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Legislative Journal

Bills Introduced

S. 581, Untitled. Amends title 10, United States Code, to authorize Army arsenals to begin to fulfill orders or contracts for articles or services before receiving payment when the customer is a department or agency of the United States government, or will use the items or services to fulfill a federal contract.

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

H.R. 1352, Untitled. Amends title 10, U.S.C., to prohibit Department of Defense (DoD) appropriations from being spent on food, clothing, textiles, specialty metals, and hand tools made outside the United States under "Buy American" requirements.

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

H.R. 1458, Untitled. Limits the exceptions to "Buy American" requirements that allow goods made outside the continental United States and its possessions to be purchased either as needed or during a national security emergency.

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

S. 734, Untitled. Amends the Foreign Service Buildings Act of 1926 to expand eligibility for the award of construction contracts to contractors who have performed similar construction work at United States diplomatic or consular establishments abroad under contracts worth no more than $5,000,000.

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

H.R. 1324, Small Business Contract Equity Act of 2001. Requires federal agencies to submit the draft solicitation, make a determination, perform a study, review the study, publish the solicitation, and revise the solicitation when bundling procurement contract requirements.

Status: Referred to the House Committee on Government Reform in addition to the House Committee on Small Business. 🗁

S. 740, Government Neutrality in Contracting Act. Preserves open competition and federal government neutrality towards the labor relations of government contractors on federal and federally-funded construction projects.

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

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REFORM WATCH

OMB wants list of all "inherently governmental" functions

The Office of Management and Budget (OMB) has requested federal agencies to identify and list all civilian, inherently governmental positions in a separate report which must be submitted with their fiscal year 2001 Federal Activities Inventory Reform (FAIR) Act inventories. Both documents are due to OMB by June 30, 2001.

The FAIR Act of 1998 requires all agencies to prepare an annual inventory of their commercial activities which are performed by federal employees. OMB reviews each list and consults with the agency regarding the content. Once the review is complete, agencies must send their inventories to Congress and make them available to the public.

Agencies should prepare the additional report in the same format as their FAIR Act inventories, and should contain the same level of detail. Military and civilian employees who are exempt from the inventories should not be included in the report.

OMB plans to use the information as part of its statutory review process. The separate report, however, will not be released to the public as part of agencies' FAIR inventories.

Although the Bush administration has initiated governmentwide management reforms, which include an increase in A-76 competition and more accurate FAIR inventory analysis, OMB has stated that its current request for additional information is unrelated to the President's acquisition goals.

For questions regarding 2001 inventories or the supplemental report call David Childs in the Office of Federal Procurement Policy at (202) 395-6104. 🗁

Current DoD employees exempt from new education standards

Acting Undersecretary of Defense for Personnel and Readiness, Charles L. Cragin has announced that employees hired before October 1, 2000, will not be required to meet the new education requirements for contracting personnel. Specifically, military and civilian personnel who held GS-1102 positions and contracting officer positions with authority to award or administer contracts above $100,000 on or before September 30, 2000, are exempt from the new requirement.

The provision (Section 808 of the Floyd D. Spence National Defense Authorization Act for fiscal year 2001, P.L. 106-398), provides that all GS-1102 series employees hired since last fall must have

- a bachelor's degree;

  AND

- at least 24 credit hours (or the equivalent) of study from an accredited institution of higher education.

The 24 credits may be earned in any of the following disciplines:

- accounting;
- business finance;
- law;
- contracts;
- purchasing;
- economics;
- industrial management;
- marketing;
- quantitative methods; and
- organization and management.

Section 808 applies to military and civilian hires who have authority to award or administer contracts above the simplified acquisition threshold. The simplified acquisition threshold is currently $100,000, except in overseas contracts supporting contingency operations or peacekeeping missions, when it is $200,000.

Cragin is reminding agencies that implementation of the new education requirements is not meant to affect the hiring controls called for by Chief of Staff Andrew Card's January 20, 2001 memorandum. 🗁

Congressman accuses GSA of delaying low-cost phone contracts

Congressman Tom Davis (R-Va) has recently raised concerns regarding the delay in implementing the General Services Administration's (GSA's) Metropolitan Area Acquisition (MAA) contract program. GSA has awarded 20 contracts under the MAA program. The Program will provide government local telecommunications users with lower-cost contracts.

To date, no agency has transferred its telecommunication operations to the MAA awardees.

Last month, Congressman Davis requested the General Accounting Office to investigate the implementation delays. The House Subcommittee on Technology and Procurement Policy will also hold a hearing on the program on June 13, 2001.

GSA initiated the MAA program as a result of the Telecommunications Act of 1996, which originally called for local service competition. The program is a competitive local services procurement that takes advantage of the local market to reduce prices for the entire government.

