contract solely for the government's benefit. "The renewal of plaintiffs contract was dependent on her having received a satisfactory performance evaluation. Because the requirement that plaintiff's performance be found satisfactory serves to protect the government interests by insuring that its contractors are performing adequately and by avoiding improvident renewals, the court finds that the provision was included in the contract for the benefit of the defendant, rather than plaintiff." The court concluded that the failure to do an evaluation was not a breach of contract by the government.

Dangfeng Shen Ho v. The United States, U.S. Court of Federal Claims, No. 00-202C, March 30, 2001. 🗁

Bribe costs contractor dearly

RULE: *Any contract entered into as a result of a bribe is a void contract. A contractor giving a bribe can be fined many times over the amount of the bribe.*

A bribe can cost a contractor a lot more than the bribe itself. A bribe exposes a contractor to losing any equitable adjustment that might otherwise be due under the contract, it exposes him to termination for default, it exposes him to fines, and it exposes him to a jail term. And the fact that the government might have known of the bribe will not excuse a contractor's conduct as a recent decision of the Armed Services Board of Contract Appeals shows.

The Army issued a solicitation for sanitary room repair in Germany. The contract specialist for the Army was bribed by one of the potential contractors to rig the bidding process. In exchange for the bribe, the contract specialist told the contractor who his competitors would be so that he could make deals with them. And to make sure that only these identified competitors would submit bids, the contract specialist did not post the solicitation for other bidders to see. The contractor naturally won the contracts – two of them.

While the contract was being performed, the Army got suspicious and suspended the contractor from further bids. Curiously, the Army also extended the contracts of the briber even after it got suspicious. After he had performed almost all the work on the two contracts, he submitted invoices for equitable adjustments and final payment. When the government refused to make final payment, he stopped work. The government terminated the contract for default which the contractor appealed to the board. The contractor also appealed the contracting officer's denial of the equitable adjustments. Eventually, the briber and bribee were convicted of criminal offenses in Germany. The Army then got more involved. It added another reason for terminating the contract, this time for giving the bribes. It also ordered the contractor to pay the government an amount equal to about 5 times the bribe given the contract specialist.

The contractor fought the government's actions, in part by arguing that the government knew of the alleged bribes yet encouraged the contractor to finish up the work under the contracts.

The board did not accept these arguments and upheld the government's actions. "The operative facts herein clearly and convincingly establish that appellant's owner, Mr. Pfister, paid a total of at least DM 80,000 to Mrs. Gimpl for the express purpose of bribing her to manipulate the competitive bidding process. In return, Mrs. Gimpl provided Mr. Pfister with the bidders lists that contained only the identities of the firms he had designated to participate in the two procurements involved herein. Mrs. Gimpl also prevented other potential contractors from learning of and participating in the two procurements involved herein by failing to post the solicitations on the bulletin board of her office."

The board did not agree with the contractor's argument about government knowledge absolving the contractor of responsibility. The contracts could not be ratified by the government's knowledge or suspicion of bribery. Any government knowledge of the crime could not excuse it. "This is due to the primacy of the public interest in preserving the integrity of the Federal procurement process as well as the overriding concern for insulating the public from corruption."

Erwin Pfister General-Bauunternehmen, ASBCA Nos. 43980, 43981, 45569, 45570, May 18, 2001. 🗁

How is a brand new joint venture to be evaluated on past performance?

RULE: *In considering the past performance of a joint venture, an agency can consider the performance of the entity that would actually perform the work.*

In government contracts, it's not unusual for two companies to team up and form a joint venture to do the work. Now that Congress is putting emphasis on past performance as an evaluation factor, how is this "new firm" to be evaluated? Technically, it's a brand new firm having no experience and therefore its experience should be rated as a neutral factor. This simplistic view, however, hides the fact that the firms forming the joint venture could have years of experience in a particular line of work. In a recent case, the General Accounting Office (GAO) handed down some guidance to agencies attempting to evaluate the experience and past performance of joint ventures.

Urban-Meridian Joint Venture submitted a proposal to the General Services Administration (GSA) for operation, maintenance and repair services at the United States Court of Appeals in San Francisco, California. The solicitation would evaluate, among other factors, experience and past performance. Another offeror was also a joint venture, B&W Service Joint Venture.

Urban-Meridian was a joint venture formed under the Small Business Administration's (SBA's) mentor-protégé program. Urban Systems, Inc., was a small disadvantaged business and protégé. Meridian Management Corporation was a large business and mentor. Meridian was to be involved in the contract but the real day-to-day work would be performed by Urban-Meridian.

