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FEATURE COMMENT: Appropriate Contractual Instruments For R&D

Federal Government agencies enter into a wide variety of contractual relationships for various purposes under different regulatory regimes. In addition to procurement contracts covered by the Federal Acquisition Regulation and assistance instruments (grants and cooperative agreements), these include contracts for real property, non-appropriated fund contracts, sales contracts, cooperative research and development agreements, and various licensing and loan guarantee arrangements, for example. Some Government agencies have authority to enter into “other transaction” agreements—that is, contracts subject to fiscal laws but with few regulatory constraints, essentially allowing for commercial style contracting. Despite this array of legal authorities, the either/or dichotomy of procurement versus assistance looms large and tends to overshadow the variety of legal authorities mentioned, and sometimes leads to the use of procurement contracts for purposes for which they are not entirely suited.

There is a profound misunderstanding of the proper use of, and a related misuse of, available contractual instruments in the conduct of R&D within the Department of Defense and some other agencies. Basic policies established in law and regulations are routinely ignored or misinterpreted. The primary purpose of procurement contracts as established in law is to buy things—goods or services. The purpose and goals of contracted R&D are different from merely acquiring things. Quoted below are relevant laws and regulations followed by a concise discussion demonstrating that “other transactions” are not merely useful but the legally preferred means for conducting contracted R&D

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within DOD, and should be its default instrument for doing so.

Law (*Armed Services Procurement Act, 10 USCA § 2303*)—(a) This chapter [title 10, U.S. Code, chapter 137, the Armed Services Procurement Act] applies to the *procurement* by any of the following agencies, for its use or otherwise, of *all property* (other than land) and *all services* for which payment is to be made from appropriated funds [emphasis supplied]:

- (1) The Department of Defense.
- (2) The Department of the Army.
- (3) The Department of the Navy.
- (4) The Department of the Air Force.
- (5) The Coast Guard.
- (6) The National Aeronautics and Space Administration.

Regulation (*Federal Acquisition Regulation 35.002—General*)—The *primary purpose of contracted R&D* programs is to advance scientific and technical knowledge and apply that knowledge to the extent necessary to achieve agency and national goals. *Unlike contracts for supplies and services*, most R&D contracts are directed toward objectives for which the work or methods cannot be precisely described in advance. It is difficult to judge the probabilities of success or required effort for technical approaches, some of which offer little or no early assurance of full success. The contracting process shall be used to encourage the best sources from the scientific and industrial community to become involved in the program and must provide an environment in which the work can be pursued with reasonable flexibility and minimum administrative burden. [emphasis supplied]

Regulation—(*FAR 35.003—Policy*)—(a) *Use of contracts*. Contracts shall be used *only* when the principal purpose is the *acquisition of supplies or services* for the direct benefit or use of the Federal Government. Grants or cooperative agreements should be used when the principal purpose of the transaction is to stimulate or support research and development for another public purpose. [emphasis supplied]

Law—Uses of Other Transactions (OTs)—(*10 USCA §§ 2371 and 2371b*)—§2371 (a) *Additional Forms of Transactions Authorized*—The Secretary of Defense and the Secretary of each military department may enter into transactions (other than contracts, cooperative agreements, and

grants) under the authority of this subsection in carrying out *basic, applied, and advanced research projects*. The authority under this subsection is *in addition to the authority* provided by section 2358 of this title to use *contracts, cooperative agreements, and grants* in carrying out such projects. [emphasis supplied]

§ 2371b (a) *Authority*—(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, *carry out prototype projects* that are directly relevant to *enhancing the mission effectiveness* of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, *or to improvement of platforms, systems, components, or materials* in use by the armed forces. [emphasis supplied]

Discussion—A possible source of confusion apparently stems from ignoring the first sentence of FAR 35.002 which is not merely regulatory fluff but a factual statement of the principle purpose of contracted R&D. Attempts to apply the either/or paradigm of the Federal Grant and Cooperative Agreement Act, 31 USCA § 6301 et seq., to OTs may rely on the false assumption that the Act applies to all possible Federal contractual relationships. In fact, the original Office of Management and Budget guidance on the Act, 43 Fed. Reg. 36860 (1978), expressly states: “This Act does not cover all possible relationships that may exist between the Federal agencies and others.” (p. 36862). A relatively recent joint publication of OMB and the White House Office of Science and Technology Policy says regarding OTs: “They may be used to support projects that are not strictly procurement or assistance; in lieu of standard assistance instruments; and depending on specific statutory authority for the acquisition of goods and services.” Innovative Contracting Case Studies (2014), p.15. The same publication cites FAR 35.002, “R&D contracts are unlike contracts for supplies and services.” FAR 35.003 is the regulatory implementation of the Federal Grant and Cooperative Agreement Act in an R&D context.

OTs under § 2371 may be awarded when standard award instruments are not deemed appropriate. Standard procurement contracts are to be used to acquire property and services, but FAR pt. 35

states that most R&D contracts are unlike contracts for supplies and services. At the time of enactment of 10 USCA § 2371 in 1989, *standard* grants and cooperative agreements were only awarded to academic institutions or non-profits. Thus, an assistance instrument awarded to a profit making company is not a *standard* grant or agreement for purposes of § 2371. At the time of enactment of § 2371, § 2358 of title 10 did not authorize award of cooperative agreements, but OMB guidance for cooperative agreements related only to cooperative agreements with academic institutions or non-profits. Thus a cooperative agreement awarded to a for-profit company was not a *standard* cooperative agreement. Additionally, multi-party instruments such as consortia, whether procurement or assistance were not *standard* instruments in 1989.