GSA planned to implement the MAA program throughout its 11 regions, with New York, Chicago, and San Francisco being the pilot cities. To date, GSA has awarded MAA contracts in

- Albuquerque, NM to Qwest;
- Atlanta, GA to Winstar and Bell South;
- Baltimore, MD to Winstar,
- Boise, ID to Qwest;
- Boston, MA to Southwestern Bell, AT&T, Winstar, and Verizon;
- Buffalo, NY to Verizon and AT&T;
- Cincinnati, OH to Winstar;
- Cleveland, OH to Ameritech Corp and AT&T;
- Dallas/Ft. Worth, TX to Winstar, Southwestern Bell, and AT&T;
- Denver, CO to Qwest, Winstar, and AT&T;
- Indianapolis, IN to Winstar, AT&T, and SBC Global;
- Los Angeles, CA to Winstar and Pacific Bell;
- Miami, FL to Winstar and Bell South;
- Minneapolis, MN to Qwest and Winstar;
- New Orleans, LA to Bell South;
- Philadelphia, PA to AT&T and Winstar; and
- St. Louis, MO to Winstar and Southwestern Bell.

"I am deeply concerned that the federal government has been inexcusably slow in creating service orders to transition business to MAA contract award winners," commented Davis. "As chairman of the subcommittee that oversees federal procurement, I am committed to seeing the transition of this business occur rapidly," he said.

The 20 contracts are projected to be worth $4.1 billion, and could save taxpayers $1 billion compared to current costs. "These huge cost savings are not being realized, at least in part, because of GSA's inaction in implementing and acting on the MAA contracts that have been awarded," concluded Davis.

Allen Fletcher, GSA's MAA program representative, responded that there has not been an official delay in implementing the contracts. "MAA program participants are still familiarizing themselves with how the contracts work, and how they are performing in the government market," Fletcher said. "Full participation is currently being phased in to the 20 MAA cities."

Contractors will have to provide more info for CCR

The Defense Logistics Agency (DLA) has announced that additional information will now be required from contractors when they register in the Central Contractor Registration (CCR) database.

Effective immediately, contractors seeking to register will have to

- **provide their North American Industry Classification System (NAICS) code.** The NAICS element is located under the "Goods and Services" tab and replaces the Standard Industrial Classification (SIC) codes. Until all vendors and

agencies have fully transitioned from the SIC codes, CCR will continue to record both; and

- **certify whether they are a member of Historically Underutilized Business Zone (HUBZone) Program.** The HUBZone element is located under the "Corporate Information" tab. The Program's objective is to stimulates economic development and creates jobs in rural communities by providing federal contracting preferences to certified small businesses.

For contractors already registered, they will also be required to add this information to their registry when they do their next annual CCR update.

DoD is planning future changes to the function and style of the CCR database. The agency expects to implement the revisions by the end of the summer.

DoD may buy additional technical data

The Department of Defense (DoD) is reminding employees that they have the authority to purchase technical data for commercial items. According to DoD, most agency contracting personnel believe that the Federal Acquisition Regulation (FAR) prohibits this practice. DoD's reminder is contained in an official memorandum from Darryl A. Scott, Deputy Assistant Secretary for Contracting in the Air Force.

Under FAR 27.4, *Rights in Data and Copyrights*, contracting officials are limited to using only the data publicly released by companies, such as advertisements, in choosing what commercial items to purchase. The memo notes, however, that this information is often insufficient for complete technical evaluation of an item. Publicly-offered data cannot accurately predict long-term field operation and maintenance.

Scott emphasized that the Defense Federal Acquisition Regulation Supplement (DFARS), creates an exception to the general FAR prohibition. DFARS 227.7102-1 allows contracting employees to

- buy additional technical data for form, fit, and function;
- buy technical data for repair and maintenance; and
- support commercial item or process modifications at government expense.

To make greater use of this authority, Scott directs agency contracting personnel to work with components to

- identify when exceptions can be made;
- evaluate appropriate price/benefit tradeoffs; and
- develop and negotiate cost-effective contract terms.

In addition, the Deputy Assistant Secretary is encouraging employees to review the report, *Commercial Item Acquisition: Considerations and Lessons Learned*, for ideas on creating effective strategies for procuring commercial items. The report is available online at *www.acq.osd.mil/ar /doc/cotsreport.pdf*. 🗁

GAO finds staff cuts necessary to stay A-76 competitive

Both government contracting personnel as well as federal contractors have resorted to staff reductions in order to compete for work under A-76 studies, according to a recent report by the General Accounting Office (GAO) – *GAO-01-388*.

The report was compiled at the request of Senators Herbert Kohl (D-WI) and Russell Feingold (D-WI), because of concerns that A-76 competitions might be having an adverse affect on the pay and benefits of former government employees. The Congressional members were suspicious that the competitions were forcing federal workers to shift to the private sector for less pay and benefits.

GAO analyzed the results of 3 Department of Defense (DoD) A-76 studies, determining that when the government wins an A-76 competition, it converts its military positions to less expensive civilian ones. Contractors, on the other hand, often hire employees with the least costly skills needed to perform the job. Also, contractors are able to hire temporary or seasonal employees to fulfill larger workloads at less cost.

Unfortunately, GAO noted that it is unclear whether federal employees are being forced en mass

to the private sector at lower pay as a result of A-76 competitions. It cited a significant number of examples, however, of such cases.