Urban-Meridian's experience/past performance was rated at a 5 (out of 10 available) points. GSA looked at the experience of both joint ventures. Urban had no directly related experience; Urban's only experience was in parking garage management contracts. Meridian had some experience with all required systems and some experience in courthouses. Also considered was Meridian's past performance ratings; they were satisfactory, but not outstanding. When Urban-Meridian lost, it protested.

Urban-Meridian argued that GSA had improperly downgraded its experience and past performance and had improperly up-graded B&W's. GSA allegedly gave Urban-Meridian no credit for the mentor-protege program.

GAO had no problem with the way GSA evaluated Urban-Meridian. "Where an agency is evaluating the experience and past performance of a joint venture, there is nothing improper in its considering the specific experience and past performance of the entity that would actually perform the work. The SBA regulations governing

the mentor-protégé program do not provide otherwise and we find no other basis for precluding the agency from fully considering the experience and past performance of both firms in such an arrangement." It cited a precedent that concluded: "While an agency may consider the separate qualifications of joint venture partners in evaluating the qualifications of the joint venture, there is no requirement that a corporate experience evaluation disregard a lack of experience by the joint venture itself." In short, an agency properly can take a look at the entire "past performance" picture of a joint venture.

GAO also found no problem with the way GSA evaluated B&W's past performance. "A procuring agency properly may evaluate the corporate experience of a new business entity by considering the experience of a predecessor firm, including experience gained by employees while working for the predecessor firm. The key consideration is whether the experience evaluated reasonably can be considered predictive of the current offeror's performance under the contract. Here, since the four on-site employees proposed by BWCS worked for the predecessor firm in the same capacities they will fill under the new contract, we think it was reasonable for the agency to consider the employees' experience and past performance predictive of BWCS's performance if it received award."

GAO denied the protest.

Urban-Meridian Joint Venture, B-287168; B-287168.2, May 7, 2001. 🗁

Lessor not responsible: rent won't cover costs

RULE: *An offeror for a federal construction and lease project may properly be found to be non-responsible if its price proposal does not include enough rent to cover construction costs.*

Before the government leases property from a private landlord, it wants to make sure that the rent the government will pay enough to cover the costs to prepare the space for government occupancy, the so-called build-out costs. To help the government get this information, the solicitation, called a solicitation for offers (SFO) in leasing, requires all offerors to prove they can actually make a go of it if the government gives it the lease. If an offeror can't prove it's responsible, it cannot get the lease. What kind of information can be used by the government to justify a finding that an offeror is non-responsible? A recent decision of the GAO gives a good indication.

The General Services Administration (GSA) issued an SFO for the construction and lease of office and laboratory space for the US Drug Enforcement Agency (DEA) in San Diego, California. Award was to be made to the firm whose offer represented the greatest value to the government. Both Acquest Development LLC and Western Devcon submitted best and final offers (BAFO) that had deficiencies in them. The contracting officer did a review of the finances of both. GSA's credit and finance division had no problem with Western but it did with Acquest. In addition, GSA determined that Acquest would be unable to recover its construction costs through the rent it would receive. So the contracting officer found Acquest not financially responsible and awarded the contract to Western.

Acquest's protest focused on the SFO provision called "Evidence of Capability to Perform." It requires an offeror to submit "[s]atisfactory evidence of at least a conditional commitment of funds in an amount necessary to prepare the space." Acquest said that it had.

GAO said that it hadn't. "Contracting officers are vested with broad discretion in exercising the business judgment involved in a nonresponsibility determination. We consider only whether the negative determination was reasonably based on the information available to the contracting officer at the time it was made."

The agency's determination here was reasonable. "While Acquest submitted a great deal of financial information on itself and its related entities, the agency concluded that the information was insufficient to establish financial capability and, in

fact, raised more questions than it answered. For example, Acquest's financial statements were considered unreliable, in part, because the net loss for the relevant period was not shown in the equity section of the balance sheet, and a deposit on a land purchase was shown on the November 2000 balance sheet while other documents showed the deposit had not been made until December 2000. Similarly, although Acquest certified that there had been no material changes in its assets between November 2000 and January 2001, GSA's reviewer found that Acquest's year-end financial statement showed material changes, including a one-third reduction in assets and liabilities, plus an increase in equity although no income was shown. GSA also found that Acquest's equity "appear[ed] light and no revenues [were] shown;" that there was no current information on a loan that was to be extended to end of January 2001 or on a purchase option that expired on January 28; and that Acquest's proposed rental rate was not sufficient for it to recover its construction costs. In light of these discrepancies and the inadequate rental rate, we think the contracting officer reasonably concluded that Acquest was not financially responsible."