In summary, § 2371 is a viable options for R&D from basic research up to technology demonstrations, including prototype projects. Section 2371b agreements may be awarded whether or not a standard procurement contract or assistance is also deemed appropriate. Section 2371b is available for prototype projects from their very earliest stage up to residual operational use and follow on production. Despite their differences, there is substantial overlap between the two authorities. Contrary to the recently issued (January 2017) DOD Guide for Other Transaction for Prototypes, § 2371b OTs may be used not only for acquisition but also for other purposes including support and stimulation.

The authority of § 2371 (and thus also of § 2371b) is *in addition* to authority to award standard procurement contracts, grants and cooperative agreements. Thus, in programs where award instruments are specified as contracts, grants or cooperative agreements, DOD may also award OTs consistent with the requirements of the relevant OT statute. An example is 15 USCA § 638, authorizing the Small Business Innovative Research program. OTs are especially suited to dual-use science and technology projects and programs where commercial opportunities may develop.

It would be appropriate for DOD to adopt the OT as its default award instrument for R&D projects and follow on production programs after a successful 2371b prototype project as provided for in § 2371b (f). Broad Agency Announcements R&D solicitations should at a minimum include OT's among potential award instruments. Using procure-

ment contracts as the default instrument for R&D is inconsistent with FAR 35.002 and 35.003.



This FEATURE COMMENT was written for The Government Contractor by Richard L. Dunn. Mr. Dunn was the first general counsel of the Defense Advanced Research Projects Agency. He was instrumental in the creation of DOD's other transactions authority. Currently Mr. Dunn acts as a consultant providing advice and engaging in research and analysis related to the deployment and implementation of technology in the military and civil sectors through partnering and other innovative means; he conducts research in national security operations, technology and their interactions; and, analyzes laws, policies and practices that impact the effective implementation of technology. He can be reached at richardldunn@verizon.net.

Developments

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DOD Could Improve Pacific Command's Operational Contracting Support Processes, GAO Says

The Department of Defense's Pacific Command (PACOM), which is responsible for the Asia-Pacific region, "does not fully account for contractor personnel in a steady-state, or peacetime, environment and lacks a process to vet foreign vendors," according to a recent Government Accountability Office report. PACOM officials acknowledged that "the combatant command is aware of the importance of foreign-vendor vetting, but, in the absence of specific requirements from DOD, the command does not have a documented vendor vetting mechanism, such as a vendor vetting cell or other process by which to vet vendors." GAO also found that improving and making permanent a pilot operational contract support (OCS) structure could lead to more effective contracting processes.

Throughout PACOM's area of responsibility, deployed U.S. military personnel "rely on a variety

of contracted services to provide needed support to conduct military operations, including exercises, humanitarian responses, and contingency operations,” GAO noted. “A growing reliance on contractors to provide logistical, transportation, intelligence, and other support to the combatant command’s missions in this region requires advanced planning, rapid response, flexible procedures, and integration of efforts.”

Vendor Vetting—DOD guidance “requires the accounting of certain contractor personnel during contingency operations, but is unclear for steady-state environments.” Although PACOM issued limited guidance in 2016, that guidance excludes foreign national contractor employees. This has led to using “multiple mechanisms for contractor personnel accountability [and] inconsistent reporting,” according to GAO. “[I]nconsistencies regarding contractor personnel accountability in a steady-state environment could present difficulties in an emergency or contingency operation.”

“Without PACOM guidance clarifying the types of contractor personnel that should be accounted for in a steady-state environment, PACOM and its subordinate commands may continue to have limited visibility over contractor personnel,” GAO added. And, without guidance specifying a system of record, “PACOM may not have a comprehensive and consistent accounting of contractor personnel in its area of responsibility, which could potentially limit PACOM’s visibility over contractor personnel for whom it may be responsible in the event of a contingency operation or an emergency.”

Clear DOD guidance could help PACOM improve vendor vetting and avoid contracting with the enemy in high-threat areas, GAO suggested. However, “[i]n lieu of comprehensive department-wide guidance on vendor vetting, two other combatant commands—U.S. Africa Command and U.S. Central Command—have developed their own foreign-vendor vetting guidance,” GAO noted.

OCS—In 2014, “DOD introduced the concept of an OCS Integration Cell,” and PACOM “established an interim organizational structure to oversee and manage OCS in its area of responsibility,” GAO said. “In PACOM, the role of the OCS Integration Cell is performed by the OCS Mission Integrator Demonstration—a 3-year pilot program that began in June 2014” and was set to end in June. According to GAO, the pilot was intended “to establish OCS

as an enduring capability to provide the combatant command, subordinate unified commands, and service components a central entity to integrate OCS across joint functions ... in steady-state and contingency environments.”

“PACOM officials stated that, upon completion of the pilot, they intend to establish the structure as an enduring OCS capability within the command’s logistics directorate,” GAO said. “However, service component officials stated that PACOM’s OCS organizational structure might have been more effective if it engaged all joint staff functions, including directorates beyond logistics.” GAO suggested that “[b]y considering ways to expand its OCS organizational structure beyond the logistics directorate and better integrate the equities of other directorates, PACOM could be better positioned to build on the progress made during the pilot program.”

