THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

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¶ 55 POSTSCRIPT: SIMPLIFICATION, REFORM, STREAMLINING

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In the July issue of the REPORT, we told of a U.S. Army procurement of grounds maintenance services in which the agency conducted a simplified acquisition for commercial services, set aside for small businesses, to mow less than two acres of grass 18 times a year for one year with four one-year extension options. The work will include edging, trimming, pruning, and general cleanup at a small Army facility in suburban Virginia. We told how in order to do that the Army issued a 90-page Request for Quotations containing 105 Federal Acquisition Regulation and Defense FAR Supplement solicitation provisions and contract clauses and incorporating a 525-page Army grounds maintenance regulation as the standard of quality. See *Simplification, Reform, Streamlining, and Innovation: The Government Is Immune to Those Things*, 38 NCRNL ¶ 44.

When printed out in full text the 105 solicitation provisions and contract clauses incorporated into the RFQ for this small acquisition add between 150 to 200 pages to the Army's 90-page RFQ. So, between the 90-page RFQ, the 525-page Army regulation, and the 150 to 200 pages of provisions and clauses, the text of the prospective contract is between 750 and 800 pages in length. However, we did not tell the whole story.

Government Contracts Are More Voluminous Than They Appear

Among the contract clauses in the RFQ was FAR 52.222-41, *Service Contract Labor Standards* (AUG 2018). That clause is 4-1/2 pages long in the official pdf 8-1/2 inches by 11 inches three-ring binder version of the FAR that is downloadable at acquisition.gov. Paragraph (b) of the clause, *Applicability*, states:

> This contract is subject to the following provisions and to all other applicable provisions of 41 U.S.C. chapter 67, Service Contract Labor Standards, and regulations of the Secretary of Labor (29 CFR Part 4).

41 USCA Chapter 67 is 8 pages long at the official House of Representatives U.S. Code webpage. Title 29 of the Code of Federal Regulations, Part 4, is 91 pages long in the pdf version available at ecfr.gov. So now we're up to about 900 pages.

Paragraph (h) of FAR 52.222-41, *Safety and sanitary working conditions*, states: "The Contractor or subcontractor shall comply with the safety and health standards applied under 29 CFR part 1925." 29 CFR § 1925.2, *Safety and health standards*, provides as follows: "Every contractor and subcontractor shall comply with the safety and health standards published in 41 CFR part 50-204, including any matters incorporated by reference therein."

41 CFR Part 50-204, *Safety and Health Standards for Federal Supply Contracts*, is 26 pages long as downloaded from ecfr.gov. Subpart B, *General Safety and Health Standards*, § 50-204.2, *General Safety and Health Standards*, provides as follows:

(a) Every contractor shall protect the safety and health of his employees by complying with the standards described in the subparagraphs of this paragraph whenever a standard deals with an occupational safety or health subject or issue involved in the performance of the contract.

(1) U.S. Department of Labor—Title 29 CFR—

Part 1501—Safety and Health Regulations for Ship Repairing.

Part 1502—Safety and Health Regulations for Shipbuilding.

Part 1503—Safety and Health Regulations for Shipbreaking.

Part 1504—Safety and Health Regulations for Longshoring.

Part 1910—Subpart C through Subpart S (national consensus standards).

(2) U.S. Department of Interior, Bureau of Mines.

(i) In Chapter I of Title 30, Code of Federal Regulations, the standards requiring safe and healthful working conditions or surroundings in:

Subchapter B—Respiratory Protective Apparatus; Tests for Permissibility; Fees.

Subchapter C—Explosives and Related Articles; Tests for Permissibility and Suitability.

Subchapter D—Electrical Equipment, Lamps, Methane Detectors; Tests for Permissibility; Fees.

Subchapter O—Coal Mine Health and Safety.

(ii) In Chapter II of Title 30 the standards requiring safe and healthful working conditions or surroundings in:

Part 211—Coal-Mining Operating and Safety Regulations.

Part 216—Operating and Safety Regulations Governing the Mining of Coal in Alaska.

Part 221—Oil and Gas Operating Regulations.

Part 231—Operating and Safety Regulations Governing the Mining of Potash; Oil Shale, Sodium, and Phosphate; Sulphur; and Gold, Silver, or Quicksilver; and Other Nonmetallic Minerals, Including Silica Sand.

(3) U.S. Department of Transportation: 49 CFR parts 171–179 and 14 CFR part 103 Hazardous material regulation—Transportation of compressed gases.

(4) U.S. Department of Agriculture Respiratory Devices for Protection against Certain Pesticides—ARS-33-76-2.

(b) Information concerning the applicability of the standards prescribed in paragraph (a) of this section may be obtained from the following offices:

(1) Office of the Bureau of Labor Standards, U.S. Department of Labor, Railway Labor Building, Washington, DC 20210.

(2) The regional and field offices of the Bureau of Labor Standards which are listed in the U.S. Government Organization Manual, 1970-71 edition at p. 324.

