



OFFICE OF FEDERAL
PROCUREMENT POLICY

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 26, 2008

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
AGENCY SENIOR PROCUREMENT EXECUTIVES

FROM:

Paul A. Denett
Administrator

SUBJECT:

Use of Advisory and Assistance Service Contract Waiver Authority

Section 834 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, requires the Office of Federal Procurement Policy (OFPP) and the Department of Defense to report separately to Congress on the use of advisory and assistance services (A&AS) contracts. In addition, section 834 authorizes the head of an agency to issue a waiver to extend a task order contract for A&AS contracts for a period of not more than ten years if the agency head makes certain written determinations. However, section 834 prohibits the issuance of a waiver if certain data, on the use of A&AS, is not submitted to Congress by April 1, 2007. See attached for a copy of section 834.

OFPP surveyed agencies to determine the availability of data specified in section 834. Agencies indicated that this data is not available. OFPP researched other sources for A&AS data (e.g., OMB Circular A-11- Object Class Code 25.1, Federal Procurement Data System (FPDS)) but none of these sources could provide the information outlined in section 834. Because the information requested was not available to include in our report to Congress, agencies are prohibited from issuing waivers to extend task order contracts for A&AS contracts pursuant to section 834.

OFPP is assessing the Federal Acquisition Regulation A&AS definition and the FPDS reporting requirements for service contracts, in general, as a part of our continued efforts to strengthen the management of service contracts. As part of this assessment, we intend to consider the recommendations in a pending Government Accountability Office report on A&AS contracts. If you have any questions regarding this matter, please contact Julia Wise on (202) 395-7561.

Attachment

SEC. 833. USE OF FEDERAL SUPPLY SCHEDULES BY STATE AND LOCAL GOVERNMENTS FOR GOODS AND SERVICES FOR RECOVERY FROM NATURAL DISASTERS, TERRORISM, OR NUCLEAR, BIOLOGICAL, CHEMICAL, OR RADIOLOGICAL ATTACK.

(a) **AUTHORITY TO USE SUPPLY SCHEDULES FOR CERTAIN GOODS AND SERVICES.**—Section 502 of title 40, United States Code, is amended by adding at the end the following new subsection:

“(d) **USE OF SUPPLY SCHEDULES FOR CERTAIN GOODS AND SERVICES.**—

“(1) **IN GENERAL.**—The Administrator may provide for the use by State or local governments of Federal supply schedules of the General Services Administration for goods or services that are to be used to facilitate recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack.

“(2) **DETERMINATION BY SECRETARY OF HOMELAND SECURITY.**—The Secretary of Homeland Security shall determine which goods and services qualify as goods and services described in paragraph (1) before the Administrator provides for the use of the Federal supply schedule relating to such goods and services.

“(3) **VOLUNTARY USE.**—In the case of the use by a State or local government of a Federal supply schedule pursuant to paragraph (1), participation by a firm that sells to the Federal Government through the supply schedule shall be voluntary with respect to a sale to the State or local government through such supply schedule.

“(4) **DEFINITIONS.**—The definitions in subsection (c)(3) shall apply for purposes of this subsection.”

Deadline.

(b) **PROCEDURES.**—Not later than 30 days after the date of the enactment of this Act, the Administrator of General Services shall establish procedures to implement subsection (d) of section 502 of title 40, United States Code (as added by subsection (a)).

SEC. 834. WAIVERS TO EXTEND TASK ORDER CONTRACTS FOR ADVISORY AND ASSISTANCE SERVICES.

(a) **DEFENSE CONTRACTS.**—

(1) **WAIVER AUTHORITY.**—The head of an agency may issue a waiver to extend a task order contract entered into under section 2304b of title 10, United States Code, for a period not exceeding 10 years, through five one-year options, if the head of the agency determines in writing—

(A) that the contract provides engineering or technical services of such a unique and substantial technical nature that award of a new contract would be harmful to the continuity of the program for which the services are performed;

(B) that award of a new contract would create a large disruption in services provided to the Department of Defense; and

(C) that the Department of Defense would, through award of a new contract, endure program risk during critical program stages due to loss of program corporate knowledge of ongoing program activities.

(2) DELEGATION.—The authority of the head of an agency under paragraph (1) may be delegated only to the senior procurement executive of the agency.

(3) REPORT.—Not later than April 1, 2007, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on advisory and assistance services. The report shall include the following information:

(A) The methods used by the Department of Defense to identify a contract as an advisory and assistance services contract, as defined in section 2304b of title 10, United States Code.

(B) The number of such contracts awarded by the Department during the five-year period preceding the date of the enactment of this Act.

(C) The average annual expenditures by the Department for such contracts.

(D) The average length of such contracts.

(E) The number of such contracts recompeted and awarded to the previous award winner.

(4) PROHIBITION ON USE OF AUTHORITY BY DEPARTMENT OF DEFENSE IF REPORT NOT SUBMITTED.—The head of an agency may not issue a waiver under paragraph (1) if the report required by paragraph (3) is not submitted by the date set forth in that paragraph.

