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INSIDE

Unions fault Bush Administration for contractor bias

Two federal labor union leaders have accused the Bush Administration of drastically and deliberately furthering the interests of government contractors at the expense of federal employees. In an extremely critical letter to Office of Management and Budget (OMB) Director Mitch Daniels, Colleen Kelley, National Treasury Employees Union President, and Bobby Harnage, American Federation of Government Employees President, expressed their skepticism over recent A-76 related developments.

Kelley and Harnage questioned OMB's latest directive that agencies must furnish lists of their inherently governmental jobs with their fiscal year 2001 Federal Activities Inventory Reform (FAIR) Act reports. *See the* Federal Acquisition Report*, May 2001, page 3.* OMB's assurance that the supplementary lists will be kept separate from the actual inventories and not publicized cannot be taken seriously, the union leaders stated. It is only a matter of time until the information is slipped to the public, since senior acquisition personnel often transfer to the private sector as federal contractors, they said.

"Office of Management and Budget staff have reportedly all but invited contractors to obtain these lists by pressuring agencies or through the Freedom of Information Act," Kelley and Harnage wrote. Agencies are specifically exempt from reporting inherently governmental work data on their FAIR Act inventories. OMB Policy Letter 92-1 defines "inherently governmental" as a function that is so intimately related to the public interest that it must be performed by federal employees, such as applying government authority or making monetary decisions for the government.

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Legislative Journal

Bills Introduced

H.R. 1360, Untitled. Allows federal construction contractors to require contractor or subcontractor employees to negotiate or become a party to a project labor agreement with a labor organization.

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

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. 🗁

Despite contractors' attempts during the last Congress to push through legislation that would give them access to inherently-governmental job data, that legislation gained "virtually no support" from lawmakers, the letter noted.

The leaders went on to fault the Bush Administration's directive to agencies to convert or compete no less than 5 percent of all FAIR Act jobs during FY 2002. Kelley and Harnage cited a recent General Accounting Office (GAO) finding that during FY 1998 and 1999, the overall costs of the A-76 program have exceeded their expected savings. "[The fact that] OMB is determined to sell off large chunks of the federal government to an army of service contractors, strongly suggests that the Bush Administration is more interested in replacing federal employees with contractors than in making agencies more efficient."

The letter called for agencies to be held more accountable for their contractors. In addition, OMB needs to take steps to properly account for the federal service contractor workforce, and ensure the public has access to its costs and size to the same extent as it does to information on federal employees, they wrote.

"It is imperative that OMB instruct agencies to always give federal employees full and fair opportunities to defend their jobs through public-private competitions. A failure to do so can only be interpreted to mean that the Bush Administration is far more interested in replacing federal employees with contractors, regardless of the costs," the letter concluded. The Union leaders have yet to receive any response from OMB.

DoD is on the "outs" with Congress for outsourcing

House Democratic Leader Richard Gephardt (D-Mo.) along with 10 other members of Congress recently sent a letter to Secretary of Defense Donald Rumsfeld, criticizing the Department of Defense's

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What should agencies do to ensure "fair" treatment?

National Treasury Employees Union President Colleen Kelleyhas made 5 recommendations to agencies for ensuring that government employees receive equal consideration in A-76 competitions.

To combat government bias towards contractors, agencies should

- implement reporting and oversight systems to track the actual costs of government service contracting;
- involve employees before decisions are made to determine how best to deliver government services;
- conduct fair public-private competition for government work after it has been agreed upon to consider outsourcing;
- develop federal employee appeal rights, just as contractors can appeal agency decisions; and
- implement post-decisional oversight, including agency authority to bring work back in-house if contractors cannot perform the work satisfactorily.

"American taxpayers want to be sure that there are systems in place to trace whether contracting out is saving money or improving government services," Kelley emphasized.

(DoD's) new practice of directly converting in-house government work to contractors. The Congressional members highlighted the Fiscal Year 2000 Defense Appropriations Act, which permits the National Imagery and Mapping Agency (NIMA) to directly outsource work performed by 600 or more federal employees to contractors if they are at least 51 percent owned by a Native American tribe.

Section 8104 of the Act allows the conversions without the usual cost comparison study required by the Office of Management and Budget (OMB) Circular A-76. Since the section was enacted, NIMA has converted federal work performed at MacDill Air Force Base, FL, and Kirtland Air Force Base, NM, and is in the process of directly outsourcing work at installations in Maryland and Missouri. At both MacDill and Kirtland, the installations began public-private competitions under the rules of OMB Circular A-76; however, they abandoned the process and simply awarded the work to outside companies.

In their letter, the Congressional members emphasized that NIMA firmly believes that implementing an A-76 cost comparison study would make it more difficult to ensure that it readily has an experienced and reliable workforce. The Congressmen, however, believe that this argument proves that the agency should avoid converting work to the private sector under any circumstances.

Gephardt has requested that NIMA review its decision to do away with A-76 competitions at the Maryland and Missouri installations, and that it not directly convert any in-house work in the future.

At the time of press, Congressman Gephardt's office had not yet received a response from the Secretary of Defense.

GSA to facilitate federal acquisition information "co-op"

The General Services Administration (GSA) has recently formed an Intellectual Capital Management Office within its Office of Acquisition Policy. The new office will be responsible for creating and operating an electronic knowledge management system to provide access to acquisition-related information and documents currently maintained in databases governmentwide. It will also include search and discussion capabilities so that acquisition personnel can find answers to specific questions and communicate with one another.