GAO denied the protest.

Acquest Development LLC, B-287439, June 6, 2001. 🗁

Agency properly used interim purchase orders during lengthy solicitation evaluation process

RULE: *As long as the simplified acquisition procedures are followed, an agency can use purchase orders to meet interim needs during a lengthy solicitation review process.*

Competitors don't like to see their opposition getting contracts while a solicitation process is going on. It looks to some like the government is favoring those getting the interim contracts. And the government might actually be doing that but it doesn't matter: as long as the agency is using the proper procedures, it can award interim purchase orders.

The Immigration and Naturalization Service (INS) needed janitorial and grounds maintenance services at border patrol stations and related INS facilities in the Laredo, Texas area. Because these locations would temporarily hold illegal immigrants for months, the INS wanted to make sure that they were clean. INS wanted to consolidate administration of numerous contracts so it issued request for quotations (RFQ) for services to be provided at the 12 locations. The review process dragged on. Since the existing contracts were set to expire in late September, INS looked for interim contracts to do the work until the review process was completed. It issued purchase orders to several but not all of the competitors for the new contract.

One competitor who did not get one, Aleman and Associates, Inc. protested. It argued that, in GAO's words, "the interim purchase orders were improperly issued because they were not procured using full and open competition; the contract actions were not synopsized in the Commerce Business Daily (CBD); and Aleman was not asked for quotations."

Aleman lost on all arguments. Since the acquisition used simplified procedures, full and open competition was not required. Also, the purchase orders were not over $25,000, so a CBD synopsis was not needed.

Finally, INS did not have to call or give one of the purchase orders to Aleman. GAO's rule is that maximum practicable competition "means that a responsible firm that expressly requests to quote must be given an opportunity to do so, even where three or more suppliers have already been solicited. Here, however, Aleman did not ask to compete for the interim contract, and we do not agree with Aleman's suggestion that INS was legally obligated to infer interest on the firm's part for a short-term, single-facility contract from Aleman's submission of a quotation on the long-term, 12-facility one."

Aleman & Associates, Inc., B-287275, May 17, 2001. 🗁

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Simply because a vendor is an ASP may not be a sufficient basis to award a contract noncompetitively

The need for information technology and its importance in the daily activities of federal employees has necessarily increased the amount of agency funds spent on hardware, software, and support services. While the rules governing the procurement of IT services and material have been revised to accommodate the uniqueness of these types of purchases, their everyday application is not always clear, as is demonstrated by the following opinion from the Department of Transportation (DOT) Office of Inspector General.

The Federal Railroad Administration (FRA) decided to switch from GroupWise email software to Microsoft Exchange late last year. In drafting the requirements for the transition, FRA noted that its needs would be best met by an outside service provider capable of maintaining hardware and software suites at the agency and providing operation support, including troubleshooting and maintaining email address listings. FRA firmly believed that its requirements would be best met by an application service provider (ASP).

FRA consulted with the DOT former Chief Information Office (CIO) about its email requirements and service needs. The former CIO agreed with the agency that an ASP was an appropriate choice. He referred the agency to USinternetworking, Inc. (USi) as a viable application ASP candidate.

FRA next performed a search of the General Services Administration (GSA) schedule and found 55 email service providers, one of which was USi. USi, however, was the vendor that identified itself as an ASP. As a result, FRA concluded that no additional search for competition as necessary and awarded the contract to USinternetworking, Inc.

The contract was for 1 base year and 2 optional years. The agreement provided that USi would be paid a flat monthly fee for its services.

Two months after the contract was awarded, DOT's OIG initiated a review of the award. It found that FRA failed to comply with the "full and open competition" proves as required by the Federal Acquisition Regulation (FAR) and perform any check to determine whether USi was financially qualified to perform the work prior to contract award.

The OIG emphasized that the FAR requires purchases over $2,500 to be acquired through reasonably competitive procedures, which generally includes soliciting at least 3 sources. Procurement officials may limit solicitation to a single source if that is the only source reasonably available.

