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Legislative Journal

Bills Introduced

H.R. 331, School and Library Construction Affordability Act. Waives the requirements of the Davis-Bacon Act relative to contracts for school and library construction and repair.

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

H.R. 381, Ratepayer Protection Act. Provides that no electricity utility shall be required to enter into a new contract or obligation to purchase or to sell electricity or capacity.

Status: Referred to the House Committee on Energy and Commerce. 🗁

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

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

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

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

Deadline delay affects acquisition rules

The Bush Administration's postponement of last minute regulations passed by the Clinton Administration has put the implementation and effectiveness of the last 2 Federal Acquisition Circulars (FACs) in doubt. Upon taking office, President Bush issued an executive order providing that all regulations published in the *Federal Register* but not in effect as of January 20, 2001, must be delayed for 60 days from their respective effective dates. *See 66 FR 7701.* The order was issued to ensure that all new regulations are reviewed AND approved by a Bush-appointed agency or department head.

The postponement affects FACs 97-22 and 97-23 as follows:

- ✓ **FAC 97-22** – original effective of March 12, 2001 has been revised to May 11, 2001.
- ✓ **FAC 97-23** – original effective February 20, 2001 has been revised to April 20, 2001.

The majority of rules in the documents are noncontroversial in nature. However, they cannot take effect without first being approved by a Bush Administration appointee. It is not clear which

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REFORM WATCH

Congress, agencies, and contractors continue to bicker over blacklisting rules

The Civilian Agency Acquisition Council (CAAC) of the General Services Administration (GSA) last month delayed the effective date of the recently-issued contractor responsibility rules. It has issued a directive permitting agencies to deviate from the requirements of Federal Acquisition Circular (FAC) 97-21 until either a official FAR change is issued or until July 19, 2001.

In response, 3 senators, Joseph Lieberman (D-Conn), Edward Kennedy (D-Mass), and Richard Durbin (D-Ill) sent a letter of protest to Mitch Daniels, Director of the Office of Management and Budget (OMB). The senators called the Council's action "likely unlawful" after a review by the non-partisan Congressional Research Service.

The contractor responsibility rules were finalized during the last days of the Clinton Administration, despite their controversy and the protests of several agencies and members of Congress. *See the* Federal Acquisition Report*, January 2001, page 3.* The regulations require contractors to disclose any past violations federal law before entering into a government contract.

In addition, the rules published in FAC 97-21 require contracting officers to discuss possible nonresponsibility determinations with agency legal counsel. Several members of Congress believe these requirements will cause many contractors to stop their federal contract work.

The FAR Council allowed agencies only 30 days to comply with the rules, a deadline which GSA and CAAC felt was impossible to meet. "The effective date extension will allow the government and contractors sufficient time to meet the new obligations and responsibilities imposed by the final rule," noted CAAC.

CAAC acted under the authority of the Administrative Procedures Act to postpone implementation of final rules published by the Federal Acquisition Regulation (FAR) Council, while the rules are undergoing judicial review.

Since CAAC issued its memorandum on January 31, 2001, 4 agencies have suspended implementation of the rule, including GSA, NASA, the Department of Transportation (DOT), and the Department of the Interior (DOI).

According to the senators' letter to OMB, those agencies are "exempting themselves for 6 months from their Contracting Responsibility obligations without the thoughtful consideration required by law."

"It is unfair for the Administration to delay the implementation date without notice or any consideration of the views of the public," the letter stated. "The Contractor Responsibility Rule – which is the culmination of a multi-year process in which more than a thousand comments from interested parties were received and carefully considered – is a moderate and sensible reform, and we urge the Administration to implement it without delay."

Several organizations, including the Business Roundtable, the Chamber of Commerce, the National Association of Manufacturers, the Associated General Contractors of America, Inc., and the Associated Builders and Contractors, Inc., have filed a lawsuit in the U.S. District Court for the District of Columbia, seeking to overturn the rules. 🗁

Reminder

Agency contracting officers participating in the class deviation should revert to the previous FAR text, including certification language. The old language is available online at *www.arnet.gov/far/*, under "FAR (Archived) HTML" for FAC 97-20.

FAR Parts affected by FAC 97-21 are: 9.103(b), 9.104-1(d), 9.104-3(c), 14.404-2(i), 15.503(a), 31.205-21, 31.205-47(a) and (b), 52.209-5, and 52.212-3(h). 🗁

agency must approve the documents. However, when contacted by the *Federal Acquisition Report*, the Office of Federal Procurement Policy (OFPP) and the Office of Management and Budget (OMB) refused to comment on whether either was responsible for approving the new rules or would do so. 🗁

Bush orders changes in construction contracting

President Bush has recently issued 2 executive orders (E.O.) that will immediately change procedures for federal construction contracting. The February 17, 2001 orders revoke policy implemented by the Clinton Administration. *See 66 FR 11225 and 11228.*

The first E.O., 13202, *Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects*, directs that procurement personnel cannot require or prohibit construction contractors from entering into union labor agreements. In addition, it prohibits agency

Air Force evaluates reverse auctioning

The Department of the Air Force has recently completed an analysis of corporate business users and providers of reverse auctioning services to determine whether the technique is viable for its contracting officers.