Acquisition resources that will be available on the system will include

- the Federal Acquisition Regulation (FAR);
- pertinent statutes, Executive Orders, agency regulations, and relevant agency policy directives;

- relevant Comptroller General, Board of Contracts Appeals, or court decisions dealing with acquisition-related topics;
- workbook competencies; and
- relevant articles and professional journals.

According to Edward Loeb, Director of the new office, GSA will first initiate a pilot of the knowledge management system. The pilot should be completed by the end of the year depending on the amount of funding the project receives. "Ideally, the system will assist contracting officers by making the information already available on government websites more current and relevant to pressing issues," he noted.

The system will tie together the information that is currently available on government acquisition web pages, making it easier for acquisition personnel to access. By bringing to the forefront the most recent additions and developments, GSA expects that the tool will act as a single point of access to all information necessary to performing federal procurement work, Loeb concluded.

Agency workforce reports due to OMB

All federal agencies with more than 100 full-time employees must submit an analysis of their workforces to the Office of Management and Budget (OMB) by June 29, 2001, according to a May 8, 2001 directive issued by OMB. The information submitted will be used in formulating agency-specific acquisition restructuring plans.

OMB has requested that agencies submit summaries of their progress in implementing President Bush's recent procurement goals. Such goals include: (1) making greater use of performance-based contracts (PBSCs) by using such agreements for all awards worth more than $25,000 and at least 20 percent of eligible service contracting funds; (2) increasing online procurement by posting notices and solicitations for purchases over $25,000 on the FedBizOpps website (*www.FedBizOpps.gov*); and (3) completing public-private or direct conversion competitions on at least 5 percent of the full-time equivalent (FTE) positions included on their Federal Activities Inventory Reform (FAIR) Act inventories.

The workforce analyses should include

- information on the demographics of the agency's permanent workforce, including age, grade, retirement eligibility, and expected retirements over the next five years;
- information on the agency's seasonal, temporary, and intermittent workforce for FY 2000;
- descriptions of the skills of the workforce; and
- title, grade level, and geographic location of each manager, as well as supervisor-to-staff ratios, as reported to the Central Personnel Data File.

OMB is reminding agencies that if they cannot achieve the procurement goals established in the FY 2002 budget within the next 18 months, they should explain the reason for the delay, as well as steps being taken to avoid future problems. Moreover, they should provide a time-line of when the goals will be met.

Agencies should submit questions on the procurement goals to their OMB representatives, and questions on how to conduct the workforce analyses to the Office of Personnel Management's (OPM's) Employment Service at (202) 606-6500. 🗁

GAO finds that simplified acquisition is working, but how well is a mystery

Congress should extend federal agencies' authority to use simplified acquisition procedures until 2005, to be able to more closely evaluate the benefits that the procedures offer the government, according to a recent General Accounting Office (GAO) report – *GAO-01-517*. Agencies' simplified acquisition authority is scheduled to expire on January 1, 2002.

The report represents the conclusions of GAO's study of the simplified acquisition test program, which has been in effect since 1996. The study was requested by Senators John Warner (R-Va.) and Carl Levin (D-Mi.) of the Senate Committee on Armed Services, and Congressmen Bob Stump (R-Az.) and Ike Skelton (D-Mo.) of the House Committee on Armed Services, to determine the extent to which

agencies are using the authority, and its effect on federal contracting.

The simplified acquisition test program permits agencies to eliminate usually-required procedures when making commercial item purchases under $5 million. Under the test program, government purchasing agents

- can issue a combined solicitation and Commerce Business Daily notice and require submission of proposals in less than 45 days, as would usually be required;
- do not have to establish a formal evaluation plan or competitive range, conduct discussions with vendors, or score quotations from offerors; and
- can reduce the documentation required to justify contract award decisions.

GAO noted that agencies do not use the simplified acquisition procedures to purchase the majority of their commercial items. The test program does, however, provide an alternative contract vehicle for these purchases, and in fiscal year 2000, accounted for $1.9 billion of the $31.6 billion spent on commercial items.

GAO interviewed various procurement officials and reviewed 12 Department of Defense (DoD) simplified acquisition contracts during the course of the study. Procurement officials involved with the studied contracts concurred that the test program has had a positive impact on

- time required to award a contract;
- administrative costs;
- prices;
- small business participation; and
- delivery of products and services.

GAO's study of the 12 DoD contracts, however, failed to support the buying agents' positive views. GAO could not determine the extent to which the test program impacted the factors identified by the agents. As a result, GAO recommended that Congress extend the test program for an additional 3 years. The additional time could permit the Office of Federal Procurement Policy (OFPP) to quantitatively measure the results of all simplified contracts for a more definite finding on what benefits the program has produced. 🗁

DOT tests payment approval procedures for COTRs

The Department of Transportation (DOT) has authorized contracting officer representatives (COTRs) in the Federal Transit Administration (FTA) to approve vouchers for payment of all types of contracts. Previously, FTA COTRs could only approve invoices submitted for payment under fixed-price contracts.

The expansion of COTRs' authority is part of an overall DOT experiment. DOT is hopeful that broadening COTRs' permitted activities will improve the agency's efficiency in administering contracts. The trial period is expected to last until February 28, 2002.