Further, although PACOM “has integrated OCS into 6 of its 11 operational, concept, and campaign plans for potential contingencies” by developing required OCS annexes, its annexes “lack details on contractor management and support estimates in required appendixes,” GAO found. “While PACOM has taken steps to manage and oversee OCS, challenges remain in areas such as accounting for the total number of contractor personnel, vendor vetting, the enduring OCS organizational structure, and OCS requirements-development planning for incorporation into operational plans,” GAO concluded. “OCS is a critical force multiplier that supports U.S. military forces in the region when they respond rapidly to crises, such as threats including North Korea. PACOM’s readiness is evaluated against its ability to execute operational and contingency plans ... to respond to operational contingencies.”

Recommendations—GAO has recommended that (a) DOD and PACOM update guidance related to contractor personnel accountability, vendor vetting and OCS organizational structure; and (b) PACOM develop guidance that clarifies requirements development for operational, concept and campaign planning. GAO has previously reported on DOD’s challenges “integrating OCS in functional areas beyond logistics.” See 52 GC ¶ 124; 55 GC ¶ 51; 58 GC ¶ 5(b). The Congressional Research Service has also surveyed DOD’s OCS planning efforts. See 55 GC ¶ 181.

PACOM’s area of responsibility includes China, Australia and India. It is supported by the Pacific

commands of all four military services and two subordinate unified commands supporting U.S. military activities in Japan and South Korea. “According to data from the Federal Procurement Data System—Next Generation, DOD obligated more than \$40 billion between fiscal years 2011 and 2015 within PACOM’s area of responsibility, including for contracts supporting deployed forces,” GAO noted.

Operational Contract Support: Actions Needed to Enhance Capabilities in the Pacific Region (GAO-17-428) is available at www.gao.gov/assets/690/685444.pdf.

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GAO Urges DOD To Improve Prototyping

The Department of Defense can do more to support and coordinate the use of prototyping across weapon system programs, the Government Accountability Office recently reported. GAO said that prototyping has helped DOD programs “introduce realism into their business cases by providing information on technology maturity, the feasibility of the design concepts, potential costs, and the achievability of planned performance requirements.”

Prototypes of systems, subsystems or components “can be a way to ‘test the waters’ with new and potentially disruptive concepts and technologies,” GAO said. “[P]rototypes can be developed by contractors or groups of contractors, government labs, or both, and efforts can be managed by the science and technology community, acquisition programs, or other types of research and development organizations,” GAO noted. “Competitive prototyping” refers to two or more contractors developing prototypes for the same component, subsystem or system.

DOD Prototyping—GAO reviewed 22 major defense acquisition programs that entered system development between December 2009—when Congress enacted competitive-prototyping requirements in the Weapon Systems Acquisition Reform Act (WSARA)—and February 2016. In 2015, Congress repealed the WSARA requirements.

GAO found that 17 of the major programs, or 77 percent, used prototyping before system development. For example, the Navy competitively prototyped shipping containers to house the Littoral

Combat Ship’s mission modules, which contain systems developed by other programs, and the Air Force competitively prototyped satellite-control engineering models for the Global Positioning System Next Generation operational control system. DOD officials generally believed that prototyping provided a good return on investment, and programs with higher levels of risk generally used prototyping more extensively, GAO reported. Officials said prototyping helped develop business cases and provide insight into requirements, costs, risks and the feasibility of proposed solutions.

Prototyping Initiatives—DOD and the military services have launched initiatives to promote prototyping outside of major programs, including opening seven offices to promote prototyping, experimentation and innovation since 2012. However, GAO said they face challenges, including limited funding, a risk-averse acquisition culture, competing priorities and long budget timelines.

GAO suggested that pending DOD organizational changes provide opportunities for a more strategic approach to innovation and prototyping. DOD has announced plans to appoint a chief innovation officer, and by statute the position of undersecretary of defense for acquisition, technology and logistics will be divided into new undersecretary positions for research and engineering and for acquisition and sustainment. See 59 GC ¶ 33(f).

Private Sector—GAO noted that the private sector employs key enablers of prototyping, such as “developing a strategy for innovation, identifying relative levels of investments that align with innovation goals, and protecting funding for technology investments that have higher risk, but perhaps more reward across the enterprise.” DOD has not implemented all of these enablers and lacks “a department-wide strategy that communicates strategic goals and priorities and delineates roles and responsibilities to guide the prototyping initiatives.”

DOD could use “strategic buckets” to allocate funding to projects by type of strategy, GAO said. For instance, percentages of resources could be allocated in buckets for incremental upgrades to existing systems, disruptive new systems, disruptive new components, and developing disruptive new uses for existing systems.

Recommendations—GAO recommended that DOD (a) develop a high-level, department-wide strategy with strategic goals, priorities, and roles

and responsibilities for prototyping and innovation initiatives; (b) adopt “strategic buckets” or a similar funding approach to ensure adequate investment in innovation; (c) maintain adequate funding of advanced component development and prototypes; and (d) institute a mechanism to coordinate prototyping budget activities.

Before Congress repealed the WSARA competitive-prototyping requirements, DOD waived the requirements for various programs, including a nondevelopmental oiler acquisition, the VXX presidential helicopter, the B-2 bomber’s defensive management system and an armored multipurpose vehicle family. See 55 GC ¶ 290(b); 56 GC ¶ 141(a); 56 GC ¶ 161(a); 56 GC ¶ 332(b).

Weapon Systems: Prototyping Has Benefited Acquisition Programs, but More Can Be Done to Support Innovation Initiatives (GAO-17-309) is available at www.gao.gov/assets/690/685478.pdf.