The Air Force first studied the reverse auctioning practices of several private-sector companies. It found that

- it is easier to establish a reverse auctioning practice with nonessential items and then move on to experiment with more complex procurements;
- advance preparation is essential and must focus more on the market than on the product or service;
- focus should be placed on the health of the supplier base of products;
- reverse auctioning can be used to stimulate competition, and reduce a supplier base;
- it is wise to require users to pre-qualify their sources; and
- choosing "best value" over the lowest bid may be more appropriate.

The Air Force next studied service providers. It found that companies offer a wide range of services, from the simplest "do-it-yourself" tool to very complex integrated e-business exchanges in which reverse auctioning is just one component. The Air Force concluded that buying offices must understand that reverse auctioning does not constitute all of electronic commerce, and should be approached as a small component to be integrated into a larger strategy.

The service provider analysis also showed that

- the market is becoming more homogenous, with many companies offering the same types of services, making distinction more difficult;
- a key discriminator is the level of additional service provided within the e-business domain;
- pricing is market-share driven and very competitive; and
- enablers can foster inclusion of competition for a particular requirement.

The Air Force has partnered with the Army Communications-Electronics Command (CECOM) during fiscal year 2001 to provide reverse auctioning software and training to Air Force contracting personnel for free. The training and software use is not mandatory, however, and Air Force employees are able to receive the same services both from the Navy and from the General Services Administration (GSA).

More information on the Air Force's reverse auctioning analysis is available online at *www.safaq.hq.af.mil/contracting/reverseauction/*. Air Force employees who have questions regarding reverse auctioning should contact Lt. Col. Alan Boykin at *alan.boykin@pentagon.af.mil*.

contracting officers from discriminating against any construction contractor on the basis of their labor organization affiliations or lack thereof.

Vendors are still free to enter into any labor agreement they wish, the President noted in the order. Those agreements, however, will have no affect on federal contract awards.

The second E.O., 13204, *Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts*, eliminates the requirement that contractors taking over public building contracts offer employees of previous vendors the right of first refusal. The requirement was first introduced by the Clinton Administration in E.O. 12933, October 20, 1994.

President Bush has directed the Federal Acquisition Regulation (FAR) Council to adjust the FAR to reflect the new E.O.s as soon as possible, but in no more than 60 days. 🗁

Congressman takes another stab at putting the government on "TRAC"

Congressman Al Wynn (D-Md.) has reintroduced the Truthfulness, Responsibility, and Accountability in Contracting (TRAC) Act in the House. Wynn acted quickly, within the first few weeks of the new Congress to put the legislation back into action.

Wynn originally introduced the bill last spring; however, the House Subcommittee on Government Management, Information and Technology, to which it was referred, never held a hearing for the bill. *See the* Federal Acquisition Report*, April 2000, page 2, and November 2000, page 3, respectively.*

The TRAC Act (H.R. 721) would require federal agencies to

- keep track of the costs of contracting out;
- subject work to public-private competition before giving it to contractors;
- abolish arbitrary in-house personnel ceilings that prevent federal employees from competing for work; and
- emphasize contracting in to the same extent as contracting out.

According to Michael Rious, a spokesperson for Congressman Wynn, the new bill differs from the old one only in that it exempts handicapped and blind employees, as well as certain construction contracts from its requirements.

Rious expressed optimism for passage of the TRAC act during this Congressional session. "We have been promised a hearing for the bill by the Chairman of the House Committee on Government Reform," he explained. "There is also a rally coming up in Raleigh [NC]. Congressman Wynn is confident that the bill will be passed during this Congress," Rious said.

The TRAC Act has currently been referred to the House Committee on Government Reform. 🗁

GSA seeks opinions on 508 implementation

The General Services Administration (GSA) is currently accepting comments from agencies on proposed changes to the Federal Acquisition Regulation (FAR) pertaining to Section 508 electronic and technology accessibility. Finalized Section 508 standards were issued by the Architectural and Transportation Barriers Compliance Board (Access Board) on December 21, 2000.

Section 508 of the Workforce Investment Act of 1998 requires agencies to ensure that electronic and information technology is accessible by:

- individuals with disabilities who are federal employees; and
- individuals with disabilities who are members of the public seeking information or services from a federal department or agency.

The new standards require, for instance, text labels for graphics on web pages, desktop software that is compatible with Assistive Technology, and hardware that meets certain height and reach requirements. Exceptions exist for (1) micropurchases (until January 1, 2003); (2) national security systems; (3) materials acquired by a contractor incidental to a contract; (4) information located in spaces frequented only by service personnel for maintenance or repair or occasional monitoring of equipment; and (5) circumstances

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Small businesses still have what it takes, GAO finds

Small businesses are still able to compete for federal procurement contracts, despite changes in acquisition practices over the past decade, the General Accounting Office (GAO) concluded in a recent report, *GAO-01-119*.

