



Government Procurement & Export UPDATE

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SBA reports that "Contract Bundling" on increase;

GAO grants protest finding that Army violated bundling rules

Despite efforts by federal agencies to limit contract bundling and despite the fact that neither the Clinton nor Bush White Houses favored bundling, the Small Business Administration (SBA) recently found that bundling is on the increase. Bundling is the practice where agencies group into one large contract several smaller contracts that were previously separately awarded. The SBA argues that increased bundling limits contracting opportunities for small businesses.

Bundled contracts now account for nearly 17% of the 177,000 prime contracts awarded by federal agencies, but a staggering 51% of all prime contract dollars. The SBA found that the average size of all federal contracts was \$1.2 million; whereas the average size of bundled contracts was \$3.8 million. The prime offender is the Defense Department (DoD). The SBA found that nearly two-thirds of all bundled contracts are awarded by DoD. The SBA found that 55% of the \$1.2 trillion dollars in defense spending over the past decade

went to bundled procurements. The form that bundled contracts take include Basic Ordering Agreements (BOAs), Corporate Contracts and Virtual Prime Vendor (VPV) contracts.

Not only do these massive contracts exclude small business, but they significantly increase procurement costs – as evidenced by various SBA and Inspector General (IG) audit reports. The SBA previously found that bundling had increased 193% at the Defense Logistics Agency (DLA) despite SBA's findings that small business was being excluded. A number of DoD IG audit reports have found that DLA was overcharged by a range of 38% to 280% on a variety of bundled contracts awarded to Sundstrand, Allied Signal and United Technologies.

Recently, the White House proposed new regulations making it harder for agencies to bundle existing contracts. Also, Sen. Kit Bond (R-Mo), who is expected to reclaim the chairmanship of the Senate Small Business Committee

now that the Republicans have reclaimed the Senate, promises to take on bundling as an issue. Sen. Bond reports that bundling costs small business in excess of \$13 billion in contracts each year and that for every 100 bundled contracts awarded, there is a corresponding decrease of 60 contracts to small businesses.

Under current rules, agencies may not bundle existing contracts without seeking SBA review to determine the impact on small businesses. However, too often, agencies can successfully evade the poorly-drafted regulations by arguing that the procurement does not qualify as a bundled procurement. The White House promises to tighten the rules to make more procurements subject to SBA scrutiny. The General Accounting Office (GAO) upheld one recent protest, finding that the Army failed to seek input from SBA when it attempted to consolidate 9 contracts that were previously awarded to 9 separate firms, 3 of which were small businesses. ❖

DoD unable to account for spare parts spending

Congress has criticized DoD for spare parts shortages and the need to improve military readiness. The Senate Appropriations Defense subcommittee asked the GAO to study DoD's spare parts spend-

ing habits in order to get a clearer picture of the problem. The GAO, however, reported back that it was unable to fully evaluate DoD's funding of spare parts because DoD's accounting systems are lacking,

allowing DoD to track only *estimates* of spare parts spending, but not actual spending. This despite the fact that DoD is required to provide actual funding data for all spare parts in total and for specific commodi-

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ties such as aircraft engines. DoD has advised Congress that it would be too costly to modify its accounting systems to provide the requested information. It is unclear how the Congress will respond.

GAO overturns "best value" award of janitorial contract

GAO upheld the protest of a disappointed bidder finding that the Navy had improperly evaluated the awardee's past performance on a janitorial services contract when it evaluated as part of the awardee's past performance a contract performed by another entity that shared the same parent corporation as the awardee. GAO found that this was improper since the affiliated companies did not share the same workforce or management. GAO also found that the Navy's cost evaluation was flawed where the Navy increased the awardee's technical score for proposing a superior quality control staff, yet mysteriously backed-out the cost of that staff in conducting its cost-technical tradeoff when comparing the price of the two competing proposals.

State Department places increased emphasis on exports

In response to criticism from industry that it still takes far too long for the State Department to issue export licenses and President Bush's call for "a comprehensive review of defense trade controls," the State Department announced that it will create a new Deputy Assistant Secretary slot to be in charge of its Office of Defense Trade Controls (DTC). Over the past three years, the number of DTC personnel has increased 25 percent to over 100. The increase was supposed to cut-down delays in issuing licenses. The individual who fills the newly-created Deputy Assistant Secretary post will manage DTC's operations and will report to Assistant Secretary of State for Political-Military Affairs Linc Bloomfield.

8(a) officials arrested for fraud, bribery

Two high-ranking former Pentagon officials were arrested on federal charges of bribery, extortion and witness-tampering for allegedly using their positions within DoD's Office of Small and Disadvantaged Business Utilization to accept bribes, illegal payments and gratuities from defense contractors. Both officials were responsible for DoD's Pilot Mentor-Protege Program and its Small Business Administration 8(a) Business Development program for disadvantaged and minority-owned contractors. The two officials are accused of using nominee companies, offshore bank accounts and multi-layered sham transactions in embezzling in excess of \$100,000 in DoD funds.

Sen. Grassley moves to block contracts to foreign tax evaders

Sen. Charles Grassley (R-Iowa) has introduced legislation designed to prevent the award of government contracts to U.S. firms who relocate overseas to avoid paying U.S. taxes. Foreign firms are otherwise permitted to bid on U.S. government contracts. However, a recent GAO report found that contractors that have reincorporated in tax havens such as Panama and Bermuda received more than \$2 billion in federal contracts last year. According to GAO, they include 4 of the top 100 federal contractors. Ingersoll Rand was found to have paid \$28,000 to set up its headquarters in Bermuda where it enjoyed \$40 million in U.S. tax savings, while receiving \$36 million in U.S. contracts.

Evaluating Offeror's Past Performance

The evaluation of an offeror's Past Performance has become increasingly important for large procurements for support services. In a recent bid

protest decision, the GAO held that it was permissible for an agency to evaluate the collective past performance experience of the individual members of a newly-formed joint venture, where the joint venture itself had no past performance of its own. The GAO added that it is appropriate to evaluate the past performance of the individual members, unless the solicitation expressly prohibits it.

Westernizing Poland's Air Force

As more Eastern European nations come into the NATO fold, there are more opportunities for U.S. defense contractors to make sales overseas. In agreeing to loan Poland up to \$3.8 billion to replace its aging fleet of Soviet-era aircraft, the U.S. Government hopes to provide U.S. contractors with the inside track in making sales to Poland. The U.S. loan is expected to persuade Poland to select Lockheed's F-16 over two rival European aircraft.

FAR Council clarifies scope of "discussions"

Federal Acquisition Regulation §15.306(d) requires procuring agencies to conduct "discussions" with all offeror's in the competitive range. The purpose is to point out weaknesses and deficiencies in a proposal that in the opinion of the contracting officer could be improved in a revised proposal. The FAR Council just issued a government-wide rule stating that §15.306(d) does not require that every single weakness and deficiency be pointed out. The Council held that a contracting officer is not required to discuss every area where a proposal can be improved, but to discuss only those aspects that, if changed, could materially alter the proposal's value. ❖