To exercise the new authority, COTRs must satisfy all applicable agency training requirements. DOT is reminding contracting officials (COs) that even though COTRs may be delegated approval authority, it is ultimately a CO's responsibility to ensure that proper payment decisions are made. In addition, COTRs are still prohibited from

- issuing task or delivery orders against a contract or any of the agreements defined under FAR Subpart 16.7;
- changing any of the terms and conditions of a contract or any of the agreements defined under FAR Subpart 16.7;
- signing contracts or contract modifications;
- writing letters to the contractor that would impact the cost or schedule of the contract;
- approving contractors' vouchers under other types of cost-reimbursement contracts – but the COTR could review the voucher and make recommendations to the contracting officer; and
- committing the government to any adjustments to the cost or price of the contract or order without the prior approval of the contracting officer.

DOT delegated the approving authority on a limited basis because it considers approval of cost reimbursement vouchers a critical task. At the end of the trial period, DOT will determine the effectiveness of allowing the representatives to approve all types of vouchers and whether it should be continued.

Decisions

Agency should not have relaxed solicitation requirement for only one offeror

RULE: *An agency cannot relax a mandatory solicitation requirement for one offeror but not for another. If it wants to relax the requirements, it must do so for all, by an amendment to the solicitation.*

Fair play and fair procurements require equal treatment for all offerors. While an agency can set mandatory requirements demanding that all meet those requirements, it cannot relax the requirement for one but not all. If it does, the government in effect awards a contract to an offeror who submitted an unacceptable proposal.

The Air Force issued a solicitation for a fixed-base weather observation system for the 21st century (OS-21 FISHERMAN'S BOAT SHOP) that would measure weather conditions at Air Force installations. The solicitation said that any system proposed to the Air Force needed to already exist as an integrated system, and must have been evaluated and certified by the Federal Aviation Administration (FAA) or similar foreign agency prior to submission of proposal. Coastal proposed a system that had not been certified by the FAA and was not yet in operation. Based on its "significant technical merit," however, Coastal got the contract at a $5.1 million higher price.

Systems Management, Inc. (SMI) and Qualimetrics, Inc. protested the award. They argued that its proposal was technically unacceptable because it lacked FAA certification. As a result, it should have been rejected. In comparison, their proposals were certified, but they lost. Moreover, they argued that they could have proposed systems like Coastal's if the solicitation did not require "FAA certification."

The Air Force defended its decision by focusing on the word "certification." Its interpretation of the word was not as restrictive as everyone else's. To the Air Force, a certified system was simply one that had been declared operational at a given location, had available maintenance documentation and trained personnel, and logistics support in place to support the fielded system. Moreover, the term was defined "deliberately nonspecific," and the Air Force claimed that there were "multiple industry understandings of the term.'"

GAO did not agree. It found that the Air Force had unfairly relaxed a mandatory solicitation requirement for one but not all offerors and recommended that the Air Force start again.

GAO emphasized that a reasonable reading of the requirement that the proposed system "need[ed] to already exist as an integrated system, and need[ed] to have been evaluated and certified by the FAA or similar foreign agency prior to submission of proposal" could not be interpreted as only requiring that the system be operational. Contrary to the Air Force's argument, the term "certification" was not a vague term that connoted only that a system be "operational." Moreover, the record showed that the agency was certainly aware that FAA certifications were extant and relevant. A number of the evaluators mentioned FAA certifications as strengths in SMI's and Qualimetrics' proposals.

The Air Force had unfairly changed the rules, without telling the offerors, without issuing an amendment to the solicitation, and to the benefit of only one offeror, the winner. "It is a fundamental principle of government procurement that competition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of

their proposals. When, either before or after receipt of proposals, the government changes or relaxes its requirements, it must issue a written amendment to notify all offerors of the changed requirements. *See Federal Acquisition Regulation § 15.206(a).* The same principle applies where a protester was misled into believing that a solicitation required it to meet certain stated requirements, whereas the agency evaluated competitors' proposals on the basis of lesser requirements."

Systems Management, Inc.; Qualimetrics, Inc., B-287032.3; B-287032.4, April 16, 2001. 🗁

Company's bid bond amount was wrong but not wrong enough

RULE: *An agency can accept a bid that does not have the correct bid bond amount if the amount of the bid guarantee was greater than the difference between that firm's bid and next low bid.*

Bidders must stand by their bids. If a bidder is the low responsive, responsible bidder, it has to accept the government contract. If a bidder refuses to do the work, the government must award the work to the next low bidder. This invariably forces the government to pay more for the work because the original winner walked. Why should the government pay more for the contract work when extra cost was caused by a bidder walking from the contract?

That's the reason there are "bid guarantee bonds," or simply "bid bonds." All bidders have to get a bond from an insurance company guaranteeing payment of the gap between their apparently successful bid and the next lowest bidder who gets the contract as a fall-back. If the bid bond is not in the correct amount, the so-called "penal sum," the bid is nonresponsive.

A solicitation will require bidders to provide a bond of, generally, a certain percentage (e.g., 20 percent) of their bid. What if a bidder doesn't give a bond in the correct amount? Is the bid automatically nonresponsive? Or can the bidder still win the contract?

As is typical, there are exceptions to the bid guarantee rule. One exception allows a bidder's bond to be acceptable, even if not in the correct amount, if the amount of the bond at least would cover the difference between it and the next low bidder if the incorrect bond bidder were to walk.

