

8 August 2008

■ **Title 10 US Code Provisions:**

• **Sec. 2461.** Commercial or industrial functions: require studies and reports before conversion to contractor performance. Requires MEO certification, cost comparisons, & Congressional notification. Certifies contracting actions are not solely to avoid personnel ceilings.

• **FY08 NDAA Impact.** Restrictions in the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA) limit but do not prohibit use of the competitive sourcing tool.

• **Section 323** amends 10 U.S.C. 2461 to provide that a Military Department or Defense Agency may not be required to conduct a public-private competition at the end of the performance period specified in the performance agreement. Components may continue to carry out follow-on competitions at the end of performance periods at their discretion.

• **Section 325** prohibits the Office of Management and Budget (OMB) from directing or requiring the Secretary of Defense or the Secretary of a Military Department to undertake a public-private competition under OMB Circular A-76. The Department independently determines its competitive sourcing program during the normal program and budget review process. Annual and out-year plans are established by each Component and submitted via the DoD Comptroller's PB-42 budget exhibit and Components are expected to execute these plans.

• **Sec. 2461a.** Development of system for monitoring cost savings resulting from workforce reductions. Cost and savings factors to be estimated and taken into account in the FYDP.

• **Sec. 2462.** Requires a DoD report to Congress on public-private competitions.

• **Sec. 2463.** Collection of cost data on converted functions. Requirement for DCAMIS database. Guidelines and procedures on in-sourcing new and contracted out functions.

- **FY08 NDAA Impact.** Restrictions in the National Defense Authorization Act for Fiscal Year 2008 (FY08 NDAA) limit but do not prohibit use of the competitive sourcing tool.
 - **Section 324** amends 10 U.S.C. 2463 to give special consideration to using DoD civilians: DoD components can use DoD civilian employees to perform new functions or functions that are performed by a contractor if an economic analysis shows that DoD civilian employees are the low cost provider, or the DoD component has determined that the function is inherently governmental or exempt from private sector performance.
- **Sec. 2464.** Limits contracting-out DoD core logistics capabilities under A-76 unless waived by the Secretary of Defense.
- **Sec. 2465.** Limits contracting of firefighting and guard services.
- **Sec.'s 2466 & 2469.** Limits contracting of depot maintenance functions to 50%.
- **Sec. 2470.** Authorization for Depot Level activities to compete for maintenance and repair workloads of other agencies.
- **Sec. 2475.** Requirement with respect to reporting any restructuring or reengineering of functions or activities which will result in a manpower reduction effecting 50 or more personnel. Mandates a 30 day waiting period after Congressional notification before implementing the decision.

■ Other Laws and Regulations.

- **P.L. 105-270 "Federal Activities Inventory Reform (FAIR) Act"** . Requires all executive agencies to submit to Congress an annual inventory of activities that are not inherently governmental, and to make this inventory available to the public. The FAIR Act defines all activities, that are not inherently governmental, as commercial activities and are to be included in this inventory.
- **Title 16, Sec. 670a 'Sikes Act'** . A-76 does not apply to implementation and enforcement of natural resources policy.

- **Title 40, Sec. 541 'Brooks Act' (Title 31, Sec. 1105).** Sets limits and conditions concerning the contracting of architectural and engineering services by the federal government.
- **Title 41, Sec. 351 'Service Contract Act'.** When contracting for specific services, the Federal Government must pay minimum monetary wages to those service employees as determined by the Secretary of Labor. Specific requirements for fringes and working conditions are also specified.
- **FAR 15.5.** Pre-award, award and post-award notifications, protests and mistakes.
- **FAR 33.103.** Agency Protest procedures.
- **FAR 33.104.** GAO Protest procedures.
- **FAR 52-207-1 & FAR 52-207-2.** Notice of Cost Comparison Clauses. (Sealed bid and Negotiated)
- **FAR 52-207-3.** Right of First Refusal Clause.

■ **Revised A-76 Contracting Implications**

- A-76 Clause, 52-207-1 and 52-207-2 require update or revision to exclude appeals and revise terminology.
- Compliance Matrix recommended for all A-76 solicitations. (Circular A-76, pp B-8&9)
- Performance Periods are 3 to 5 years, exceptions to CSO. (Circular A-76, p. B-9)
- If performance bond used, the solicitation must show it as a separately costed CLIN. (Circular A-76, p. B-9)
- If award fee used, CSO must document it is available to all offerors (Circular A-76, p. B-12) and approve its use. (Circular A-76, p. C-19) • A phase-in period must be required by the solicitation and proposed by all bidders. (Circular A-76, p. B-10)
- GFP use or non-use must be approved by the CSO. (Circular A-76, p. B-9)

- Quality Control Plan is required for all A-76 Solicitations. (Circular A-76, p. B-10)
- Development of QASP by the PWS Team is required in all competitions. (Circular A-76, p. B-10)
- If no source (no bidders) is received other than the Agency Tender the Contracting Officer will refer to CSO for resolution. (Circular A-76, p. B-12)
- Contracting Officer must conduct price analysis and cost realism for all offerors. (Circular A-76, p. B-16)
- Only Sealed Bid, Low Cost Technically acceptable and the Two-Phase type solicitations can be used without CSO approval. (Circular A-76, p.p. B-13&14) The Two-Phase approach seems to offer the best alternative except with simple requirements. Its use may require additional time.
- Contracting Officer must certify on the SCF or SLCF that it is prepared in accordance with A-76 procedures. (Circular A-76, p. B-16)
- The Contracting Officer establishes an MEO letter of obligation if the performance decision favors the agency tender. (Circular A-76, p. B-5&18)
- The Agency Protest process under FAR Subpart 33.103 becomes the "Contest" under the new A-76 provisions (Circular A-76, p. B-20) replacing the A-76 Administrative Appeals Process.
- Changes to performance standards proposed in the Phased Approach (Phase 1) shall consider their discrete cost or price difference. The requiring activity (who?) will determine if the proposal is desired. Available funding must be considered in this decision. (Circular A-76, p. B-14)
- The Contracting Officer will monitor performance and make option year determinations for agency, public reimbursable source, and private sector performance decisions. (Circular A-76, p. B-19)
- Recommend that a draft PWS/Solicitation be out for comment prior to its release thus allowing all to comment on its content and accuracy. (Circular A-76, p. B-7)
- Release of Info at performance decision may be different than before since all are treated equally under the FAR. Parties are required to sign non-disclosure

agreements and are only allowed access for purpose of challenging the performance decision. (Circular A-76, p. B-18)

- Periods of Performance other than 3-5 year must be approved by the CSO. (Circular A-76, p. B-9)