To avoid the result, GAO recommends that agencies

- limit proposed activities to the streamlined requirements in the performance work statement;
- substitute civilian for military workers;
- design new work processes;
- adopt multiskilling (employees performing more than one skill); and
- update methods and tools used to perform tasks. 🗁

GAO forms panel to study outsourcing

The General Accounting Office has recently announced that it has selected a panel of experts to study the transfer of activities being performed by government employees to federal contractors. Selection of the panel is required by the FY 2001 National Defense Authorization Act.

The panel will study the government's current procedures to determine whether work should be retained in-house and the cost benefits of outsourcing. The panel will also examine the implementation of the Federal Activities Inventory Reform (FAIR) Act.

Continued on page 7

Correction

The article "HUBZone program bolstered by new technology and new regulations," (*Federal Acquisition Report*, April 2001, page 5) incorrectly reported that Federal Acquisition Circular (FAC) 97-23 encouraged more widespread participation in the HUBZone Program. FAC 97-23 only pertains to forced or indentured child labor. The Small Business Administration published a final rule in the *Federal Register* on January 18, 2001 (66 FR 4643) regarding the HUBZone program. Both the SBA rule and FAC 97-23 were published on January 18, and became effective on February 20, 2001.

ACQUISITION ADVICE

Q: Can a simple letter to a contracting officer constitute a "claim" and require a contracting officer's final decision?

A: Maybe. It can if it contains the following 3 conditions: (1) written demand asserting specific rights; (2) a sum certain demand; and (3) a demand for a final decision and certification. Failure to meet these bare essentials will cause the document not to be deemed a claim. *See D.C. Cab & Taxi Dispatch, Inc., VABCA No. 5482, April 27, 1998.*

In the case, D.C. Cab & Taxi Dispatch had a contract to provide taxi services for the VA's Northern California health-care system. The company had trouble getting insurance. When the government found out about that, it sent the contractor a cure notice. Eventually, the government terminated the contractor for default. Later, the contractor billed the government for the services that had already been provided. The government responded that it could not pay the invoices because it was waiting until the exact amount of any excess reprocurement costs could be determined. These costs would be unknown until the end of the contract year, Sept. 30, 1998. The contractor submitted several other letters to the government seeking payment. One letter asked the contracting officer to "please re-evaluate your decision on not paying until Sept. 26, 1998." When the contractor got no decision from the contracting officer, it appealed to the board.

The board dismissed the case, concluding that no claim had been submitted. It noted the requirements of the Contract Disputes Act and the definition of a claim in the Federal Acquisition Regulation (FAR). The board stated that there are only 3 requirements for a valid claim. A contractor must "(1) submit to the contracting officer a written demand asserting specific rights and relief; (2) specify the monetary compensation sought; and (3) demand a final decision or certify the claim where necessary in accordance with the requirements of the Contract Disputes Act." The board concluded that the letter to the contracting officer did not state the claim and failed to meet the 3 requirements for a claim.

Section 832 of the Act directs the Comptroller General to choose extremely knowledgeable representatives for the panel. Members must be from the Department of Defense (DoD), private industry, federal labor organizations; and the Office of Management and Budget (OMB).

Members chosen for the panel at this time include:

- David. M. Walker; Comptroller General of the United States;
- Dr. Frank A. Camm, Senior Economist, RAND;
- Mark Filteau, President, Johnson Controls World Services;
- Stephen Goldsmith, former Mayor of Indianapolis, Indiana;
- Bobby L. Harnage Sr., National President, American Federation of Government Employees;
- Colleen M. Kelley, National President, National Treasury Employees Union;
- Sean O'Keefe, Deputy Director, Office of Management and Budget;
- Senator David Pryor (retired), Director, Institute of Politics, Harvard University;
- Stan Z. Soloway, President, Professional Services Council; and
- Robert M. Tobias, Distinguished Adjunct Professor, and Director of the Institute for the Study of Public Policy Implementation, American University.

Future members will include the Director of the Office of Personnel Management and a representative from DoD. The panel plans to hold several public meetings during the course of its study.

Decisions

RFQ should have been clearer on delivery preference

RULE: *While the simplified acquisition procedures allow an agency to simplify its description of evaluation criteria, it is best that the agency be as specific as possible since more detailed descriptions can lead to lower prices.*

Simplified acquisition procedures are designed to make it easier for the government to make smaller purchases. The procedures are simplified because the small dollar value of the items doesn't warrant the red-tape of more expensive buys, but how many short-cuts can an agency take? If it wants to take them, shouldn't it do so in a way that not only makes the buys easier, but also makes them cheaper? The General Accounting Office (GAO) recently let an agency get by with some shortcuts on its buying procedures for simplified acquisitions but suggested that it would be wise if the agency gave vendors more information since it would have led to lower prices.