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GAO Recommends Army Develop Contracting Metrics

Quarterly department-wide contracting reviews by top Army leaders since 2012 did not consistently evaluate either “the efficiency and effectiveness of the [Department of the Army’s] contracting operations” or “the effects of major organizational changes on contracting operations,” the Government Accountability Office recently reported. Instead, Army leaders “have primarily focused on efforts to obligate funds before they expire, as well as competition rates and small business participation.”

According to GAO, the Army obligated over \$74 billion in contract actions in fiscal year 2016. “In recent years, the Army has faced challenges in executing its contracting operations,” including the extensive use of sole-source bridge contracts to extend existing contracts to avoid coverage gaps, GAO pointed out. See 57 GC ¶ 321; 58 GC ¶ 45. “Since 2012, Army leaders ... have acknowledged a need for improvements in contracting and have taken positive intermittent steps, but GAO found that these leaders did not sustain the efforts or—alternately—provide a rationale for not doing so.”

For example, according to a key strategic planning document from 2014, “contracting operations

should adhere to schedule, cost, and performance objectives,” but Army officials “have not established the timeliness, cost savings, and contractor quality metrics needed to evaluate contracting operations against such objectives,” GAO found. “Without adequate metrics, Army leaders will not have the information needed to determine whether Army contracting operations are meeting the department’s objectives.”

Further, the assistant secretary of the Army for acquisition, logistics and technology (ASA(ALT)) “has not established the metrics needed to effectively evaluate the size of the department’s contracting workforce,” and the office of the deputy assistant secretary for procurement “has not consistently implemented the program it established to improve the department’s compliance with acquisition policies and regulations,” GAO pointed out.

Army leaders are also failing to evaluate the effects of major organizational changes on contracting organizations “despite repeatedly changing reporting relationships across contracting organizations since 2008, when the Secretary of the Army created the Army Contracting Command,” GAO observed. “The number of changes has increased since 2012, with five major changes in 2016.” Some Army leaders moved towards centralized contracting decision-making, “while others made changes intended to improve support to field operations,” but generally “they did not establish measurable objectives in accordance with federal standards for internal control.”

GAO heard from “eight different Army organizations ... that the numerous changes disrupted contracting operations and caused confusion.” Although the responsible senior officials acknowledged the need to measure “how the changes have affected contracting operations,” the officials “have not yet agreed upon specific metrics,” GAO stated. “In the absence of measurable objectives and authoritative data to assess the effectiveness of organizational changes, disagreements over the risks and benefits of some of the most recent changes have increased tensions between officials in the ASA(ALT) office and at [Army Materiel Command].”

“The Army’s contracting professionals are critical to the department’s efforts to execute its missions. However, Army leadership has taken a relatively narrow view of the department’s contracting operation,” GAO said. “By primarily focusing

on ensuring that contracting officers are obligating funding before it expires, Army leadership has in effect promoted a ‘use or lose’ perspective and deemphasized the efficiency and effectiveness of contracting operations.”

GAO made eight recommendations to improve Army contracting operations, including (a) developing metrics to assess contracting operations for timeliness, cost savings, and contractor quality; (b) documenting rationales for key decisions; (c) ensuring greater ASA(ALT) involvement with quarterly reviews “to demonstrate commitment to improving contracting operations”; and (d) establishing measurable objectives to assess the effects of organizational changes on contracting operations.

Army Contracting: Leadership Lacks Information Needed To Evaluate and Improve Operations (GAO-17-457) is available at www.gao.gov/assets/690/685425.pdf.

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McCaskill Questions GSA Effort To Reduce Improper Payments, DOE Contracts

Sen. Claire McCaskill (D-Mo.), the Senate Homeland Security and Governmental Affairs Committee ranking member, recently asked Tim Horne, the acting administrator of the General Services Administration, to provide an update “on what the agency is doing to reduce improper payments,” and on its progress in implementing recent recommendations by the GSA inspector general. McCaskill also questioned a Department of Energy contracting arrangement at the Hanford nuclear waste treatment plant.

GSA—In May, the GSA IG reported that GSA did not meet all of its improper payment reduction targets under the Improper Payments Elimination and Recovery Act, P.L. 111-204. The IG also found a lack of adequate internal controls over reporting improper payments and insufficient implementation of the corrective action plan addressing its fiscal year 2015 risk assessment. See 59 GC ¶ 147. “GSA concurred with all of [the IG’s] recommendations,” and “indicated that ‘corrective action is underway’ to make improvements in the agency’s processes and controls related to improper pay-

ments,” McCaskill wrote. “While I am encouraged that GSA has agreed to implement all ... recommendations, the agency qualified that response by noting that these remedial actions ‘will be implemented as feasible.’ ”

To better understand GSAs current efforts and plans to reduce improper payments, she asked Horne to provide an update on the status of each recommendation, all outstanding relevant IG recommendations from FYs 2011–2016, any factors that may impact the feasibility of implementing the recommendations, additional steps that GSA has taken to improve its oversight of improper payments, and the impact of the president’s proposed FY 2018 budget on agency compliance with the IG’s recommendations.

DOE—McCaskill asked DOE Secretary Rick Perry for a briefing about the circumstances under which two DOE “contractors with a history of waste and fraud were able to subcontract to themselves by creating a subsidiary that can avoid direct oversight by the federal government.” McCaskill noted that the companies, which she identified as Bechtel National Inc. and AECOM, recently paid a \$125 million settlement. The formation of the subsidiary “raises questions about DOE’s ability to conduct oversight of Bechtel’s work as a subcontractor to itself, including transparency and accountability issues that could arise,” McCaskill wrote.

