



Government Procurement & Export UPDATE

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FAR Amendment to Fight Contract Bundling

In October of 2003 a final rule became effective which amended the Federal Acquisition Regulation ("FAR"), making it harder for agencies to engage in contract bundling. Contract bundling occurs when two or more contracts are "bundled" into a single contract that is likely not suitable for award to a small business. In March 2002, the White House unveiled a plan to support and foster small businesses. President Bush called upon the Office of Management and Budget ("OMB") to prepare a strategy for unbundling government contracts. A recent government report concluded that far too many government contracts are bundled, to the detriment of small businesses that are essentially precluded from competing for these large awards.

The new definition of bundling now includes multiple award contract vehicles and task and delivery orders. The rule requires greater coordination between an agency's procurement and small business personnel to prevent unnecessary and unjustified contract bundling. The new rule also reduces the dollar threshold and revises the documentation required by the government for substantial bundling and requires agency small business personnel to review agency bundling activities. Substantial bundling is any bundling that results in a contract of \$7 million or more for DoD; \$5 million or more for NASA, GSA and DoE; and \$2 million or more for all other agencies.

State Department D-TRADE: Going High Tech

The State Department is in the final stages of going completely paperless and providing for fully electronic export licensing according to Lincoln Bloomfield, the U.S. Assistant Secretary of State for the Bureau of Political-Military Affairs, the Bureau that oversees the Directorate of Defense Trade Control ("DDTC"). DDTC receives more than 56,000 license applications

per year and can approve or deny \$96 billion worth of exports in a given year. The electronic licensing procedures - called D-TRADE - are intended to make the approval process run smoother and faster. Be sure to regularly check the DDTC website at <http://www.pmdtc.org/> for continued updates regarding the new electronic licensing process.

GAO Protests Increased in Fiscal Year 2003

The number of bid protests submitted to the General Accounting Office ("GAO") in FY 2003 increased by 12% from FY 2002. GAO also reports a substantial increase in the number of

cases where protesters received relief from the agencies either before or after an appeal to the GAO. The number of hearings before the GAO for FY 2003 also increased by 13%.

Export Reform at Department of Commerce

The Commerce Department's Bureau of Industry and Security ("BIS") is drafting a proposal to completely change the "country group" regime for determining what products can be exported to which countries. The new

approach would not focus on entire countries, rather it would focus on suspect end-users and end-uses. The proposal is in the beginning stages and will need to be cleared by other agencies before implementation begins.

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Federal Court Reviews Agency Determination of the “Public Interest Exception” to Competitive Procedures

For the first time, the U.S. Court of Federal Claims (“COFC”) has held that it has jurisdiction to review an agency’s determination of what constitutes a “public interest exception” under the Competition in Contracting Act. The public interest exception allows the government not to competitively bid a solicitation when it is in the “public interest” not to do so. The COFC reviewed a challenge made by Spherix, Inc. to the determination of

the Secretary of Department of Agriculture that it was in the public interest to award a contract without competition on a contract modification that would provide electronic reservation systems in the National Parks. The government argued that the public interest exception is purely within agency discretion and, therefore, not subject to review by the courts. The court, however, disagreed, holding that once regulations are finalized “they are

binding on the Secretary, and her action is subject to judicial review to determine compliance with those regulations.” The COFC ultimately held that the Secretary had clearly and convincingly justified her decision not to compete the contract and award it as a sole source modification. Despite the final holding, the case allows for federal courts to review an agency’s application of the public interest exception.

GAO Report Shows That Dual Use Items are Not Properly Monitored By Department of Commerce

U.S. Senator Jon Kyl of Arizona prompted a recent GAO report entitled “Export Controls: Post-Shipment Verification Provides Little Assurance That Dual-Use Items Are Being Properly Used” because of his concerns regarding exports to countries of concern such as China and India. The GAO report concludes that the Commerce Department is not adequately monitoring the export of dual use items (those items that may be used for civilian or military purposes). The report states that post shipment verification (“PSV”) processes do not meet the requirements of the export

laws because many U.S. officials do not check license conditions with respect to end-use; and the end users are not always aware of the license conditions. Additionally, countries such as China do not always provide the U.S. government necessary access and many inspectors lack the necessary training.

The Department of Commerce commented on the report in a letter to GAO that stated that the post shipment verification process should not be viewed as a comprehensive solution to police licensed transactions or license

conditions. Rather, the process is used to “verify delivery of a U.S.-origin item to a stated end-user for a stated end-use.” The Commerce letter also stated that the Office of Export Enforcement within the Bureau of Industry and Security (“BIS”) has implemented new training and procedures to improve the verification process and that Commerce Department has already taken significant steps to strengthen the process in line with the recommendations of the GAO report. The report is available at <http://www.gao.gov/>.

Great Britain Tightens Its Export Controls

For the first time since World War II, Great Britain has overhauled its export control regime to better control arms trafficking and brokering between other countries. The new Export Control Act of 2002 replaces the Import, Export and Customs

(Defense) Act of 1939. Britain is the world’s second largest arms exporter. The new act was created to address certain gaps in the current law and primarily addresses the transfer of military technology and software through electronic means (email, phone or fax)

and the electronic transfer of technology used for weapons of mass destruction. The new act also addresses British individuals while overseas, who act as brokers or traffic to prohibited destinations. These changes become effective in May 2004.

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