(b) CIVILIAN AGENCY CONTRACTS.—

(1) WAIVER AUTHORITY.—The head of an executive agency may issue a waiver to extend a task order contract entered into under section 3031 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253i) for a period not exceeding 10 years, through five one-year options, if the head of the agency determines in writing—

(A) that the contract provides engineering or technical services of such a unique and substantial technical nature that award of a new contract would be harmful to the continuity of the program for which the services are performed;

(B) that award of a new contract would create a large disruption in services provided to the executive agency; and

(C) that the executive agency would, through award of a new contract, endure program risk during critical program stages due to loss of program corporate knowledge of ongoing program activities.

(2) DELEGATION.—The authority of the head of an executive agency under paragraph (1) may be delegated only to the Chief Acquisition Officer of the agency (or the senior procurement executive in the case of an agency for which a Chief Acquisition Officer has not been appointed or designated under section 16(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(a))).

(3) REPORT.—Not later than April 1, 2007, the Administrator for Federal Procurement Policy shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Government Reform of the House of Representatives a report on advisory and assistance services. The report shall include the following information:

(A) The methods used by executive agencies to identify a contract as an advisory and assistance services contract, as defined in section 303I(i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253i(i)).

(B) The number of such contracts awarded by each executive agency during the five-year period preceding the date of the enactment of this Act.

(C) The average annual expenditures by each executive agency for such contracts.

(D) The average length of such contracts.

(E) The number of such contracts recompleted and awarded to the previous award winner.

(4) PROHIBITION ON USE OF AUTHORITY BY EXECUTIVE AGENCIES IF REPORT NOT SUBMITTED.—The head of an executive agency may not issue a waiver under paragraph (1) if the report required by paragraph (3) is not submitted by the date set forth in that paragraph.

Deadline.

(c) TERMINATION OF AUTHORITY.—A waiver may not be issued under this section after December 31, 2011.

(d) COMPTROLLER GENERAL REVIEW.—

(1) REPORT REQUIREMENT.—Not later than one year after the date of the enactment of this Act, the Comptroller General shall submit to the committees described in paragraph (3) a report on the use of advisory and assistance services contracts by the Federal Government.

(2) DEFENSE AND CIVILIAN AGENCY CONTRACTS COVERED.—The report shall cover both of the following:

(A) Advisory and assistance services contracts as defined in section 2304b of title 10, United States Code.

(B) Advisory and assistance services contracts as defined in section 303I(i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253i(i)).

(3) MATTERS COVERED.—The report shall address the following issues:

(A) The extent to which executive agencies and elements of the Department of Defense require advisory and assistance services for periods of greater than five years.

(B) The extent to which such advisory and assistance services are provided by the same contractors under recurring contracts.

(C) The rationale for contracting for advisory and assistance services that will be needed on a continuing basis, rather than performing the services inside the Federal Government.

(D) The contract types and oversight mechanisms used by the Federal Government in contracts for advisory and assistance services and the extent to which such contract types and oversight mechanisms are adequate to protect the interests of the Government and taxpayers.

(E) The actions taken by the Federal Government to prevent organizational conflicts of interest and improper personal services contracts in its contracts for advisory and assistance services.

(4) COMMITTEES.—The committees described in this paragraph are the following:

(A) The Committees on Armed Services and on Homeland Security and Governmental Affairs of the Senate.

(B) The Committees on Armed Services and on Government Reform of the House of Representatives.

Subtitle D—United States Defense Industrial Base Provisions

SEC. 841. ASSESSMENT AND ANNUAL REPORT OF UNITED STATES DEFENSE INDUSTRIAL BASE CAPABILITIES AND ACQUISITIONS OF ARTICLES, MATERIALS, AND SUPPLIES MANUFACTURED OUTSIDE THE UNITED STATES.

Section 812 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; 117 Stat. 1542) is amended—

(1) by amending the heading to read as follows:

“SEC. 812. ASSESSMENT AND ANNUAL REPORT OF UNITED STATES DEFENSE INDUSTRIAL BASE CAPABILITIES AND ACQUISITIONS OF ARTICLES, MATERIALS, AND SUPPLIES MANUFACTURED OUTSIDE THE UNITED STATES.”;

(2) by adding at the end of subsection (c)(2)(A) the following new clauses:

“(v) The dollar value of any articles, materials, or supplies purchased that were manufactured outside of the United States.

“(vi) An itemized list of all waivers granted with respect to such articles, materials, or supplies under the Buy American Act (41 U.S.C. 10a et seq.).

“(vii) A summary of—

“(I) the total procurement funds expended on articles, materials, and supplies manufactured inside the United States; and

“(II) the total procurement funds expended on articles, materials, and supplies manufactured outside the United States.”; and

(3) by adding at the end the following new subsections:

“(d) **PUBLIC AVAILABILITY.**—The Secretary of Defense shall make the report submitted under subsection (c) publicly available to the maximum extent practicable.

“(e) **APPLICABILITY.**—This section shall not apply to acquisitions made by an agency, or component thereof, that is an element of the intelligence community as set forth in or designated under section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).”.

SEC. 842. PROTECTION OF STRATEGIC MATERIALS CRITICAL TO NATIONAL SECURITY.

(a) **REQUIREMENT TO BUY FROM AMERICAN SOURCES.**—

(1) **IN GENERAL.**—Subchapter V of chapter 148 of title 10, United States Code, is amended by inserting after section 2533a the following new section:

“§ 2533b. Requirement to buy strategic materials critical to national security from American sources; exceptions

“(a) **REQUIREMENT.**—Except as provided in subsections (b) through (j), funds appropriated or otherwise available to the Department of Defense may not be used for procurement of—