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Army Needs To Assess Requirements Development Workforce

The Army needs to comprehensively assess the necessary composition and size of its workforce for the requirements development process for weapon systems, the Government Accountability Office has recommended. GAO said the Army has struggled with “a litany of canceled, delayed, or restructured programs over the past 20 years.”

In 2011, the Army commissioned a review—referred to as the Decker-Wagner report—of its poor acquisition record. See 52 GC ¶ 193(c); 53 GC ¶ 249(d). The report identified various factors contributing to poor weapon system acquisition outcomes, one of which was poorly developed requirements. GAO said that “too many of the Army’s past

acquisition programs resulted in negative outcomes due to un-executable requirements.”

Under funding constraints in recent years, the Army has prioritized combat readiness over other areas, including requirements development, GAO said. GAO determined that the Army’s requirements development workforce has declined by 22 percent since 2008. The requirements development workforce includes operations research/systems analysts, systems engineers, capability managers and others. “[W]orkforce shortfalls limit the extent to which requirements are well informed and feasible,” and “[t]his shortfall is occurring at a time when the demands placed on the requirements development workforce have increased.”

Since the Decker-Wagner report was issued, the Army has sought to improve its requirements development process, GAO noted. The Army has established research/systems analyst units in its centers for excellence, issued guidance facilitating early knowledge-based decisions at key milestones, increased leaders’ involvement in requirements approval and improved coordination with the other military services.

GAO recommended that the Army comprehensively assess the workforce and resources needed for the requirements development process and determine whether shortfalls can be addressed, given other funding priorities. Without a service-wide assessment, “the Army cannot be certain it has the capabilities to effectively determine program requirements and achieve positive acquisition outcomes.”

GAO also surveyed nine case studies, suggesting that “conducting detailed requirements and systems engineering analysis before starting development contributes to understanding the requirements’ challenges and identifying and mitigating associated risks.” The case studies included the Army’s Ground Combat Vehicle, Common Infrared Countermeasure and Joint Air-to-Ground Missile programs. Successful acquisition programs have “requirements informed by early, robust systems engineering analyses,” GAO concluded, citing previous GAO reports. See 47 GC ¶ 519; 50 GC ¶ 51.

Army Weapon Systems Requirements: Need to Address Workforce Shortfalls to Make Necessary Improvements (GAO-17-568) is available at www.gao.gov/assets/690/685406.pdf.

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Developments In Brief ...

- (a) **Federal Union Decries Aggressive IRS Contractor Debt Collection**—“[F]or-profit collection agents are aggressively pressuring taxpayers with reckless advice for settling their federal tax debts,” the National Treasury Employees Union (NTEU) said, citing a letter from four Democratic senators to an Internal Revenue Service contractor. According to the letter, obtained by the New York Times, the senators are concerned that the scripts used by Pioneer Credit Recovery Inc. may be pressuring taxpayers into risky transactions, violating the Fair Debt Collection Practices Act and the Internal Revenue Code, and violating the terms of its contract. In 2015, Congress mandated the IRS to contract with private collection agencies “for the collection of all outstanding inactive tax receivables.” See 57 GC ¶ 391; 59 GC ¶ 119(a). According to the letter, Pioneer’s script advises its agents to “[g]ive the Taxpayer ideas on where/how to borrow” to pay their tax debt, and suggests sources, including “Credit Card,” “2nd Mortgage” and “Borrow against 401K”—“options that are extraordinarily dangerous for taxpayers’ financial security,” said Sens. Elizabeth Warren (D-Mass.), Jeff Merkley (D-Ore.), Sherrod Brown (D-Ohio) and Benjamin Cardin (D-Md.). The aggressive scripts suggest that Pioneer may be violating statutory protections for taxpayers and thereby violating the terms of its contract with the IRS, the senators said, noting that the scripts do not have any evidence that Pioneer agents are complying with a contract requirement to inform taxpayers of their right to assistance from the Taxpayer Advocate Service. The IRS’ private debt collection program “has twice been abandoned because of high costs to taxpayers and abusive tactics on the part of the private companies,” NTEU said. “Nonetheless, Congress insisted on a third try, starting in April.” NTEU noted that IRS employees have greater flexibilities and authorities to work with taxpayers on delinquent tax debt. NTEU has endorsed the Taxpayer Protection Act, H.R.

2171, introduced by Rep. John Lewis (D-Ga.) to repeal the IRS' private debt collection mandate. See 59 GC ¶ 142.