The Defense Supply Center Philadelphia (DSCP), Pennsylvania, issued a request for quotes (RFQ) for electric lanterns. The procurement used procedures for simplified acquisitions. The RFQ at Block 6 said "Deliver within 40 days [after date of order (ADO)]." However, the form allowed variations. It said that if the offered delivery date was unacceptable, best possible delivery should be provided. The general instructions of the RFQ included a notice that DSCP purchases at or below the simplified acquisition threshold are subject to Best Value Buying techniques. This includes, but is not limited to, the Delivery Evaluation Factor Program and Contracting Officers' individual determinations based on a comparative assessment of pertinent circumstances, including delivery.

Only Multi-Spec's quotation promised a delivery period of 40 days. The other quotes offered longer delivery periods, in one case 150 days. JAMC's price of $51,067.50 was lowest, followed by Multi-Spec's price of $59,400. The delivery evaluation mentioned above added to each quote for each day delivery would be beyond 40 days. For JAMC, adding the additional days resulted in its price still being the lowest so it got the contract. Multi-

Specification protested on the grounds that JAMC's delivery period was more than 40 days. It also argued that the agency made delivery a criteria contrary to the applicable simplified purchase agreement (SPA) previously issued by the agency. It said that there was an unequal competition because there was no notice that delivery beyond 40 days was acceptable. It would have lowered its price if it had known the government would allow delivery past the 40 day period, JAMC said.

GAO did not agree and refused to overturn the procurement. The Competition in Contracting Act of 1984 (CICA) exempted simplified acquisitions "from the requirement that solicitations include a statement of all significant evaluation factors and subfactors that the agency reasonably expects to consider. Nevertheless, all procurements, including those to which this exemption applies, must be conducted consistent with the concern for a fair and equitable competition that is inherent in any procurement. An agency must evaluate quotations on the basis set forth in the RFQ."

GAO said the 40 day delivery date was not a requirement but the "agency's desire" because the agency also expressly permitted firms to propose a different delivery period if they considered the 40-day period unacceptable.

GAO also did not believe that the agency "was required to state in the RFQ any given level of detail concerning the evaluation factors identified in this RFQ. The only requirement is that the agency conduct the evaluation reasonably and consistent with the terms that are stated in the RFQ. Here, the agency evaluated delivery by increasing the evaluated price of a quotation for each day the quoted delivery period exceeded the requested 40-day period. The evaluation of delivery thus treated shorter delivery periods as better. This is a reasonable evaluation of delivery, consistent with the notice in the RFQ stating that delivery would be evaluated."

GAO saw no violation of the SPA even though the RFQ did not contain the language that the agency promised would be in the RFQ regarding delivery. "Even assuming, *arguendo*, that the SPA requires such a verbatim incorporation of one or more of these statements as a prerequisite for evaluating delivery, the clear statement in the RFQ that delivery would be evaluated cannot be ignored. At best, the protester reasonably could have concluded that the RFQ contained an obvious defect or ambiguity"

GAO, however, thought that the government could save money if the RFQ was clearer on delivery. Acknowledging the protester's point that prices would have been lower if longer delivery times had been expressly stated in the RFQ, GAO noted that "It does not appear prudent to seek superiority in one area (such as delivery lead-time here) at the expense of potential cost savings, when there is little burden associated with issuing an RFQ that can help accomplish both goals, i.e., by disclosing the relative importance of any evaluation factor that the agency does choose to identify in the RFQ."

Multi-Spec Products Corporation, B-287135, March 30, 2001. 🗁

Agency fails to follow FAR CBD requirement but still wins protest

RULE: *Reasonable dissemination of solicitation information is required of an agency. If an agency fails to follow the FAR CBD publication requirements, but a bidder could have found out about the solicitation anyway, it's the bidder's fault for not knowing about the solicitation.*

You wouldn't have been in business 30 years ago without a typewriter. Now you shouldn't be in business without a computer, as a government vendor recently found out. The vendor did not keep himself current on a procurement that was spread all over the web. The vendor was counting on the material being put into print in the Commerce Business Daily. So when the agency failed to put the availability of a solicitation in the CBD, as required by the FAR, it was shame on the vendor, not on the agency. The vendor had the "last clear opportunity" to learn of the solicitation by consulting the Internet but did not do so. The vendor's failure to keep

current meant that the agency's procurement did not get derailed by its failure to put the solicitation in the CBD.

A request for proposals (RFP) for several items including aiming lights was issued by the U.S. Army Communications-Electronic Command (CECOM). It was synopsized in the CBD Online (CBDNet) which identified the RFP as "N204." The synopsis told potential bidders that the material associated with the solicitation was available on the Army Single Face To Industry (ASFI) Interactive Business Opportunities Web Page and gave the URL. It also gave the contracting officer's telephone number and e-mail address.

To get more bidders, the government split the procurement and wanted to buy the aiming lights separately. It went back to CBDNet and announced this split, using the identifier "N204." The agency again gave the contracting officer's phone number and e-mail address. Because the fiscal year changed, the agency changed the solicitation number from N204 to N201, explained why, and issued the solicitation on the website. The website would locate the solicitation by either N204 or N201.