The Army Materiel Command issued a solicitation for roofing replacement and repairs. The IFB required bidders to provide a bid bond equaling the lesser of either 20 percent of the bid amount or $3,000,000. Phoenix submitted a price of $11,972,424.75 and was the apparent low bidder. South Atlantic's bid of $12,185,607.02 was the second lowest.

South Atlantic filed a protest after Phoenix won the contract. It claimed that Phoenix's bid bond was deficient because the bond listed "conflicting penal sums." In one part of its bid, Phoenix had a penal sum of 20 percent of the bid amount but in another part it had an amount "not to exceed $600,000," clearly less than the 20 percent required by the IFB.

The General Accounting Office (GAO) rejected South Atlantic's protest. It acknowledged that "a bid bond is a material part of the bid and by its terms must clearly establish the requisite liability of the surety or the bid must be rejected as nonresponsive. The question presented where a bond contains any defect is whether the government materially obtains the same protection under the bond actually submitted as it would if the bond complied with the solicitation in all respects." GAO also quoted FAR § 28.101-4(c)(2) dealing with waivers of bid guarantee bond penal amounts.

To GAO, the inconsistency was not an issue. "We see no reason that even an inconsistency within the bid (concerning whether the bid guarantee was even higher than that maximum) would lead to a conclusion that the bond was not valid for the $600,000 amount."

With that issue out of the way, GAO addressed the waiver issue. "The contracting officer properly determined that Phoenix's bid was acceptable, even though its bid guarantee was limited to $600,000, because that amount was greater than the $213,182.27 difference between Phoenix's bid and South Atlantic's bid.

South Atlantic Construction Company, LLC, B-286592.2, April 13, 2001.

Discussions were meaningful even though the losing proposal had none

RULE: *If an initial proposal had no deficiencies, significant weaknesses, or excesses, the government is not required to have discussions with that offeror.*

A good initial offer turned out to be a curse for a company recently. The contractor submitted a proposal that had no deficiencies, significant weaknesses, or excesses. So the government did not have discussions with that offeror. The government, however, awarded the contract to an offeror with whom it did have discussions. Even though the government did not want to pay the additional price for the better proposal of the "non-discussions" offeror, the government did not have to discuss price because, overall, the price for that company's proposal was reasonable. The contractor, however, thought that the government should at least have told the contractor that its price was too high. The General Accounting Office (GAO) disagreed.

The Air Force needed personnel for operating a delivery control center at Langley Air Force Base. The evaluation factors in the solicitation were past performance, mission capability, and price in declining order of importance. Award would be a best value decision.

After evaluating the initial offers, the Air Force found Cherokee Information Services (CIS), Business Plus Corporation (BPC), and a third firm to be in the competitive range. However, the Air Force had discussions with only 2 – it had none with CIS. The Air Force told CIS that it was in the competitive range but because its proposal had no significant weaknesses, deficiencies, or excesses, no discussions were necessary. CIS also had the highest technically-rated proposal.

While all proposals were found to be reasonably priced, considering the different technical approach each used, CIS did not have the lowest price. As a result, it did not get the contract because the contracting officer could not justify paying added costs for its higher-rated proposal.

CIS protested. It claimed that the Air Force had not had meaningful discussions with it for 2 reasons: (1) the Air Force did not tell it about any significant weaknesses, deficiencies, or excesses like the Air Force did with the other two offerors; (2) and the Air Force did not discuss its price.

GAO found the Air Force had acted properly. It emphasized that the Federal Acquisition Regulation (FAR) only makes contracting officers discuss "significant weaknesses, deficiencies, and other aspects of its proposal that could, in the opinion of a contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR § 15.306(d)(3). While the precise scope and extent of discussions are a matter of CO judgment, the agency should tailor its discussions to each offeror's proposal. FAR § 15.306(d)(1).

The Air Force did that here, according to GAO. Since CIS had no significant weaknesses, deficiencies, or excesses and the others did, it was permissible for the Air Force to not hold discussions with CIS. In fact, CIS' technical proposal was rated very highly. Therefore, discussions would not have been justified.

On the tougher issue, the Air Force's failure to discuss price with CIS, GAO also found for the Air Force. It noted that the FAR allows a contracting officer to discuss price in very specific terms. "Under FAR § 15.306(e)(3), the [CO] may 'inform an offeror that its price is considered by the [go]vernment to be too high, or too low, and reveal the results of the analysis supporting that conclusion.' According to GAO, this language clearly gives the CO discretion to inform the offeror that its cost/price is too high, but does not require that the CO do so, especially where, as here, the agency does not consider the price unreasonable or a significant weakness or deficiency." Because the Air Force did not consider CIS' price too high for the approach taken, the service had no obligation to discuss price with the company.

Cherokee Information Services, B-287270, April 12, 2001.

A prime on federal contract cannot delay insolvent sub for free

RULE: *Under the Miller Act governing bonds on federal construction projects, a subcontractor is entitled to delay damages, even though it may be insolvent.*

Because workers and suppliers on a federal construction project cannot get liens on federal property, another way of making sure they get paid is necessary. The Miller Act provides the solution. The statute requires companies working on federal construction projects get bonds to make sure everybody will be paid for their work or the materials they put into the project. Despite the squeeze that many subs feel from primes as a matter of course, a right subs maintain is the ability to sue for delay from the prime. As a recent decision shows, simply because the sub is insolvent is no reason to deny rightful payment to the sub or its surety.