GAO analyzed data from the General Services Administration's (GSA's) Federal Procurement Data Center (FPDC) to determine what effects federal procurement reform over the past 5 years has had on small businesses. The analysis and consequent report were done at the request of Congressmen Stephen Horn (R-Ca) and Tom Davis (R-Va) to determine

- provisions in acquisition reform legislation enacted in the 1990s and other changes in procurement that occurred during that time that could affect small business contractors; and
- trends that might indicate possible shifts in the ability of small businesses to obtain federal contracts.

The Congressmen raised concerns originally brought up by representatives of small business contractors that changes in procurement policy reduce contracting opportunities for all small businesses. GAO found, however, that agencies have met and exceeded their 23 percent small business contracting goals.

The report did note that small businesses' concerns are not unfounded. Small Business Administration (SBA) data shows that while agencies met the 23 percent procurement goal between fiscal years 1993 and 1999, there was a small decrease in the percentage of total contract expenditures. That includes new contracts and contract modifications that went to small businesses.

GAO research indicated that small businesses received between 25 and 28 percent of the value of new contracts worth more than $25,000 during that time. Also, GAO calculated that small businesses received a higher percentage of expenditures in FY 1999 on new contracts over $25,000 than they did in FY 1993.

New contract vehicles – specifically multiple award contracts, provided small businesses with 26 to 55 percent of expenditures for new contracts over $25,000. Other changes, such as contract bundling and use of purchase cards were too recent for GAO to determine their affect on small businesses.

SBA generally concurred with GAO's report, but the agency expressed concerns over recent and likely future trends that suggest that agencies are having trouble meeting the governmentwide 23 percent contracting goal. 🗁

DoD sets record for small-business set-asides

Late last month, the Department of Defense (DoD) entered into the largest-ever federal small business set-aside contract. The contract is for satellite transmissions services, and is worth up to $2.196 billion over the life of the contracts, exercising all options.

The Defense Information Systems Agency (DISA) awarded the 3-part contract to provide DoD and federal agencies with a full range of transponder and emerging processed commercial satellite communications services, earth terminals, and system management.

The 3 indefinite delivery/indefinite quantity contracts went to

- Artel Inc. of Reston, VA, a small disadvantaged business;
- Spacelink International of Dulles, VA, a small business; and
- Arrowhead Space and Telecommunications Inc. of Falls Church, VA, a woman-owned small disadvantaged business.

The contracts each have a base period of 3 years, with 7 one-year options. DoD has not immediately obligated any funds.

"This piece of satellite communications will help complete a very critical segment of the Global Information Grid by completing and enhancing existing DISA satellite, wireless, teleport, and terrestrial network capabilities," commented Air Force Lt. Gen. Harry D. Raduege Jr., Director of DISA. "Most importantly, this will help us get much needed, wider and faster information pipelines to the warfighters deployed in support of contingency and humanitarian operations."

where application of the proposal would create an undue burden.

GSA's rule would apply the 508 standards to federal procurement officials. Specifically, the rule

- defines the term "electronic and information technology" for procurement personnel;
- provides guidance on how to implement the accessibility standards;
- incorporates the electronic and information technology standards in acquisition planning and market research; and
- establishes a sunset date of January 1, 2003, for the micro-purchase exemption.

The federal Chief Information Officers (CIO) Council estimates that 10 percent of Americans have some type of disability and they would benefit from having accessible information technology in their workplace. The Council also stated that 70 percent of the disabled population is currently either un- or under-employed, and that complying with the 508 standards will increase the government's ability to tap into this under-utilized labor market.

Comments on the proposed rule are due to GSA by March 23, 2001. *See page 12 for details.* 🗁

NASA needs to separate contractors from employees

The National Aeronautics and Space Administration (NASA) needs to separate the job functions of civil servants from those of federal contractors, according to a recent report by the NASA Inspector General's Office (OIG).

NASA's OIG reviewed the agency's use of support service contractors to perform general administrative duties. The OIG found that NASA relies heavily on contractors to achieve its mission, a fact which raises concerns over the separation of federal and non-federal job activities.

The Federal Activities Inventory Reform (FAIR) Act requires agencies to identify all opportunities for possible outsourcing. NASA has also recently announced a new initiative to hire a larger portion of nonpermanent employees. The government, however, prohibits contracting out predetermined inherently governmental functions. NASA must

ACQUISITION ADVICE

Q: Is lack of financing an excusable reason to avoid a termination for default?

A: No. *See* Richard J. Danzig, Sec'y of the Navy v. AEC Corporation*, U.S. Court of Appeals for the Federal Circuit No. 99-1343, September 25, 2000.* If a contractor is behind schedule or simply cannot finish the work, there may be good reasons for that. Maybe the government delayed the contractor by not making government property available on time. Or maybe there was unusually severe weather. These so-called excusable delays "excuse" a contractor from being in default. What if a contractor, however, simply does not have the money to finish the project? Is that an excusable delay? Generally, no, but there are some exceptions.