(c) In applying the safety and health standards referred to in paragraph (a) of this section the Secretary may add to, strengthen or otherwise modify any standards whenever he considers that the standards do not adequately protect the safety and health of employees as required by the Walsh-Healey Public Contracts Act.

While many, perhaps most, of those standards apparently do not apply to contracts for grounds maintenance, some may well apply, such as 41 CFR § 50-204.6, *Medical services and first aid*; 41 CFR § 50.204.7, *Personal protective equipment*; and 41 CFR § 50-204.8, *Use of compressed air* (often used to clean equipment like mowers). The point is that the only way to know is to read the regulation. We are not sure how many more pages to add to the prospective contract.

The Burden Of The Socioeconomic Programs

Among the most complex Government contract terms are those associated with the socioeconomic programs, which are covered in FAR Subchapter D, Parts 19 through 26:

FAR Subchapter D—Socioeconomic Programs

Part 19—Small Business Programs

Part 20 [Reserved]

Part 21 [Reserved]

Part 22—Application of Labor Laws to Government Acquisitions

Part 23—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

Part 24—Protection of Privacy and Freedom of Information

Part 25—Foreign Acquisition

Pat 26—Other Socioeconomic Programs

The implementation of those programs entails the issuance and maintenance of many thousands of pages of regulations, orders, standards, administrative and judicial decisions, *et cetera*.

Such programs are political in origin and are backed and clung to by politically powerful constituencies. The importance and benefits of such programs may in time become more symbolic than actual, but once launched they are generally easier to expand than to cut back or terminate. Evidence-based policymaking is not always much in evidence in such cases. The classic example is the small business programs, which over the course of time have proliferated into many subset programs—small disadvantaged business (the 8(a) program), HUBZone small business, veteran-owned small business, service-disable veteran-owned small business, women-owned small business, and small business subcontracting. We doubt that anyone knows the cost of administering and complying with the socioeconomic programs.

The "Hidden" Pages Of Contracts

Most such programs are assigned to specific agencies of the Executive Branch for execution and administration. Those agencies issue their own implementing regulations, which are then referred to or incorporated into the FAR. FAR contract clauses for contractual implementation of such programs often refer to the titles of the U.S. Code and to the Executive Orders that authorized

them, and the clauses sometimes incorporate by reference voluminous regulations issued by the executive agencies that administer them into contracts, which effectively become "hidden" pages of those contracts. This is especially true of programs related to labor and employment laws. And the regulations cited in a contract clause may require contractor compliance with yet other provisions of the CFR.

Consider the matter of equal employment opportunity, covered in the five pages of FAR Subpart 22.8, *Equal Employment Opportunity*, which is based on Executive Order 11246, issued by President Lyndon Johnson in 1965 and amended by Presidents Bush (E.O. 13279) and Obama (E.O. 13665 and 13672). The policy is implemented in contracts by the clause at FAR 52.222-26, *Equal Opportunity* (Sept 2016). The clause applies to contracts valued at more than $10,000 and was included in the Army's grounds maintenance RFQ.

Subparagraph (c)(7) of the EEO clause states: "The Contractor shall comply with Executive Order11246, as amended, and the rules, regulations, and orders of the Secretary of Labor." It does not cite specific regulations, so one must search for them. We are not EEO experts, but think that the "rules, regulations, and orders of the Secretary" regarding EEO are the ones in 29 CFR Subtitle B, *Regulations Relating To Labor (Continued)*, Chapter XIV, *Equal Employment Opportunity Commission*, the 338 pages of which bring out total mowing contract total to more than one thousand pages, and 41 CFR Subtitle B, Chapter 60, *Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor*, which comes to 260 pages.

We now have a 1,500 plus page prospective contract to mow a lawn 18 times per year for five years, pages of definitions, rules, and procedures that no one is going to read (much less understand) unless there is a problem. And we have discussed only a couple of the socioeconomic clauses in the RFQ. The small commercial contractor that is likely to be awarded the contract probably does not know how to find most of the rules that it must follow. The Contracting Officer probably does not know either.

What are the chances that an EEO issue will arise under the prospective contract in question? Slim, at worst. So why is the EEO clause in the prospective contract? Presumably because it the contract is expected to exceed $10,000 dollars, a threshold set in 1965, the same year in which the Service Contract Act threshold was set at $2,500. See 41 USCA § 6702. Alternatively, the clause might be there because an automated contract writing system or a confused or lazy CO put it there improperly.

Keep in mind that we have considered only two FAR contract clauses, FAR 52.222-41 and FAR 52.222-26, and that we have not looked at any of the DFARS clauses. There are several other such clauses. We have only scratched the surface of the matter.

The United States is getting close to obligating one trillion dollars in appropriated funds for procurements in a single fiscal year, and it has long been considered a good investment to use those funds in ways that will mitigate various social and economic ills. The current (Spring 2024) issue of Public Contract Law Journal contains a lengthy "note" by Sehar Jamal, *The Power of Procurement: How the United States Should Leverage Its Buying Power To Uphold International Labor Standards and Clean Global Supply Chains*, 53 Pub. Cont. L.J. 665 (2014). The author argues:

> [T]he United States should better harness the market power of its procurement system to promote adherence to labor standards. To better prohibit labor law violations and sourcing from cheap labor, … the U.S.