Pickus Construction was the prime contractor at a Navy construction project at the Great Lakes Naval Training Center in Illinois. It hired Metrick Electric Co. to do the electrical work. Both got bonds as required by the Miller Act. In the course of doing its work, Metrick was delayed, allegedly by Pinkus. Metrick later went bankrupt. Consequently, its bonding company hired another company, Aldridge Electric Co., to finish Metrick's electrical work. The bonding company and Aldridge filed a suit under the Miller Act to get money from Pinkus for the delay Metrick allegedly suffered prior to going bankrupt.

The federal district court denied damages. The surety appealed.

In one of the best written decisions to come along in a long time, the appeals court said the district court judge "missed the boat" on some issues.

The appeals court started its opinion by bluntly asking, why was Aldridge a plaintiff? It emphasized that Reliance [Metrick's surety] had paid Aldridge the full agreed price for its work, and it was hard to see how Pickus could owe Aldridge anything. Any loss as a result of Pickus's scheduling problems had been borne by Reliance, not Aldridge.

At oral argument, counsel said that Aldridge and Reliance had agreed to share any recovery from Pickus, but the court was not persuaded. It noted that such a relationship did not make Aldridge a proper plaintiff any more than a lawyer working on contingent fee becomes a party to a case. If Reliance had promised to pay half of its winnings to its CEO as a bonus, or to its bank to retire a loan, neither the CEO nor the bank would become entitled to sue Pickus.

Having thrown out the replacement vendor, the court then looked at whether the surety had a valid delay claim.

It may well have but the district court judge "missed the boat" on that issue by focusing on Aldridge instead of the delay to the original subcontractor, Metrick, for which the surety was fighting. What the judge did not discuss, however, was whether the 100-day delay before Metrick's insolvency caused injury by requiring the company to rearrange its own schedules in order to synchronize its work with other components of the project. A subcontractor is entitled to compensation for extra expense caused by the need either to delay or to accelerate its work in order to mesh with the progress of other contractors, whose efforts may be essential to (or may depend on) the work of the electrical subcontractor.

The appeals court found that the surety was entitled to "recover from Pickus whatever Metrick could have recovered. It was irrelevant for this purpose that Aldridge replaced Metrick. Damages (if any) depended on how a single contractor that was on the job the whole time would have been affected by the delay; Metrick's abandonment of the job neither increased nor reduced Pickus' exposure, which should be evaluated as if Metrick had been the electrical subcontractor from start to finish."

The appeals court sent the case back to the district court, and a different judge, to let the surety go to trial on the delay damage issues.

United States of America for the use and benefit of Aldridge Electric Company, Inc., and Reliance

Insurance Company, Plaintiffs-Appellants, v. Pickus Construction & Equipment Co., Inc., and The American Insurance company, Defendants-Appellees, No. 00-2853, United States Court of Appeals for the Seventh Circuit, May 4, 2001. 🗁

Government "approval" of drawings isn't really approval

RULE: *The Government's approval of submittals like shop drawings does not constitute a waiver of the contract requirements.*

There are 2 good rules for government contracts: Rule 1—read the Federal Acquisition Regulation (FAR); and Rule 2 —don't believe everything you read in the FAR. The "approval" by the government of a contractor's submittals in a construction project is a good example. FAR Part 52.236-21, *Specifications and Drawings for Construction*, provides that the contractor is to submit shop drawings to the government for the government's "approval." The problem is that "approval" is not an approval for all purposes. A better word for what the government does is "review" and comment on the drawings.

A contractor, however, might want to argue that approval means that, if the drawings are wrong, any government objection to contractor deviations from the specifications on the drawings are waived by the government." In effect, a contractor tries to argue that government approval relieves the contractor of any liability for deviations.

This is a losing argument, and it should be. The government hires the contractor as an expert to do drawings and build what the government wants. To have the government approval of drawings amount to a waiver of non-conforming work shifts the risks from the specialist – the contractor – to the generalist – the government. A good example of this can be seen in a recent decision of the Armed Services Board of Contract Appeals.

Elter S.A. had a construction contract with the Department of the Navy (DoN) for several projects at Souda Bay, Crete, Greece. The contract had several typical construction contract provisions in it, including FAR 52.236-5, *Material and Workmanship* (APR 1984); and FAR 52.236-21, *Specifications and Drawings for Construction* (APR 1984) - Alternates I, II (APR 1984). The clauses require the contractor to bring any variations from the specification on the drawings to the attention of the contracting officer.

Elter submitted shop drawings to the Navy for approval on a project for a bowling alley. One part of the drawings showed what Elter intended to do as part of the installation of exterior lighting in the parking lot. Elter showed light pole anchor bolts that were different from what the Navy had specified. Apparently the Navy never discovered the variation and "approved" the drawings.

Later, DoN learned that the anchor bolts were not the right kind and made Elter replace them. Elter conceded that the bolts were not consistent with the agency's specifications, but it argued that the Navy approved the variation because it had approved the shop drawings which contained it.

The board disagreed. It paraphrased the pertinent clause — "[t]he contractor was required to identify the proposed variation separately and include the documentation for the proposed variation along with the required submittal for the item. Paragraph 1.5.6(c) placed responsibility on the contractor for advising the contracting officer of any proposed variation." The board also noted that the submittal included a certification that the proposed material was in compliance with the specifications and drawings. No variation from contract requirements was noted.