In the case, AEC Corporation had a Navy contract to complete the construction of a Naval and Marine Corps Reserve Training Center in Miami, Florida. AEC got behind schedule, partially because it was having financial difficulties with its surety. AEC prepared a revised schedule which the Navy approved. But the problems with the surety continued. After the surety froze AEC's bank account, workers started leaving the company. The Navy sent AEC a cure notice, asking AEC to give the Navy within 10 days some indication that AEC would finish the project on time. AEC's response blamed the delay on numerous government changes as well as its surety's blocking of funds. It concluded that it might never be able to finish the project. Despite Navy requests for information backing up AEC's argument that the many government changes were delaying the project, AEC simply referred the Navy to AEC's previous correspondence. Eventually, the Navy terminated the project.

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learn to balance its outsourcing with compliance with the regulations, the agency OIG stated.

The report noted that NASA's contractors generally handle integral tasks such as sorting mail, typing, taking notes, entering timecards, and filing. These tasks potentially cause contractors toperform inherently governmental work. Also, co-locating civil servants with contractors allows federal employees to have continuous control over the contracted employees, the report noted. Both of these occurrences violate federal regulation.

To ensure compliance with government regulations, the Inspector General recommends that

- NASA's Office of Human Resources and Education incorporate FAR Part 11.106, *Purchase Descriptions for Service Contracts*; Title 5 CFR, Section 300-501, *Use of Private Sector Temporaries*; and Equal Opportunity Commission (EEOC) Enforcement Guidance Notice No. 915.002, *Application of the Equal Employment Opportunity Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, into NASA's acquisition regulations;
- the Office of Human Resources and Education and the Office of Procurement work with other NASA organizations to establish agencywide policy to differentiate between civil servants and contractors;
- the Office of Procurement should reiterate the requirements of FAR Part 11.106 with contracting officers who develop purchase descriptions for service contracts;
- the Office of Human Resources and Education and the Office of Procurement should periodically request that NASA familiarize its workforce with appropriate contractor-federal employee communication;
- the Office of Human Resources and Education should assess the appropriateness and necessity of any general administrative support being provided to NASA; and
- the Office of Procurement should determine whether NASA centers are properly structuring and administering their contracts for general administrative support to avoid inherently governmental services.

NASA agreed with the OIG's recommendations and has submitted corrective action implementation plans for each.

Decisions

Surety can't prosecute claims that arise prior to a takeover agreement

RULE: *Unless the contractor and its surety join the government in a takeover agreement, the surety cannot on its own raise claims occurring prior to the agreement.*

A surety that assures the government it will complete the project if the contractor does not is a critical part of many government contracts. Its rights can be seriously undermined, however, if the surety goes it alone by not getting the contractor to join in a takeover agreement, as a recent decision of the Armed Services Board of Contract Appeals (ASBCA) shows.

The Air Force had a construction contract with Castle Abatement Corporation. United Pacific Insurance Company gave a performance bond assuring the completion of the project. The site of the project could have been contaminated, according to the contract. When Castle ran into problems with the project, the contract got terminated for default. United took the project over and signed a takeover agreement with the government. Castle was not a party to it and Castle never appealed the termination for default. United then filed claims for almost $1,759,966. The claims were for work that occurred before the takeover agreement as well as work that occurred after. The contracting officer took three zeros off the end of the claim and gave United $1,431. United appealed to the board.

The government argued that United could not sue the government for claims that arose before the takeover agreement was signed. The takeover

ACQUISITION ADVICE

Q: What basis does an agency need to cancel a solicitation?

A: Only a "reasonable" one. *See* USA Electronics, *B-283269.2, October 5, 1999*; D & F Construction Co., Inc.*, B-281244.3, October 1, 1999.*

Canceling a solicitation is very unpopular with vendors. After they have spent time and money preparing their solicitation, they don't like to hear that it was canceled and they have lost their chance to make money. Often, the vendor takes it personally: The solicitation was canceled, they believe, because the government did not want to do business with them. But situations do change, particularly in the government, so the rules for canceling a solicitation must be flexible and accommodating to the uncertainties of government contracting. The following decisions of the General Accounting Office (GAO) show what latitude the government has and define what GAO considers to be a "reasonable basis" for cancellation.

Government demand increases

(USA Electronics, *B-283269.2, October 5, 1999*)

In the case, USA Electronics was the low bidder on a Request for Quotations (RFQ) for power assemblies from the Army. While it was in the process of verifying its low bid and trying to prove to the Army that it had made a mistake, the Army discovered that it needed a great deal more power supplies. Hoping to get better prices for a larger- quantity procurement, the Army canceled the solicitation. USA protested but lost. A big increase in the government's need or the potential for cost savings are both acceptable bases for canceling a solicitation, according to GAO.

All bids too high

(*Quality Inn and Suites Conference Center*, B-283468, October 20, 1999)

In the case, the Army needed lodging and transportation for its School of Cadet Command at Fort Monroe, Virginia. Bids came in from Holiday Inn and Quality Inn, at two to three times the government estimate—so the Army canceled the solicitation. Quality Inn protested the cancellation to GAO, arguing that the government estimate was too low. GAO denied the protest.

GAO stated that prices that are unreasonably high are a valid basis for canceling a solicitation. Here, the government had done a market survey establishing that the prices bid were way too high. GAO noted that it had previously sanctioned canceling a solicitation where the prices bid were only 7.2 percent higher than the government estimate. Here, with prices two to three times higher, cancellation was clearly justified.

agreement with United covered work that occurred after the takeover agreement. Any claims relating to work before the takeover agreement was signed had to be filed by Castle who was now permanently out of the picture. In effect, the government argued that United lacked standing to raise any claims for work prior to the takeover agreement.