One bidder, Wilcox, did not submit a bid because it did not use the web to see the status of the solicitation. Apparently, it was waiting for the CBD notice. When it found out that the solicitation had been issue and awarded without its participation, it protested to GAO.

GAO acknowledged that a CBD notice is generally required. Along with the agency's obligations, however, "prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents. Where a prospective contractor fails in this duty, we will not sustain the protest even if the agency failed in its solicitation dissemination obligations, and in considering such situations, we look to see whether the agency or the protester had the last clear opportunity to avoid the protester's being precluded from competing."

GAO found the agency's methods of disseminating information on the procurement to be reasonable. It was synopsized in the CBDNet and the CBD, gave the link to the agency's ASFI Internet home page, and gave the CO's e-mail address and telephone number. "That CBDNet announcement thus provided potential offerors with all of the information they required to keep current on the status of the solicitation, either by reviewing the ASFI website, or by contacting the CO by e-mail or telephone. Wilcox failed to take any of these reasonable steps to keep current on the status of the procurement. Wilcox, not CECOM, had the last clear opportunity to obtain a copy of the solicitation." GAO denied the protest.

Wilcox Industries Corporation, B-287392, April 12, 2001.

GAO sets high standard for overturning agency's version of information from references

RULE: *If an offeror thinks that an agency did not accurately record what a reference said about the vendor, GAO will get involved only if the offeror shows unusual circumstances that lead to a significant inequity for the offeror.*

As past performance becomes more important in the award of contracts, what references say, or allegedly have said, about the offeror becomes very important. It's not hard to imagine that the agency may record the information inaccurately, intentionally or inadvertantly. What chance does an offeror have to get GAO to check out the information given by the reference? Not much, according to a recent GAO decision. An offeror who thinks the agency got the information wrong must prove unusual circumstances that convert the agency's failure to accurately record the information into a significant inequity for a vendor. Clearly, GAO does not want to get into the battle over what a reference said, especially when references are unlikely to tell an offeror that they received bad grades from the agency. These "on-the-fly" references also point up the importance of a data base that can assemble past performance data in an organized fashion and not in the rush of an on-going procurement.

FC Construction Company, Inc. submitted a proposal to the Air Force for base custodial services

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at Goodfellow Air Force Base (AFB), San Angelo, Texas. Past performance was an evaluation factor in the best value award. Past and present performance was evaluated using written questionnaires.

FC gave the Air Force references which were contacted by phone. The contract administrator read the references the questions and ratings definitions, and transcribed their answers. The contracting officer also considered what she knew about the company's past and present performance on Air Force contracts. It wasn't all that good. When FC lost, it protested to GAO. It argued that the Air Force should not have done the reference check over the phone; rather, the references should have filled out the questionnaire in writing. FC also claimed that the Air Force did not accurately write down the answers given by the references.

GAO saw no problem with the agency's past performance evaluation process, concluding that it passed the test of reasonableness. The record here showed that one of the references did not have a working facsimile machine, and requested a telephone interview after the agency repeatedly attempted to transmit the written questionnaire. The record also shows that the second reference explained that he was "going out the door" and asked to be interviewed telephonically.

GAO did not think it was important that the RFP promised offerors that the agency would use written questionnaires but then failed to keep its promise. "While FC correctly notes that the solicitation advised that written questionnaires would be used, there was nothing unreasonable or improper *per se* in deciding to conduct the interview telephonically under these circumstances. In addition, we have long held that there is no legal requirement that all past performance references be included in a review of past performance."

GAO also described the test in past performance issues: "For our Office to sustain a protest challenging the failure to obtain or consider a reference's assessment of past performance, a protester must show unusual factual circumstances that convert the failure to a significant inequity for the protester. There has been no such showing here."

GAO was not sympathetic to FC's claim that the Air Force either erroneously or intentionally misrepresented their telephonic responses. It took the contracting officer's word that she did not. FC had facts to the contrary. In GAO's words, FC claimed that "both of the references the Air Force contacted have advised [FC] that they described ABM's past performance as 'exceptional.' In support of this contention, FC provides an affidavit from one of the references indicating that he was contacted by the contracting officer and was asked 'approximately 26 questions' regarding ABM's past performance for his company. He indicates that his response to virtually all of the questions (more than 20) was that ABM performance should be rated as 'exceptional,' and that the remaining responses were 'very good.' FC represents that the second respondent was unable to provide a timely affidavit, but advised the company that he believes the information he provided 'was that ABM's past performance is excellent or exceptional and he is willing to so state if called as a witness at a hearing.'"

These claimed reference statements, however, conflicted with the transcription of their responses prepared by the contract administrator, which shows an array of answers that support the agency's overall rating of "satisfactory."

GAO offered to hear the contracting officer and the two references in person, but it never happened. One reference was no longer employed by the company and the other was unavailable for some unknown reason. Without being able to judge the credibility of these references in person, GAO sided with the contracting officer's version of events.