The board concluded that "Elter certified conformance with contract requirements and failed to point out the anchor bolt deviations from contract requirements. The Specifications and Drawings for Construction clause provides in the context of this contract that the contractor must review and approve submittals for accuracy, completeness and compliance with contract requirements. Subsequent approval of the submittal by the contracting officer does not relieve the contractor from responsibility for complying with the contract requirements, unless variations from the contract requirements are described in writing and approved by the contracting officer." Since that did not happen, Elter had to bear the cost of replacing the non-conforming bolts.

Elter S.A., ASBCA No. 52327, May 3, 2001.

Claim can change from contracting officer to Board

RULE: *A contractor appealing a decision of the contracting officer to a Board can add legal theories but cannot add new claims unless they are based on operative facts which are "common or related" to those contained in the Contract Disputes Act (CDA) claim presented to the contracting officer.*

The longer you look at something, the more you see. That's also true of claims. As a claim works its way from the contractor to the contracting officer to Washington and a court or board, it will change. Sometimes, as a contractor gets more familiar with a claim, it will try to revise it. The theory is that it has already before the board so it is permissable to try add to the project. For example, instead of arguing a differing site condition, the contractor may want to add a different legal theory, such as a defective specification. Additionally, the contractor may want to identify a second occurrence, at a different location, of the problem the claim is raising. A recent case shows the limits on how much a claim can change.

Aeronca filed a claim with the contracting officer for additional costs incurred in the manufacture of aft cowl doors (ACDs). When the contracting officer denied the claim, the contractor appealed to the Armed Services Board of Contract Appeals.

In part of its complaint to the Board, the contractor asked for an equitable adjustment for the government's alleged failure to furnish special tooling to Aeronca pursuant to the contract clauses relating to government-furnished property and special tooling." This part of the claim was dismissed by the Board because there was no reference to this matter in the CDA claim.

The contractor also sought from the Board damages for the engineering allegedly done to mend the government's failure to provide some technical data. The Board made a valiant effort to find support for this claim and eventually did so. "This demand is set forth in footnote No. 5 of the CDA claim. Count 3 alleges, furthermore, that said failure on the part of the government delayed Aeronca's progress in the repair and reassembly of the [ACDs] causing [it] to incur increased costs. The CDA claim includes a demand for recovery of unabsorbed overhead which was 'absorbed' into the rates for Aeronca's additional labor" (Rule 4 file, tab, tab 53 at 2). Considering the generality of the pleading, that is a plausible basis for keeping the demand before the Board.

Adding new legal theories at the Board is allowed. The Board allowed the contractor to add a legal theory that the government breached its implied duty to cooperate with Aeronca.

Aeronca, Inc., ASBCA No. 51927, May 2, 2001.

Rules

FAR Council

FAC 97-27: IT accessibility rule is finalized

Starting June 21, agencies must ensure that all electronic information technology (EIT) they purchase can be accessed by sensory and physically (e.g., visually) impaired federal employees and members of the public. The directive was issued by the Federal Acquisition Regulation (FAR) Council as Federal Acquisition Circular (FAC) 97-27. The FAC implements Section 508 of the Rehabilitation Act as amended by Title IV of the 1998 Workforce Investment Act.

The new rule establishes technical and performance criteria that EIT must meet to qualify for purchase by a federal agency. Different standards apply depending on the type of technology. The rule identifies 5 categories of EIT:

(1) software applications and operating systems;

(2) web-based information or applications;

(3) telecommunication products;

(4) video and multimedia products;

(5) self-contained, closed products (e.g., information kiosks, calculators, and fax machines); and

(6) desktop and portable computers.

The following is the list of requirements and their applicability that all EIT must satisfy as well as penalties for noncompliance.

REQUIREMENTS

(1) Software applications and operating systems

All software applications or operating systems cannot disrupt or disable any other product which provides disabled employees or members of the public access to official information. In addition, if images are used to identify controls, the functions assigned to an image must be consistent throughout the product. Moreover, any animations displayed must be also available in a plain text format, and flashing images and text cannot blink at a frequency more than 2 Hz or lower than 55 Hz. Finally, colors cannot be used as the only means of conveying information or indicating a user action. For example, the "quit" function of an application or system cannot be indicated only by a red button. Rather, there must also be a text prompt.

(2) Web-based intranet and Internet applications

All web-based products must contain verbal tags or identification of graphics and format devices, like frames, cells, and tables. Moreover, there must be text versions of all multimedia presentations that run simultaneously with the presentation. If a web page uses scripting languages to display content, the information provided must be able to be read by assistive technology, such as a screen reader for the visually impaired. Web pages may use applets or plug-ins; however, a text link to the device must be displayed. Finally, electronic forms which are designed to be completed on-line must be accessible to those using assisted technology.

(3) Telecommunications products

All telecommunication products that permit voice communication must, at a minimum, have a non-acoustic connection point for teletypewriter (TTY) and permit microphones to be disabled to allow the user to intermix speech with TTY use. Also, they must support all commonly used cross-manufacturer non-proprietary standards for TTY signal protocols. Moreover, controls and keys must be tactilely discernable without activating them, and the status of all locking or toggle controls or keys must be visually discernable either through touch or sound.

(4) Video and multimedia products

All televisions that are 13 inches or larger must be equipped with caption decoders. Also, all agency videos and multimedia productions must be either open or closed captioned and be audio described.

(5) Self-contained, closed products (e.g., kiosks)

All self-contained, closed products must have built-in access features so users do not have to attach assistive devices. In addition, they must permit private listening through a handset or a standard headphone jack. Finally, the controls for the products must be located in accessible reach ranges.