The Board agreed with the government. United's main argument was that government fraud and misrepresentation encouraged it to issue bonds it would not otherwise have issued. The government allegedly knew that the site was more contaminated that it let on.

The board acknowledged that a bonding company can get off the financial hook if the government concealed significant facts from it – but not on government contracts. The Contract Disputes Act allows only a contractor to sue. There is no exception for fraud. In any event, the government hadn't concealed anything. The solicitation in fact had sufficiently warned bidders about the contaminated land.

United Pacific Insurance Company, ASBCA No. 52419, February 7, 2001. 🗁

Bidders must look pre-bid at test boring data on file at government offices

RULE: *When the government tells bidders that test boring and samples about the site are available at government offices for inspection, the bidders must look at that data or risk waiving rights to a differing site condition.*

The differing site condition clause makes the government pay for conditions at a construction site that are different from what the government said they would be or different from what bidders would expect anyway. But if the bidders would

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know about the differing site condition from a pre-bid review of government – offered data, the bidders must look at it. Now, busy bidders should accept the government's invitation to look at test borings and soil samples data held at government offices.

The Corps of Engineers issued a solicitation for the construction of a sewage pumping station. Since the foundation would go 40 feet below the surface, any subsurface water 45 feet down would have to be removed before construction. The Corps did a lot of tests and put the results of some of these tests, the test boring logs, in the solicitation itself and the results of others, so-called gradation curves, on display at its Baltimore offices. Bidders were told about this information and told also that the information would be available for inspection. The solicitation included the inspection of site clause and the physical data clause. The physical data clause itself told bidders that soil tests were available at the Corps' Baltimore offices.

Randa did not accept the Corps' invitation and thus did not look at the data. After it won the contract, it encountered more water than it had anticipated. It filed a claim for a differing site condition based on two arguments. First, it had no duty to look at the Baltimore data "in the absence of a specific warning that the boring logs are unreliable or a statement that a review of the soil test results was required for bid preparation." Second, the Corps had the duty to disclose in the solicitation documents themselves all relevant information in its possession, including the information available at Baltimore. Because the differing site condition clause shifted the risk of a differing site condition to the government, if that risk is to shifted back to the contractor (as Randa saw the government's argument), the contractor should be warned that the solicitation's data was not accurate. Randa lost this argument before the contracting officer, the Armed Services Board of Contract Appeals, and the Court of Appeals for the Federal Circuit.

Having the last word, the appeals court agreed with the contracting officer and the board that Randa did not have a differing site condition because it should have known about the excessive water from looking at the information available for review at the Corps' offices. And the government had no duty beyond what the government did.

The duty was on Randa. It had to look at the Baltimore data. Precedent held that if the solicitation told bidders about the availability of data, a bidder was presumed to have reviewed it. The court discounted precedent that held that a contractor has a duty to inquire when warned. Precedent, according to the appeals court, did not hold that the contractor had a duty to inquire about the information **only** when it was warned by the government.

Nor did the Corps itself have a heightened duty to disclose the information beyond what it did. "Given our conclusion above that Randa had a duty to inquire and review the gradation curves, it follows that the Corps had no further duty of disclosure in this case. That is, by referring to the gradation curves and additional information and making it available for inspection, the Corps did disclose that information."

Randa/Madison Joint Venture III, v. Department of the Army, United States Court of Appeals for the Federal Circuit, 00-1122, February 7, 2001. 🗁

Agency errs in not discussing deficiencies discovered at on-site visit

RULE: *If an agency conducts an on-site visit and learns of potential deficiencies, it must raise those issues to the offeror in order to conduct "meaningful discussions."*

The obligation to raise deficiencies in an offeror's proposal can arise at different points in the evaluation process. Just because new deficiencies arise after discussions have been held and after an on-site visit does not mean an agency should not raise them.

The Library of Congress issued a solicitation for the repair of talking book machines. One of the evaluation factors in this best value procurement was "demonstrated ability to perform timely repairs in accordance with specifications as evidenced by successful past performance in component level repair of complex microprocessor-controlled electromechanical systems, including established quality control practices and procedures." One of the offerors was SWR, whose proposal specifically

discussed its corporate and staff component-level repair experience. Following discussions and receipt of revised proposals, the Library conducted on-site visits of the offerors' facilities. At the site visit of SWR, the Library asked for certain information but nothing specifically dealing with component-level repair. After the site visit, SWR was found to be not technically acceptable. The main reason was that the information SWR gave the Library at the site visit did not specifically show past performance of component-level repair of complex, microprocessor-controlled, electromechanical systems.

After SWR lost, it protested. One of its grounds was that the government never told SWR that its component-level repair experience was not acceptable. This deficiency was not identified during discussions nor was it brought up at the site visit. The Library claimed that the information provided on-site showed that SWR's previous information was not credible. All SWR had provided at the on-site were work orders other than component-level repair.