FC Construction Company, Inc., B-287059, April 10, 2001. 🗁

No deadline, no delay

RULE: *To prove a constructive acceleration, a contractor must prove an excusable delay giving rise to an acceleration order and extra costs. There can be no delay, however, without a deadline to miss.*

Like the accelerator on your car, an acceleration of a construction project speeds up the project so

that it gets done before the established contract completion date. A constructive acceleration occurs when there is no formal acceleration but the project is speeded up another way. For example, an excusable delay occurs, like unusually severe weather, but the government does not give any extra days for the excusable delay. By not giving the extra days that are justifiably due a contractor, the government in effect has speeded up the project. A constructive acceleration, however, requires an excusable delay at a minimum, and there can be no excusable delay without a delay in the first place. Also, there can be no delay without a contract completion date, as a contractor recently learned.

SAWADI Corp. had a contract for maintenance services for a local flood control project in Steuben County, NY. Work was ordered by the government under delivery orders (DOs). In late August 1999, the contracting officer's representative (COR) thought that all work had to be completed by the end of the fiscal year or the agency would lose the money. So the contractor and the COR agreed that all projects would be finished by the end of September. The contractor told the COR that it could do all the work and never complained about being unable to finish the work by that date. In November, the contractor filed a claim for a constructive acceleration. The contracting officer denied the claim, so the contractor appealed to the Armed Services Board of Contract Appeals.

The board denied the claim. A constructive acceleration requires an excusable delay. The board, however, found no evidence of delay or even of timely notice of delay. "Time was not of the essence concerning performance of the contract as a whole. None of the DOs specified a completion date. We conclude that SAWADI was entitled to a reasonable time within which to complete work under each DO."

The board acknowledged that this was no ordinary acceleration claim. "As we understand the claim, appellant is asserting that the DOs were not spread over the entire base year but were compressed into an abbreviated time period and rushed to completion by the COR. Indeed, the COR may have been incorrect that all DO work funded with FY 99 money had to be completed and invoiced by 30 September 1999. However, SAWADI was obliged to start work when directed by a DO and complete the work within a reasonable time. In late August-early September 1999, SAWADI was able to perform the directed work, was seeking more work, agreed to complete all relevant work by 30 September 1999, and did complete the work, to the extent practicable, by 21 September 1999." The board denied the claim for a constructive acceleration.

SAWADI Corp., ASBCA No. 53073, March 27, 2001. 🗁

Claim exists even though contractor intends to seek more money for same items

RULE: *A contractor does not have to wait until all costs, including overhead costs, associated with a claim are established. The government must consider a claim even if it is not for all the money for which the contractor intends to file.*

A contractor can file a claim only for a "sum certain." If a contractor files a claim but tells the government that it intends to file additional claims, has the contractor filed a claim for a sum certain? The government recently argued that a claim could only be for all the money a contractor intended to seek from the government. And until this total claim was submitted, the government did not have to deal with the "claim." The Armed Services Board of Contract Appeals did not agree.

MDP Construction, Inc., had a construction contract with the Corps of Engineers. The contract allowed the company to invoice the government on the basis of work estimated to have been finished. The Corps told the company to do certain additional work at a given price. MDP did the work but fought the price the Corps set. It submitted a number of invoices. The Corps paid up to the limit of the modification but no more. MDP wanted more. When it filed a claim for the additional amount, the Corps refused to give a contracting officer's final decision because the contracting officer was "unable to determine the exact amount of the claim or the

specific basis for it." MDP appealed to the Board on the basis of a deemed denial. All the while, MDP told the Corps that it intended to file another claim for unabsorbed overhead associated with the filed claims.

When it got to the Board, the Corps argued that the MDP's demands did not constitute sums certain because "each invoice which Appellant attempts to convert to a claim merely represents a portion of the amount Appellant alleges is due under [Mod 41]." The Corps was referring to the overhead claim that MDP had been warning the Corps about for quite a while.

The Corps would deal with the claims once the company gave the government a claim for all costs associated with the challenged modification.

The Board did not agree with the Corps argument. The Board acknowledged that a sum certain was required for a claim. But it did not buy the Corps's argument that the sum cannot be certain "so long as work remains to be done on a particular modification – here, Mod 41. While we are not unsympathetic to this position from the standpoint of judicial efficiency, we must nonetheless reject it. The Corps position is inconsistent with the DISPUTES clause, which specifically provides that unpaid invoices may become claims, and the PAYMENTS clause, under which the contractor is to be paid monthly based on estimates of work completed. Those two clauses combine to make the payment requests at issue claims under the facts in these appeals."

MDP Construction, Inc., ASBCA Nos. 52769, 52869, 52870, March 23, 2001. 🗁

Agencies can make too few references equal to a neutral rating

RULE: *An agency can treat an offeror's past performance as neutral if the offeror does not provide a sufficient number of references.*

With the increasing emphasis on past performance in evaluations, references are becoming even more important. But it takes a certain "critical mass" of references to give the government a good idea of the quality of a company's work. Recently, an agency decided that any offeror who did not get at least 3 past performance references would be given a neutral evaluation rating. The General Accounting Office (GAO) said that was reasonable. The decision also dealt with several other common problems in the evaluation process, like a new contracting officer coming on board and getting involved in the evaluation process late.