(6) Desktop and portable computers

All desktop and portable computers must have controls and keys which are: (1) tactilely discernable without activating them; (2) operable with one hand and do not require grasping, pinching, or twisting of the wrist; (3) visually discernable through touch or sound for locking or toggling; and (4) adjustable to repeat to 2 seconds per character, if key repeat is supported. Also, the products must contain an alternative form of identification or activation to biometric options, if such controls are used. Finally, computers must contain expansion slots, ports, and connectors which comply with available industry standards.

APPLICABILITY

The new requirements apply to all EIT procured by a federal agency after June 20, 2001. The requirements do not, however, apply to technology that is incidental to a federal contract. For example, a firm that produces a report for an agency under a contract would not have to procure accessible computers and word processing software even if they were used exclusively for the contract. Similarly, if an agency contracts with a firm to

develop its web site, the standards would apply to the agency's site but not to that of the firm.

(7) Exceptions

Exceptions to the new rule exist if: (1) complying with the requirements creates an undue burden on an agency; (2) the technology will be used for intelligence and cryptologic activities related to national security or the command of military forces; or (3) the EIT will be located in spaces frequented only by service personnel for maintenance, repair, or monitoring. If an agency procures a product under the "undue burden" exception, it must explain its reasoning in writing. Agencies should consider, in determining whether such a basis exists, the diffilculty or expense of compliance and the resources available to the program or office for which the supply or service is being acquired.

Although there is no exemption for commercial items, micropurchases will not be subject to the new rules until December 31, 2002. Even so, all micropurchases before that date will be exempt. To qualify, the purchase must be a one-time sale that is made on the open market rather than under an existing contract. For example, agencies cannot buy a software package that does not satisfy the new requirements even it only costs $1,800, if it is part of a larger $3 million contract.

Finally, the new standards do not apply to purchases that are part of a: (1) within-scope modifcation of a contract awarded before June 20;

What people are saying . . .

Several agencies and commercial companies submitted comments on the standards adopted, including:

Environmental Protection Agency: "The exception for purchases under $2,500 ...will frustrate the goals of the new accessibility standards by excluding electronic and information technology purchases that may give [f]ederal employees and the public the access intended by these standards. It is our opinion that, as enforcement measures are needed for compliance with Section 508 in general, they will eventually be needed for the Government's less expensive purchases as well."

Department of the Treasury: "The omission of a FAR 52 clause is a major mistake! One must be offered in the FAR in order to have government-wide consistency, limited confusion, and reduced legal risks and liabilities. As an example, Treasury Office of Procurement has reviewed several Section 508 clauses developed by different federal entities and found all to be inadequate. This typifies the magnitude of the problem.

The Access Board's Section 508 compliance final standards will require redesign of EIT that is provided by an estimated 11,000 contractors. Having inconsistent contract requirements whether in the SOW or in the quality assurance or the inspection end will only cause contractors greater expense and ultimately, the Government. So, standard clause language would expedite a consistent approach throughout the FAR-regulated community in the procurement of EIT."

The FAR Council is encouraging additional comments on whether a clause is needed.

Oracle: "Agencies should be able to take account of a particular acquisition's needs as part of its undue burden determination."

Federal Bar Association: "In our view, the rule should provide more guidance on how to use Accessibility Standards in the source selection process."

American Foundation for the Blind: "We are greatly concerned about the exemption for micro-purchases. Unless the exemption is dropped or modified, we believe that it can undermine the efforts clearly outlined by Section 508 to provide access and use of information and data by federal employees that is comparable to access and use of such data by federal employees without disabilities."

(2) unilateral option for a contract awarded before June 20; or (3) multiyear contract awarded before June 20.

NONCOMPLIANCE

If an agency fails to properly implement and follow the new regulations, disabled employees as well as members of the public may file complaints. Suits may not seek compensatory or punitive damages. Rather, their only remedy is to enjoin agencies from violating the requirements.

A complete listing of the new rules is available at *www.section508.gov*.

FAR Parts Affected: 2.101, 10.001, 11.002, 12.202, 39.000, 39.201, 39.202, 39.203, and 39.204.

Final Rule. Contact: Linda Nelson at (202) 501-1900. 66 *Federal Register* 20894, April 25, 2001.

FAC 97-25 issued

The FAR Council has issued FAC 97-25. The document contains 2 interim rules on performance-based contracting and experience/education requirements for contractor personnel.

Preference for Performance-Based Contracting (FAR Case 2000-307).

The interim rule strengthens the FAR's preference for using performance-based contracts for the acquisition of services. Currently, FAR 37.102 provides that "[a]gencies shall use performance-based contracting methods [. . .] to the maximum extent possible for the acquisition of services." The new rule revises the section to state that "[p]erformance-based contracting [. . .] is the preferred method."

In addition, the rule enumerates the order of precedence agencies must follow when acquiring services. The priority list was established by Section 821(a) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (P.L. 106-398). The order is as follows:

1) firm-fixed price-performance-based contracts or task orders;
2) non-firm-fixed-price performance-based contracts or task orders; and
3) non-performance-based contracts or task orders.

Submit written comments by July 2, 2001, to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Attn: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.2000-307@gsa.gov*.

FAR Parts Amended: 2.101, 37.101, and 37.102.

Interim rule with request for comments. Contact: Julia Wise at (202) 208-1168. 66 *Federal Register* 22083, May 2, 2001.