GAO agreed with SWR that SWR had shown that it had component-level repair experience. Its initial proposal had shown that. Also, the initial evaluation by the agency's evaluation committee found that SWR had sufficient component-level repair experience.

GAO then looked at why the Library had found SWR's proposal unacceptable: the documents provided by SWR at the site visit which allegedly did not show this experience.

GAO's problem was that "these documents were not intended to show SWR's component-level repair experience, but were provided in response to the agency's request that SWR provide at the site visit 'a current copy of [its] Quality Control Documentation.' The agency did not ask to see documents showing component-level repair, and there was no discussion at the on-site visit concerning SWR's component-level repair experience." Moreover, if the Library was concerned about the lack of experience after the site visit, it should have raised those problems with SWR by having additional discussions.

SWR Inc., B-286161.2, January 24, 2001. 🗁

Proposed subcontractor had access to information others didn't

RULE: *An "unfair competitive advantage" organizational conflict of interest exists when a winner's proposed subcontractor, because of another contract, has information other offerors did not have. An "impaired objectivity" type of organizational conflict of interest exists when a proposed subcontractor would be expected to evaluate, under another contract, the performance of the winner.*

An organizational conflict of interest (OCI) presents problems, but not insurmountable ones. If one exists, an agency can mitigate it and go on with the solicitation, keeping competition higher by not forcing conflicted companies to get out of the competition. A recent opinion of the General Accounting Office (GAO) shows good examples the different types of OCIs: unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. It also finds that, in addition to the two typical kinds of unfair competitive advantage OCIs, there can be a third.

The Army did an A-76 study in connection with its installation support services requirements at Fort Benning. The contract would cover buildings maintenance, family housing maintenance, utility systems operations and maintenance, heating etc.

The apparent winner, IT had a teaming arrangement with INNOLOG. INNOLOG was performing an integrated sustainment maintenance (ISM) contract. Under the ISM contract, INNOLOG maintained the Executive Management Information System (EMIS) database which had data on maintenance activities performed at various Army installations worldwide (including Fort Benning). In GAO's eyes, "using the EMIS, it is possible to obtain relatively in-depth, comprehensive historical information relating to maintenance activities performed at Fort Benning."

GAO found both types of OCIs. As to unfair competitive advantage OCI, GAO noted that FAR § 9.505(b) identified two types of information cites two kinds of information that can provide an offeror an unfair competitive advantage: "proprietary information obtained from the government without

proper authorization and source selection information." To these, GAO added a third: information "presumably obtained with proper authorization and not in the course of the source selection process." Information obtained from the EMIS process might be of this type.

GAO further found that information learned from the EMIS was competitively useful – it would let an offeror prepare a more refined proposal that would result solely from information in the RFP. "Such enhanced detail regarding the actual work performed could provide an offeror the opportunity to formulate a better staffing profile in the sense that the firm could propose a smaller number of employees (at a lower skill level) in arriving at its proposed staffing mix."

GAO also found that the second type of OCI was present, impaired objectivity: "where a firm's obligations under one contract could impair its objectivity in providing advice or assistance to the government under another contract." Because INNOLOG under its existing contract could be asked to evaluate other installations "and those recommendations could ultimately have an impact on the amount of work to be performed by the IT team at Fort Benning" there was an impaired objectivity OCI. "Simply stated, there is a fundamental conflict between performing installation support services, on the one hand, and evaluating the efficiency of those services (and making recommendations about where those activities should be performed), on the other."

Because the agency had not successfully mitigated either OCI, GAO sustained the protest.

Johnson Controls World Services, Inc., B-286714.2, February 13, 2001. 🗁

Agency must discuss deficiencies in initial but not in revised proposals

RULE: *If a reevaluation of an initial proposal identified deficiencies, discussions must be held with all offerors in the competitive range.*

If an agency established a competitive range, it has to discuss any deficiencies or significant weaknesses with those in the competitive range. But that is not true for deficiencies found in *revised* proposals. If an agency wants to, it can – using another round of final proposal revisions. But it doesn't have to.

On the other hand, if an agency reevaluates both initial and revised proposals, say after having the General Accounting Office (GAO) recommend a reevaluation, it must have discussions about any deficiencies in the initial proposals that come to light after the reevaluation. GAO recently recognized the problems an agency faces in this situation but concluded that discussions must be held.

The U.S. Agency for International Development (USAID) issued a solicitation for services. As a result of a protest, USAID volunteered to go back to square one in the solicitation process. The new evaluation was done by a new group of evaluators. Their evaluation, however, covered both the initial proposals and the revised proposals. Their review of the initial proposals disclosed some deficiencies for the first time. But after the evaluation was done, the panel decided not to conduct discussions. The second evaluation resulted in the company that first brought the protest, DevTech Systems, Inc., finding its score lowered even further. This brought another DevTech protest.

This protest was successful. GAO was sympathetic: "This case highlights the challenge that an agency may face when, for whatever reason, it reevaluates initial proposals after discussions are complete. If during the reevaluation of proposals the agency identified concerns that would have to be raised had they been identified before discussions were held, the agency is required to reopen discussions in order to raise the concerns with the offerors." In a footnote, GAO noted that this was not the case with deficiencies identified after receipt of final agency proposals, "in that situation, an agency is not required to reopen discussions to address the new concern."