(b) VHA Purchase Cardholders Split Buys, Exceeded Micropurchase Threshold—Veterans Health Administration purchase cardholders made improper payments by splitting purchases, exceeding the card limit for services and exceeding the yearly threshold without establishing a contract, the Department of Veterans Affairs inspector general has reported. The IG substantiated hotline allegations that VHA officials at the VA Medical Center in Dublin, Ga., improperly split purchases and exceeded micropurchase limits. The IG sampled 130 purchases from October 2012 to March 2015, and 37, or 28 percent, were unauthorized commitments, including 23 split purchases that avoided the \$3,000 micropurchase threshold and 14 purchases over the \$2,500 limit for services. The IG determined that approving officials did not adequately monitor cardholder compliance with VA policy. From its sample, the IG estimated that 100 transactions worth \$240,000 were unauthorized commitments and improper payments. The IG did not substantiate allegations that cardholders made duplicate payments to two vendors that provided recurring services, but cardholders made 91 micropurchases from the two vendors without properly establishing a contract. VHA policy requires facilities to negotiate indefinite-delivery, indefinite-quantity contracts for services expected to exceed \$5,000 in a fiscal year. This occurred because approving officials did not properly review transactions for the IDIQ threshold. Thus, cardholders purchased \$218,000 in services that avoided federal competition requirements. The IG recommended that VHA (a) review relevant transactions for unauthorized commitments, (b) request ratification of the identified unauthorized commitments, (c) improve oversight of approving officials and emphasize the importance of monitoring cardholder purchases, (d) provide cardholder training, and (e) take appropriate administrative action against cardholders who made unauthorized

commitments. In February, the Government Accountability Office estimated that 13 percent of VA micropurchases lacked required documentation, but found little evidence suggesting purchase card fraud. See 59 GC ¶ 52. In May 2016, GAO recommended that VA and other agencies issue guidance on analyzing purchase card spending patterns for possible strategic sourcing. See 58 GC ¶ 231. *Veterans Health Administration Review of Alleged Irregular Use of Purchase Cards by the Engineering Service at the Carl Vinson VA Medical Center in Dublin, Georgia* is available at www.va.gov/oig/pubs/VAOIG-15-01217-249.pdf.

(c) Army Management of HL7 Contract Needs Improvement, IG Says—The Army did not adequately manage the requirements for the Heavy Lift VII (HL7) commercial transportation contracts, according to a Department of Defense inspector general report. The HL7 contracts provide commercial transportation for moving Army equipment, cargo and personnel throughout the Middle East. The HL7 contracts were designed to provide transportation in Kuwait, Iraq and Saudi Arabia. In 2016, the Army awarded a \$5.95 million task order on the HL7 contracts, which expanded the capabilities of the original HL7 contracts to transport cargo between Kuwait and Jordan, Bahrain, Oman, Qatar and United Arab Emirates. The IG found that the Army did not analyze HL7 asset usage for intra-Kuwait movements and did not continuously evaluate HL7 requirements to adjust orders based on operational need. The IG also found the Army did not identify and correct the inefficiencies in its planning and execution of theater transportation missions. The report noted that Army requirement review boards did not require adequate information to properly validate the number of HL7 assets requested and that the Army over-ordered HL7 services because it did not properly plan the task order. The IG concluded that “the Army wasted \$53.6 million throughout the life of the HL7 contracts on services that it did not require,” the IG reported. The IG recommended that supported units establish metrics and perform quarterly per-

formance and effectiveness assessments. The IG also recommended that the Army implement a systemic process for collecting asset usage and establish a consistent schedule for analyzing usage information to use quantitative and qualitative factors when forecasting requirement quantities on future task orders. *U.S. Army's Management of the Heavy Lift VII Commercial Transportation Contract Requirements in the Middle East* (DODIG-2017-095) is available at www.dodig.mil/pubs/documents/DODIG-2017-095.pdf.

- (d) **VA IG Finds Transportation Contract Mismanagement at Chicago VAMC**—The Department of Veterans Affairs inspector general recently substantiated allegations of mismanagement of a patient transportation service contract for the Jesse Brown VA Medical Center in Chicago. Specifically, the IG found that a contracting officer at the Great Lakes Acquisition Center did not validate the performance requirements to determine the required number of trips, adequately determine price reasonableness, fully fund the contract, or properly document the contract in the VA's Electronic Contract Management System (eCMS). The IG attributed the lapses in part to the CO not ensuring that “required reviews were performed for the awarded contract and for four modifications that either funded or extended the contract, increasing its value from about \$885,000 to more than \$6 million.” Further, the VA “did not solicit competition to ensure fair and reasonable pricing,” and, thus, lacks assurance that the amount paid was the best value to the Government,” the IG determined. The IG recommended that the Veterans Health Administration ensure compliance with oversight policies and ensure that contract information in eCMS is complete. The VA should compete future transportation contracts and determine whether it violated the Antideficiency Act, the IG added. *Review of Alleged Mismanagement of the Patient Transportation Service Contract for the Jesse Brown VA Medical Center in Chicago, Illinois* is available at www.va.gov/oig/pubs/VAOIG-15-03357-180.pdf.

Legislation

¶ 209

Legislative Efforts To Rein In LPTA Continue

Legislation introduced in the U.S. House of Representatives June 22 would restrict civilian agency use of lowest-priced, technically acceptable (LPTA) source selection procedures to noncomplex procurements and commodity purchases. H.R. 3019, the Promoting Value Based Procurement Act of 2017, mirrors restrictions on the Department of Defense mandated by the Fiscal Year 2017 National Defense Authorization Act.

For several years, agency and congressional policy statements have encouraged agencies to limit use of LPTA procedures. In March 2015, the undersecretary of defense for acquisition, technology and logistics (AT&L) issued a detailed policy memorandum on LPTA use. The AT&L memo noted that LPTA procedures can reduce costs and provide a streamlined, simplified method to quickly purchase commercial and noncomplex services and supplies. But improper use of LPTA procedures can result in a missed opportunity to “secure an innovative, cost-effective solution.”