The Air Force issued a solicitation for military family housing maintenance services at Offutt Air Force Base, Nebraska. Past performance was significantly more important that the only other evaluation factor – price – in the best value procurement. Offerors were to get no more than 5 of their recent projects evaluated and the questionnaires returned. The offerors were told that it was their job to get the questionnaires returned. The solicitation also said that "[t]ypically, less than 3 submitted questionnaires could be regarded as inadequate to properly evaluate an offeror's past performance." When one of the offerors, Brand, returned only 2 references, the agency rated it as neutral/unknown confidence.

When Brand lost the solicitation, it protested, challenging several aspects of the process. It lost on all of them.

First, GAO found nothing wrong with the government replacing the original contracting officer. "We see nothing objectionable in this substitution, nor does the record in any way suggest that the protester was prejudiced by it." As to Brand's complaint that the replacement contracting officer should not have been involved in certain parts of the evaluation process because she had denied its earlier agency-level protest, GAO found no merit in that argument either. All the events Brand challenged happened prior to replacement of the contracting officer.

Brand also argued that the evaluation process was unequal: The evaluators discussed one of its evaluations via teleconferencing but met in person to discuss the other offerors' evaluations. "Since the protester has failed to offer any explanation – and we fail to see – how it was injured by the decision to discuss via telephone rather than in person, we see no merit in this argument."

Finally, GAO concluded that the agency could properly rate Brand's experience as neutral. "Where a solicitation requires the evaluation of offerors' past performance, we will examine an agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria." Clearly, the agency did what it said it would, giving a neutral rating to anyone with fewer than 3 evaluations. "Moreover, we think that the agency reasonably viewed fewer than three questionnaires as an inadequate basis upon which to evaluate an offeror's past performance and on that basis assigned a neutral rating."

GAO denied the protest.

Thomas Brand Siding Company, Inc., B-286914.3, March 12, 2001.

Rules

FAR Council

FAC 97-24 delays effective date of "Blacklisting Rule"

The Federal Acquisition Regulation (FAR) Council has issued Federal Acquisition Circular (FAC) 97-24. The interim rule suspends the effective date of FAR Case 1999-010, *Contractor Responsibility* for 270 days. That final rule was effective January 19 and revised the rules for contractor integrity.

The January 19 rule provided that a contractor's record of integrity and business ethics includes satisfactory compliance with the tax, labor, and employment, environmental, antitrust, and consumer protection laws. In addition, it

- required contracting officers to consider all relevant information in determining whether a contractor had a satisfactory record of integrity and ethics, but emphasized that the greatest weight in making this decision should be placed on a contractor's record of violations of any applicable laws in the preceeding 3 years;
- made unallowable costs incurred in promoting or detering unionization; and
- made unallowable any costs incurred in representing themselves in a civil or administrative proceeding brought by the government where the contractor violated any applicable law or regulation.

Finally, the rule required offerors to certify to any violations of tax, labor, and employment, environmental, antitrust, and consumer protection laws in the past 3 years.

The effective date of the rule has been delayed to give the FAR Council time to assess whether to revoke it. Toward that end, the Council has formally issued a proposed rule seeking the elimination of the earlier requirements.

Sorry for the extra work!

If you have already filed FAC 97-21 into your FAR, FAC 97-24 requires that you remove them and replace them with basically the original pages. Because FAC 97-21 was "stayed" and not "rescinded," the text of FAC 97-21 remains on the pages with an explanatory note that it should not be followed.

FAC 97-24 requires you to replace the following pages:

- 9-1 through 9-4.1;
- 14-15 through 14-18;
- 15-33 through 15-36;
- 31-29 through 31-30;
- 31-41 and 31-42;
- 52-27 through 52-28.1; and
- 52-37 through 52-40.1

Pending the outcome of the proposed rule to rescind FAC 97-21, you may be replacing these pages once again in approximately 9 months.

The Council decided to issue the delay in implementing the new integrity sections because it believes that the 30-day effective date of the original rule did not give agencies or contractors sufficient time to meet the new obligations and responsibilities. In particular, contracting officers have not had sufficient training nor have offerors had time to establish a system to track compliance with applicable laws and keep it current.

The proposed revocation of the rule has been offered because the FAR Council believes there are other less imposing and controversial ways agencies can assure themselves that contractors have integrity.

Contracting officers must amend any solicitations already issued which contain the certification provisions published in FAC 97-21. Specifically, they should delete those certification provisions and insert the certification provisions in FAC 97-24.

Contractors and agencies have been invited to comment both on the implementation delay and on the proposed revocation.

Submit written comments regarding the delay by June 4, 2001, to the FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405; or electronically at *farcase.1999@gsa.gov*. See 66 *Federal Register* 17754, April 3, 2001.

Submit written comments regarding the proposed revocation by June 4, 2001, to the FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405; or electronically at farcase.*2001-014@gsa.gov*. See 66 *Federal Register* 17758, April 3, 2001. 🗁

Agencies continue to get capital credits

The FAR Council has requested the Office of Management and Budget (OMB) to extend the information collection requirement for capital credits. Currently, FAR 52.241-13 requires contractors to provide a list of accrued credits by contract number, year, and delivery point the government is due.