Here, the weaknesses "all appear to relate to DevTech's proposal as it was prior to discussions." Therefore, they should have been raised during discussions. Since they weren't, the agency was wrong. GAO recommended that the agency reopen discussions. It awarded DevTech its protest costs, including attorneys' fees.

DevTech Systems, Inc., B-284860.2, December 20, 2000. 🗁

Rules

FAR Council

FAC 97-23 issued

The Federal Acquisition Regulation (FAR) Council has issued Federal Acquisition Circular (FAR 97-23). The document contains only one final rule which adds a new subpart (22.15) prohibiting the acquisition of products by forced or indentured child labor. In addition, the rule requires contractors to

- certify whether there is a reasonable basis to believe that any end products contained in a solicitation may have been mined, produced, or manufactured by forced or indentured child labor; and
- cooperate with authorities to determine whether a violation of the prohibition has occurred.

In the event a contractor fails to cooperate or violates the prohibition, a contracting officer may terminate the contract and debar the contractor up to 3 years.

The rule was originally effective February 20, 2001, according to the Bush Administration's delay, it will become effective on April 20, 2001.

FAR Parts Amended: 22.1500; 22.1501; 22.1502; 22.1503; 22.1504; 22.1505; 52.212-3; 52.213-4; 52.222-18; and 52.222-19.

Final Rule. Contact: Linda Nelson at (202) 501-3775. 66 *Federal Register* 5345, January 18, 2001. 🗁

Access rules are proposed

The FAR Council has proposed to revise the rules governing the ability of the disabled to access electronic information distributed by agencies. The proposal implements Title IV of the Workforce Investment Act (P.L. 105-220) and the Access Board's recommendations to incorporate the statute's requirements.

The Act requires federal agencies to develop, procure, maintain, or use electronic and information technology (EIT) to ensure that federal employees and the general public with disabilities are able to access agency materials. Toward that end, the proposal would require agencies to

- incorporate EIT standards in acquisition planning, market research, and when describing agency needs; and
- add a new Subpart 39.X to incorporate the new requirements.

Exceptions to the proposed requirements would exist for

- micropurchases (until January 1, 2003);
- national security systems;
- materials acquired by a contractor incidental to a contract;
- information located in spaces frequented only by service personnel for maintenance or repair or occasional monitoring of equipment; or
- circumstances where application of the proposal would create an undue burden.

Submit written comments to the General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.1999-607@gsa.gov*.

FAR Parts Amended: 2.101; 7.103; 10.001; 11.002; 12.202; and 39.000.

Proposed rule. Contact: Linda Nelson at (202) 501-4755. 66 *Federal Register* 7165, January 22, 2001. 🗁

Subcontracting information will still be required

The FAR Council has requested the Office of Management and Budget (OMB) to extend the information collection requirement regarding subcontracting plans and reports. Currently, vendors that receive a contract or modification exceeding

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$500,000 ($1 million for construction) must submit Standard Form 294, Subcontracting Report for Individual Contracts, semi-annually.

Submit written comments by April 9, 2001, to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, Dc 20405.

Notice of request for public comments regarding an extension to an existing OMB Clearance (9000-0006). Contact: Rhonda Cundiff at (202) 501-0044. 66 *Federal Register* 7468, January 23, 2001.

Department of Defense

DOD will continue to protect classified information

The Department of Defense (DoD) has proposed to extend an information collection requirement regarding unclassified data. Currently, DFARS 252.204-7000, Disclosure of Information, must be included in contracts that require contractors to access or generate unclassified information that may be sensitive and inappropriate for release to the public.

Specifically, the clause requires contractors to obtain the approval of their contracting officer before they may release any unclassified contract-related information outside the contractor's company, unless the information is already in the public domain. In requesting the approval, contractors must identify the specific information to be released, medium to be used, and purpose for the release.

Submit written comments by April 16, 2001, to the Defense Acquisition Regulations Council, Attn: Melissa Rider, OUSD, (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; fax: (703) 602-0350; or electronically at *dfars@acq.osd.mil*.

Notice and request for comments regarding a proposed extension of an approved information collection requirement. Contact: Melisa Rider at (703) 602-0350. 66 *Federal Register* 10274, February 14, 2001.

Price breakdowns continue to be required

DoD has proposed to extend the information collection requirement regarding construction and architect-engineer contracts. Currently, DFARS 252.236-7000 requires contractors to submit a price breakdown with architect-engineer contracts for any contract modification proposal.

Submit written comments by April 16, 2001, to the Defense Acquisition Regulations Council, Attn: Amy Williams, OUSD, (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; fax: (703) 602-0350; or electronically at *dfars@acq.osd.mil*.

Notice and request for comments regarding a proposed extension of an approved information collection requirement. Contact: Amy Williams at (703) 602-0288. 66 *Federal Register* 10275, February 14, 2001.