The AT&L memo stated that LPTA procedures are appropriate “only when there are well-defined requirements, the risk of unsuccessful contract performance is minimal, price is a significant factor in the source selection, and there is neither value, need, or willingness to pay for higher performance.” The memo further stated that “well-defined requirements” means “technical requirements and ‘technical acceptability’ standards that are clearly understood by both industry and government, are expressed in terms of performance objectives, measures, and standards that map to [DOD] requirement documents, and lend themselves to technical evaluation on an acceptable/unacceptable basis.”

Expanding on the memo's policy statement, § 813 of the 2017 NDAA limited use of LPTA procedures by requiring DOD to revise the Defense Federal Acquisition Regulation Supplement to permit use of LPTA procedures if the following six factors are met:

- (1) [DOD] is able to comprehensively and clearly describe the minimum requirements

expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers; (2) [DOD] would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal; (3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal; (4) the [SSA] has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to [DOD]; (5) the contracting officer has included a justification for the use of a [LPTA] evaluation methodology in the contract file; and (6) [DOD] has determined that the lowest price reflects full life-cycle costs, including for operations and support.

Section 813(c) further provided that to “the maximum extent practicable,” LPTA procedures “shall be avoided” for a procurement that is predominantly for

- information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, or other knowledge-based professional services;
- personal protective equipment; or
- knowledge-based training or logistics services in contingency operations or other operations outside the U.S., including in Afghanistan or Iraq.

DFARS case 2017-D017 is currently open to draft the NDAA-mandated rule.

H.R. 3019 would require amendment of the FAR to impose the same restrictions on civilian agency procurements. Rep. Mark Meadows (R-N.C.) introduced H.R. 3019, which was referred to the House Committee on Oversight and Government Reform. Rep. Don Beyer (D-Va.) was the lead Democrat cosponsor.

The Professional Services Counsel (PSC), an industry organization, worked with Meadows, Beyer and committee staff in drafting H.R. 3019. Cate Benedetti, PSC's vice president of government relations, said that industry's principal objection to LPTA procedures is that they create a “race to the

bottom” on price and innovation. While LPTA procedures are appropriate for commodities purchases, LPTA procedures are not appropriate for obtaining best value in procurements of “knowledge-based or other types of professional services,” which are complex or depend on innovation. Benedetti also said that the NDAA and H.R. 3019 impose reporting requirements that will help determine the extent of LPTA use.

Addressing the potential impact on bid protests, James McCullough, an attorney at Fried, Frank, Harris, Shriver & Jacobson LLP, said that agency guidance like the AT&L memo does not provide a good basis for a protest, as illustrated by the Government Accountability Office's recent decision in *Chenega Fed. Sys., LLC*, Comp. Gen. Dec. B-414478, 2017 CPD ¶ 196, which rejected a protest that cited the AT&L memo as a limit on LPTA procedures. McCullough said that, in contrast, the limits on LPTA procedures set out in the NDAA and H.R. 3019 present much more formidable protest grounds, especially if the Government fails to document its efforts to comply with LPTA restrictions. See generally McCullough, Howe, Anstett and Tucker, Feature Comment, “Bid Protest Update From The 2017 NDAA: Is This Just The Beginning?,” 58 GC ¶ 441.

¶ 210

House Committee Passes FY 2018 Defense Authorization Act

The House Armed Services Committee June 28 passed the National Defense Authorization Act for Fiscal Year 2018 by a vote of 60–1, and the Senate Armed Services Committee approved its version of the bill by a vote of 27–0.

House Bill—The House bill, H.R. 2810, would authorize \$631.5 billion for the base budget, including \$28.5 billion above the president's request for essential readiness recovery, and \$64.6 billion for overseas contingency operations. “For six years, we have been just getting by—cutting resources as the world becomes more dangerous, asking more and more of those who serve, and putting off the tough choices,” said committee chair Rep. Mac Thornberry (R-Texas). “Tonight, we begin charting a new course toward readiness recovery, and we do so with overwhelming support from Republicans and Democrats alike.”

The bill “includes the third installment of the committee’s acquisition reform initiative, which will further streamline bureaucracy, drive efficiency through competition, and give the Pentagon the tools it needs to make better business decisions,” according to a summary issued by Thornberry.

Key acquisition reforms include requiring greater specificity in service-contract funding requests; allowing agencies to purchase commercial off-the-shelf items from commercial websites; and directing the Department of Defense to transition at least 25 percent of the Defense Contract Audit Agency’s backlog of incurred cost audits to the private sector.

Thornberry expressed support for DOD’s “Section 809” advisory panel on streamlining acquisition regulations, which issued an interim report in May. See 59 GC ¶ 160. The bill “includes provisions intended to commence a longer-term effort to remove unnecessarily prescriptive requirements from U.S. Code, which create a culture of compliance within the acquisition community, rather than empowering smart, agile, decision-making.”

The bill would also seek to reduce redundancy among defense components and the military services by restricting funding for service-unique contract-writing systems and requiring an assessment of requirements. It would establish a Space Command as a sub-unified command within Strategic Command “to ensure a senior military official can focus on and is responsible for training and equipping for operations in space and, likewise, for any future warfighting in this critical domain,” according to Thornberry. And the bill would heighten congressional oversight of sensitive military cyber operations and weapons.

Senate Bill—The Senate bill, S. 1519, introduced July 10, would authorize \$632 billion for the base budget and \$60 billion for overseas contingency operations. Committee chair Sen. John McCain (R-Ariz.) said it continues “important efforts to reorganize [DOD], spur innovation in defense technology, and improve defense acquisition and business operations.”