Here, FRA failed to satisfy either of these requirements. The OIG noted that while the term ASP is relatively new, the concept is not. In essence, use of ASPs amounts to outsourcing technical services and support to contractors. Outsourcing such services has been and continues to be a standard practice for the federal government. FRA was wrong to conclude that simply because USi was identified on the GSA schedule as an ASP that it could provide the only or best services. The error was the direct result of a lack of understanding by agency procurement personnel of technical service requirements.

To support its finding, the OIG identified 69 email service providers on the GSA schedule that did not categorize themselves as "ASPs". It randomly selected 7 from that total and found that 4 of those providers could have satisfied FRA's requirements.

Due to the flawed procurement process, the OIG recommended that the contract be terminated for convenience. It noted, however, that if FRA concludes that termination is not a feasible option, at the minimum, the agency should resolicit offers with competition at the end of the 1-year base period contract. It addition, the agency should work with the current DOT CIO to enhance the procurement personnel's understanding of information technology service requirements so that similar problems may be avoided in the future.

ACTION: Report on Email System Replacement Contracts, FRA, FI-2001-057, Department of Transportation Office of Inspector General, May 3, 2001. 🗁

Rules

FAR Council

Agencies still need information to authorize extraordinary requests

The Federal Acquisition Regulation (FAR) Council has requested the Office of Management and Budget (OMB) to extend the information collection requirement for extraordinary contractual actions requests.

Currently, contractors must submit evidence that they are entitled to relief under Public Law 85-804 which allows contracts to be entered into, modified, or amended to facilitate national defense. The information submitted is used as the basis for granting or denying the contractor's request.

Submit written comments by August 14, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 M Street, NW, Room 4035, Washington, DC 20405.

Notice of request for comments regarding an extension to an existing OMB Clearance (9000-0029). Contact: Beverly Cromer at (202) 208-6750. 66 *Federal Register* 32605, June 15, 2001. 🗁

Agencies still need information on performing more economically

The FAR Council has requested OMB to extend the information collection requirement for value engineering change proposals.

Currently, contractors may submit recommendations to agencies for performing contracts more economically and how to share the resulting savings.

Submit written comments by August 14, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 M Street, NW, Room 4035, Washington, DC 20405.

Notice of request for comments regarding an extension to an existing OMB Clearance (9000-0027). Contact: Cecelia Davis at (202) 219-0202. 66 *Federal Register* 32606, June 15, 2001. 🗁

Agencies need information to make "bonding" decision

The FAR Council has requested OMB to continue to require individuals to submit Standard Form 28, Affidavit of Individual Surety if they want to serve as sureties for government bonds. To qualify, an individual must show a net worth not less than the penal amount of the bond in question.

Submit written comments by August 14, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 M Street, NW, Room 4035, Washington, DC 20405.

Notice of request for comments regarding an extension to an existing OMB Clearance (9000-0001). Contact: Beverly Cromer at (202) 208-6750. 66 *Federal Register* 32607, June 15, 2001. 🗁

Agencies need information to decide custom duties

The FAR Council has requested OMB to continue to require contractors to provide customs and duty information on foreign supplies they purchase.

Currently, when a contractor purchases foreign supplies, it must notify its contracting officer to determine whether the supplies may enter the country duty-free.

Submit written comments by August 14, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 M Street, NW, Room 4035, Washington, DC 20405.

Notice of request for comments regarding an extension to an existing OMB Clearance (9000-0022). Contact: Cecelia Davis at (202) 219-0202. 66 *Federal Register* 32606, June 15, 2001.

Contractors must inform agencies of their inventions

The FAR Council has requested OMB to continue to require contractors to report all subjective inventions created during the course of a contract.

Submit written comments by August 14, 2001, to the FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 M Street, NW, Room 4035, Washington, DC 20405.

Notice of request for comments regarding an extension to an existing OMB Clearance (9000-0095). Contact: Victoria Moss at (202) 501-4764. 66 *Federal Register* 32607, June 15, 2001.

Defense Logistics Agency

DLA adds revised solicitation requirements

The Defense Logistics Agency (DLA) has amended its acquisition regulation to require that all agency solicitations contain a clause requiring disputes to initially use alternative dispute resolution (ADR) to resolve any conflicts. Litigation would not be prohibited. Instead, it would only be an option of last resort.

The new clause at FAR Section 5452.233-9001 and its requirements are optional. Contractors may opt out of the provision before contract award by indicating this preference in their offer to the agency.

Final Rule. Contact: Mary Massaro at (703) 767-1366 or electronically at *mary_massaro@hq.dla.mil*. 66 *Federal Register* 27474, May 17, 2001.