Cooperative agreement holders get the "list"

DoD has proposed to extend the information collection requirement regarding publicizing agency contract actions. Currently, DFARS 252.205-7000 requires businesses awarded contracts exceeding $500,000 to provide cooperative agreement holders, upon their request, a list of those appropriate employees or offices responsible for entering into subcontracts under DoD contracts. The list must include the business address, telephone number, and area responsibility of each employee or office. Also, contractors must provide a list to a specific cooperative agreement holder once a year.

Submit written comments by April 16, 2001, to the Defense Acquisition Regulations Council, Attn: Melissa Rider, OUSD, (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; fax: (703) 602-0350; or electronically at *dfars@acq.osd.mil*.

Notice and request for comments regarding a proposed extension of an approved information collection requirement. Contact: Melissa Rider at (703) 602-4245. 66 *Federal Register* 10275, February 14, 2001.

DoD trades military for commercial specifications

DoD has proposed to extend the information collection requirement regarding the substitution of military specifications for commercial ones. Currently, DFARS 252.211-7005 encourages offerors to propose management or manufacturing processes, that have been previously accepted by DoD under the Single Process Initiative (SPI) Program, as alternatives to military or federal specifications cited in a solicitation.

Submit written comments by April 9, 2001, to the Defense Acquisition Regulations Council, Attn: Rick Layser, OUSD, (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; fax: (703) 602-0350; or electronically at *dfars@acq.osd.mil*.

Notice and request for comments regarding a proposed extension of an approved information collection requirement. Contact: Rick Layser at (703) 602-0293. 66 *Federal Register* 9069, February 6, 2001.

Department of Energy

DOE revises reimbursement policies

The Department of Energy (DOE) has amended its acquisition regulation (DEAR) to revise the document's coverage of reimbursing legal costs. The final rule creates a new part 719 and requires contractors to submit legal management plans where costs for legal services will be reimbursed. Once approved, the plan and applicable agency regulations form the basis for approving litigation and other legal expenses.

The rule was originally proposed on October 25, 2000 (65 FR 63809). The final rule differs from the proposal in that it eliminates a new clause in Part 952 and prescriptive language in Part 928. Instead, language has been added at 931.205-19 which requires use of the clause at 970.5228-1, Insurance-Litigation claims, for contracts exceeding $100 million.

The rule is effective for all contracts issued after February 19, 2001.

Notice of final rulemaking. Contact: Laura Fullerton at (202) 586-3420. 66 *Federal Register* 4616, January 18, 2001.

DOE seeks to protect restricted data

DOE has proposed to amend the DEAR to increase the protection of unauthorized release of restricted data and classified information. Specifically, the proposal would create a new clause entitled "Conditional Payment of Fee or Profit – Safeguarding Restricted Data and Other Classified Information." The clause would be prescribed for use in all agency contracts which involve classified information, except for management and operating contracts and other agreements designated by DOE's Procurement Executive. Additionally, the clause would provide for reductions of earned fee or profit that are otherwise payable under applicable contracts for violations committed by contractors.

Reductions would be calculated by a percentage range based on 3 degrees of violations. A "First Degree" violation would consist of performance failures that have resulted in grave damage to national security. A "Second Degree" violation would consist of performance failures that have resulted in serious damage to national security. Finally, a "Third Degree" violation would consist of performance failures that have resulted in undue risk to the common defense and security.

Penalties for "First Degree" violations would be at least 51 percent of any fixed fee or profit and could be as high as 100 percent. "Second Degree" violations could result in penalties as high as 50 percent, but would not be less than 26 percent. Finally, penalties for "Third Degree" violations would not exceed 25 percent.

Submit written comments by March 5, 2001, to Michael L. Righi, U.S. Department of Energy, Office of Procurement and Assistance Management, MA-51, 1000 Independence Avenue, SW, Washington, DC 20585.

Notice of proposed rulemaking and opportunity for public comment. Contact: Michael Righi at (202) 586-8175. 66 *Federal Register* 8560, February 1, 2000.

Department of Labor

DOL exempts new services from SCA

The Department of Labor (DOL) has finalized a rule exempting the following services from the Service Contract Act:

- information technology and installation services;
- automotive or vehicle repair maintenance services;
- financial services;
- transportation of persons by plane, car, or boats;
- real estate services; and
- relocation services.

Final Rule. Contact: William Gross at (202) 693-0062. 66 *Federal Register* 5327, January 18, 2001. 🗁

Office of Management and Budget

NAICS is revised

The Office of Management and Budget (OMB) has revised the North American Industry Classification System (NAICS). The revisions will be effective starting January 1 of next year and will include new classifications for atlas and map publishers.

Notice of final decision. Contact: John Murphy at (301) 457-2672. 66 *Federal Register* 3825, January 16, 2001. 🗁

Small Business Administration

HUBZone Program is amended

The Small Business Administration (SBA) has amended the HUBZone Empowerment Contracting Program to

- provide that the program does not apply to contracts awarded by state and local governments; and
- permit non-manufacturers (regular dealers) to be certified as qualified HUBZone small business concerns if they meet all of the requirements in section 126.200.

Final Rule. Contact: Michael McHale at (202) 205-6731. 66 *Federal Register* 4643, January 18, 2001. 🗁