Submit written comments by May 16, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for an extension to an existing OMB Clearance. Contact: Julia Wise at (202) 208-1168. 66 *Federal Register* 19435, April 16, 2001. 🗁

Contractors must continue to verify clause use

The FAR Council has requested OMB to extend the information collection requirement for Standard Form 1413, *Statement of Acknowledgement*. The form is used by agencies to verify that a contractor has included all the proper clauses in its subcontracts.

Submit written comments by May 4, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB Clearance. Contact: Linda Nelson at (202) 501-1900. 66 *Federal Register* 17869, April 4, 2001. 🗁

Contractors must continue to provide salary information

The FAR Council has requested OMB to extend the information collection requirement concerning professional employee compensation plans. Currently, contractors must provide the government with copies of their total compensation plans, including salaries and fringe benefits for their professional employees.

Submit written comments by May 4, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB Clearance. Contact: Linda Nelson at (202) 501-1900. 66 *Federal Register* 17869, April 4, 2001.

Contractors must continue provide subcontracting reports

The FAR Council has requested OMB to extend the information collection requirement for Standard Form 294, *Subcontract Plans/Subcontracting Reporting for Individual Contract*.

Currently, contractors receiving a contract or modification expected to exceed $10,000 must submit a subcontracting plan that provides maximum practicable opportunities for small businesses, small disadvantaged businesses, HUBZone businesses, women-owned businesses, veteran-owned businesses, and service-disabled veteran-owned small businesses.

If a company receives a contract which exceeds $500,000 ($1 million for construction), it must also submit semi-annual reports on SF 294. The reports must provide specific details regarding their progress in awardingsubcontracts to the above businesses.

Submit written comments by May 11, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB Clearance. Contact: Rhonda Cundiff at (202) 501-0044. 66 *Federal Register* 18755, April 11, 2001.

Contractors should still use *Statement and Acknowledgement* form

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

A request for comments was originally published on January 12, 2001, but the FAR Council received no comments (66 FR 2888).

Submit written comments by May 4, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB clearance (9000-0014). Contact: Linda Nelson at (202) 501-1900. 66 *Federal Register* 17868, April 4, 2001.

Utility firms must provide rate and term information

The FAR Council has requested OMB to extend the information collection requirement on the scope and duration of utility contracts.

Currently, utility companies contracting with the government must provide agencies a complete set of rates and terms and conditions as well as any subsequently approved or proposed revisions.

A request for comments was originally published on January 12, 2001, but the FAR Council received no comments (66 FR 2889).

Submit written comments by May 11, 2001, to the FAR Desk Officer, OMB Room 10102, NEOB, Washington, DC 20503; and a copy to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Notice of request for public comments regarding an extension of an existing OMB clearance (9000-0122). Contact: Julia Wise at (202) 208-1168. 66 *Federal Register* 18756, April 11, 2001.

National Aeronautics and Space Administration

NASA wants contractors to ensure safety

The National Aeronautics and Space Administration (NASA) has amended its acquisition regulation (NFS) to add a new safety and health clause at 1852.223-72. The clause requires contractors to take all reasonable safety and occupational health measures in contracts above the micropurchase threshold. If a contractor fails to comply with the clause, the agency may issue a stop-work order.

Submit written comments by June 4, 2001, to Jeff Cullen, NASA Headquarters Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546; or electronically at *jcullen@hq.nasa.gov*.

Interim rule. Contact: Jeff Cullen at (202) 358-1784. 66 *Federal Register* 18051, April 5, 2001.

Current Contracting Openings

Contract Specialist, GS-1102-13. Announcement number: 9-62-231-1. Locations: Riverdale, MD and Minneapolis, MN (relocation costs will not be paid). Department of Agriculture, Animal and Plant Health Inspection Service. Closing date: May 7, 2001. Salary: $63,211 to $82,180. For additional information, contact: Personnel SVCS CR, USDA/MRPBS/PSC, 4700 River Road, Unit 22, Riverdale, MD 20737.

Contract Specialist, GS-1102-12/12. Announcement number: 01-088. Location: Arlington, VA. Department of Air Force. Closing date: May 9, 2001. Salary: $53,156 to $69,099. For additional information, contact: Customer Service, *www.boiling.af.mil/civper/mssdpc.htm*. 11 WG/DPCS, 1460 Air Force Pentagon, Room 5E866, Attn: Announcement #01-088, Washington, DC 20330-1460.

Contract Specialist, GS-1102-12/12. Announcement number: 0191935. Location: Auburn, WA. GSA, Public Buildings Service. Closing date: May 11, 2001. Applicant must submit proof of military service to show eligibility. Salary: $53,262 to $69,237. For additional information, contact: Julie Endres, email: *julianne.endres@ gsa.gov*, GSA, Office of Human Resources, 450 Golden Gate Avenue, 5th Floor, San Francisco, CA 94102-3434.