Contractor Personnel in the Procurement of Information Technology Services (FAR Case 2000-609).

The interim rule prohibits contracting officers from including in solicitations for information technology (IT) services, minimum experience or educational requirements. Exceptions exist, however, if the

- contracting officer first determines that the needs of the agency cannot be met without such requirements; or
- needs of the agency necessitate the use of a type of contract other than a performance-based agreement.

The rule implements Section 813 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (P.L. 106-398). The requirement has been incorporated into FAR 39.104, which was formerly reserved.

Submit written comments by July 2, 2001, to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Attn: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.2000-609@gsa.gov*.

FAR Parts Amended: 39.104.

Interim rule with request for comments. Contact: Linda Nelson at (202) 501-1900. 66 *Federal Register* 22084, May 2, 2001.

FAC 97-26 issued

The FAR Council has issued FAC 97-26. The document contains 3 interim rules on electronic commerce, labor relations, and eliminating contractor employees.

Electronic Commerce in Federal Procurement (FAR Case 1997-304).

The interim rule designates Federal Business Opportunities (FedBizOpps: *www.fedbizopss.gov*) as the single public access point for electronic information on contracting opportunities. By October 1 of this year, agencies must transition the distribution of their procurement, presolicitation, and award notices for contracts over $25,000 to the site if the notices must also be published in the Commerce Business Daily (CBD). Moreover, agencies must post any additional solicitations or amendments associated with an opportunity listed on the site.

In addition, the rule

- requires agencies to include information on the place of contract performance and set-aside status in the notice;
- permits contractors to publicize subcontracting opportunities on the site; and
- permits agencies to post additional information explaining their needs regarding a specific proposal.

Agencies will only be required to publish notices both in the CBD and the FedBizOpps site until the end of the year. Starting January 1, 2002, notices will not have to be published in the CBD. Until October 1, contracting officers may publish notices exclusively in the CBD if he/she lacks access to FedBizOpps.

Exceptions exist if

- disclosure of the opportunity would compromise national security;
- the nature of the file does not make it cost-effective or practicable; or
- an agency makes a written determination that distributing the information through FedBizOpps is not in the government's interests.

In determining response times for opportunities posted on FedBizOpps, the date of publication for notices issued before January 1, 2002, is the date the opportunity appears in the CBD and not FedBizOpps. For notices published after December 31, 2001, the date of publication is the day the information appears on the FedBizOpps website.

Submit written comments by July 16, 2001, to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Attn: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.1997-304@gsa.gov*.

FAR Parts Amended: 4.502; 4.803; 5.003; 5.101; 5.102; 5.201; 5.202; 5.203; 5.402; 5.205; 5.206; 5.207; 5.301; 5.404-1; 6.303-2, 7.303; 9.204; 9.205; 12.603; 13.104; 13.105; 14.203-2; 14.503-2; 19.202-2; 19.804-2; 22.1009-4; 34.005-2; 35.000; 35.016; and 36.213-2.

Interim rule with request for comments. Contact: Victoria Moss at (202) 501-4764. 66 *Federal Register* 27407, May 16, 2001.

Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects (FAR Case 2001-016).

This interim rule implements Executive Order (EO) 13202, issued by President Bush on February 17, 2001. The E.O. revokes a previous E.O. (12836) issued by President Clinton which promoted the use of labor agreements on federal construction projects.

Specifically, the new rule prohibits agencies from

- requiring or prohibiting offerors, contractors, or subcontractors on a federal construction contract to enter into or adhere to agreements with one or more labor organizations; or
- discriminating against offerors, contractors, or subcontractors on a federal construction contract for becoming, refusing to become, or remaining members of a labor organization.

Exceptions exist if an agency head determines that

- his/her agency had issued bid specification or project agreements regarding a particular contract with a labor organization; or
- not to grant an exemption would threaten the public health or national security.

Submit written comments by July 16, 2001, to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035,

 ISSN 8755-9285

Attn: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.2001-016@gsa.gov*.

FAR Parts Amended: 17.603; 22.101-1; and 36.202.

Interim rule with request for comments. Contact: Linda Nelson at (202) 501-1900. 66 *Federal Register* 27414, May 16, 2001.

Executive Order 13204, Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts (FAR Case 2001-017).

The interim rule implements E.O. 13204 which revokes another President Clinton E.O. that required building service contracts include a clause requiring successive companies under such contracts to offer certain employees a right of first refusal to continue working. President Clinton's E.O. was implemented in FAC 97-11 and 97-15.

To remove the requirement that contractors provide rights of first refusal under building contracts, the new rule removes Subpart 22.12, paragraph (c)(6) from 52.212-5 and 52.222-50.

Submit written comments by July 16, 2001, to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Attn: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.2001-017@ gsa.gov*.

Interim rule with request for comments. Contact: Linda Klein at (202) 501-3775. 66 *Federal Register* 27416, May 16, 2001.

Office of Federal Procurement Policy

OFPP sets FY 2001 compensation benchmark

The Office of Federal Procurement Policy (OFPP) has raised the maximum compensation benchmark for senior executives that will be allowable under government contracts to $374,228.

The amount represents the maximum cap of allowable compensation costs under a government contract and includes a senior executive's total amount of wages, salary, bonuses and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing.

The figure is effective for FY 2001.

Notice. Contact: Richard Loeb at (202) 395-3254. 66 *Federal Register* 22266, May 3, 2001.