According to a summary of the bill issued by the committee, it continues prior Senate committee reforms by “establishing accountability, accessing new sources of innovation, removing unnecessary processes and requirements, adopting best practices, and improving the acquisition workforce.” The bill also reduces authorizations for wasteful or underperforming programs, including Army

networking programs, the Navy’s Littoral Combat Ship, duplicative contract-writing systems and duplicative research and development programs.

The bill would reduce authorizations for underperforming programs that rely heavily on software and information technology. After spending billions of dollars on communications, command and control systems, DOD and the defense IT industrial base “have been unable to deliver many of these capabilities,” the committee noted. The bill would seek to implement “modern IT systems and practices, by using commercial agile software development practices, to include more incremental development,” through training, tools, infrastructure and several pilot programs.

¶ 211

House Passes DHS Procurement Reform, Property Oversight Bills

The House of Representatives recently approved by voice vote the Department of Homeland Security Acquisition Review Board Act of 2017, H.R. 1282, and the Streamlining DHS Overhead Act, H.R. 2190. Both bills were referred to the Senate Homeland Security and Governmental Affairs Committee.

The DHS Acquisition Review Board Act would establish an acquisition review board to strengthen accountability and uniformity within the DHS acquisition review process, review major acquisition programs, and review the use of best practices. The Government Accountability Office “has repeatedly placed DHS acquisition programs as high-risk due to the frequent abuse and mismanagement,” Rep. Tom Garrett (R-Va.), the bill’s sponsor, said. “This legislation seeks to curb that trend and spend money responsibly with proper oversight.”

The Streamlining DHS Overhead Act would direct DHS “to make certain improvements in managing the Department’s real property portfolio,” including by creating a chief facilities and logistics officer position to develop policies and oversee the management of DHS real property, mobile assets, personal property and other material resources. It would require the department to develop a five-year strategy for consolidating real property, optimize asset use, and decrease the number and square footage of leased properties.

Rep. John Rutherford (R-Fla.), the bill's sponsor, said the bill would allow DHS "to improve its operations, increase its accountability, and promote efficiencies to better employ its resources." He continued, "DHS's properties represent billions of dollars in spending, but its leadership has continued to struggle with asset integration and management. H.R. 2190 will ensure taxpayer dollars are not wasted, while allowing DHS to better focus on its mission of securing the homeland."

¶ 212

House, Senate Committees Approve FAA Reauthorization Bills With Differing Air Traffic Control Privatization Goals

Competing Federal Aviation Administration reauthorization bills in the House of Representatives and the Senate recently cleared their first hurdles by gaining committee approval. On June 27, the House Transportation and Infrastructure Committee approved the 21st Century Aviation Innovation, Reform, and Reauthorization (21st Century AIRR) Act, H.R. 2997, by a 32–25 margin. On June 29, the Senate Committee on Commerce, Science, and Transportation passed the FAA Reauthorization Act of 2017, S. 1405, by voice vote.

Senate—"This passenger-friendly aviation reform legislation improves safety and incorporates over 50 amendments offered by both committee Democrats and Republicans," Sen. John Thune (R-S.D.), committee chair and bill sponsor, said. "In preparing for the future of aviation, our committee has acted to continue advancing unmanned aircraft systems and other aviation innovations while offering airline passengers new protections following recent incidents."

The Senate bill would reauthorize FAA through fiscal year 2021, but would not privatize FAA's air traffic control function—something the Trump administration wants and the House bill would accomplish. See 59 GC ¶ 171; 59 GC ¶ 180(e). According to Sen. Bill Nelson (D-Fla.), the committee's ranking member, "the support [for separating the air traffic control function] is not there."

House—The House version of the FAA reauthorization bill would reauthorize the FAA for six years and separate the air traffic control function from the FAA through the creation of a nonprofit

private corporation, although FAA would still be responsible for overseeing aviation safety. Rep. Bill Shuster (R-Pa.), the committee chair and the bill's sponsor, said the House bill "puts the American taxpayers, innovation, jobs, and the traveling public before Washington dysfunction."

Shuster said the committee "thoroughly debated the legislation, considered approximately 80 amendments, approved substantial improvements offered by Members from both sides of the aisle, and voted to move forward to give Americans the safe, efficient, modern aviation system they deserve."

Randy Erwin of the National Federation of Federal Employees said the provision to separate air traffic control would "inevitably lead to unsafe conditions as airlines increase air traffic and decrease regulations in the pursuit of profit," and "the federal workforce that now oversees the air traffic control system [would] become private sector employees under the control of corporate airlines."

Regulations

¶ 213

USAID Withdraws Proposed Foreign Contractor Warrant Program

The U.S. Agency for International Development has withdrawn a proposed rule to implement a warrant program for cooperating country national (CCN) personal service contractors. The rule was intended to alleviate a shortage of direct-hire U.S. contracting officers. See 82 Fed. Reg. 28617 (June 23, 2017).

In August 2016, USAID proposed incorporating a warrant program for CCN personal service contractors in the USAID Acquisition Regulation. See 58 GC ¶ 306. USAID notified the public that it will not publish a final rule to implement the warrant program.

In the 2016 proposed rule, USAID noted that it conducted a two-year pilot warrant program, before launching a permanent program through a September 2014 class deviation. The proposed rule was meant to address the shortage of U.S. COs and to assist USAID in "building long-term, host country technical capacity to materially assist the Missions with procurement responsibility."

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