> procurement system should add social considerations to responsibility determinations to eliminate noncompliant contractors, fully investigate and conduct audits of contractors involved in high-risk sectors rather than relying on contractor self-certification, and increase its use of suspension and debarment in response to violations to high-light the importance of ethical considerations.

Nowhere in the article did the author make any mention of the administrative effects and the costs of implementing such recommendations.

Can The Socioeconomic Burden Be Reduced?

To seasoned procurement persons the story we have told in this short piece is nothing new. Study groups and commissions have told it for many years, and yet nothing changes. In 1974, the Commission on Government Procurement recommended raising the small purchase threshold (now called simplified acquisition) threshold from $2,500 to $10,000 and making $10,000 the dollar threshold for application of all socioeconomic programs, including the Service Contract Act and the Davis-Bacon Act. They also recommended application of an escalator provision to keep pace with inflation. The Government Accountability Office (then known as the General Accounting Office) supported that recommendation, but the Department of Labor opposed it with regard to labor laws and the Office of Federal Procurement Policy decided not to pursue it. See GAO, *Should Small Purchases Be Exempt From Complying With Social and Economic Program Requirements?* PSAD-80-77 (Sept. 26, 1980), stating:

> According to procurement officials, inflation has rendered meaningless many present-day thresholds. Some social and economic programs were enacted during the Depression era and have never been updated.
>
> Also, extra paperwork and processing time are needed to implement some programs which involve Federal oversight agencies in addition to the procuring agency. In many cases, however, implementation results in added clauses to the contract which are not policed or enforced by any Government officials. Raising the thresholds would eliminate many clauses which clutter present-day purchase orders at low dollar amounts, easing the burden on agency procurement officials and contractors.
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> Further, many believe small business would benefit from a simplified contracting instrument. The officials we talked to would prefer to see the Government use contracting procedures similar to those used by commercial firms.
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> Virtually all procurement officials we spoke to at the field sites, who were actively involved in purchasing/contracting, would endorse any effort to make simplified small purchase procedures truly simplified. These officials strongly endorse the Commission's recommendation.
>
> Headquarters officials we spoke to also endorsed the Commission's recommendation. Department of Defense officials feel very strongly that inflation has "overrun the logic" of lower thresholds. In fact, given the inflation experienced over the last 4 or 5 years, Defense officials believe $10,000 may not be a high enough threshold. Department of Defense officials question whether any socially desirable objective is achievable on contracts below the $10,000 level.
>
> General Services Administration officials have no objections to raising the thresholds to $10,000 as recommended by the Commission on Government Procurement on such programs as the Buy American Act, Davis-Bacon Act, Miller Act, Service Contract Act, Rehabilitation Act, and others. Nor does the General Services Administration object to the use of small purchase procedures for transactions up to $25,000. However, regarding Public Law 95-507, which reserves all Federal contracts under $10,000 for small business, the General Services Administration does not feel that it could actively support raising set-aside thresholds above $10,000.
>
> Most officials we spoke to had concerns about social and economic programs above and beyond just the

threshold issue. The ability to accomplish their agencies' missions, the proliferation of new programs, and the cost of implementation were principal concerns.

* * *

DOL opposes raising the thresholds on any labor related programs. DOL officials stated that the Congress desires vigorous enforcement of all labor related laws, and the President does not currently favor any changes to these programs.

* * *

While we [the GAO] share the concerns expressed by DOL, on balance the value of vigorous enforcement on contracts below $10,000 or even some higher threshold can be seriously questioned.

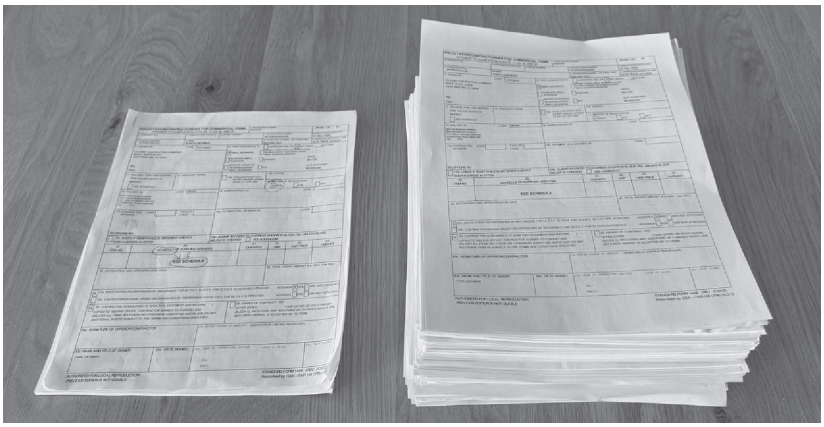
All to no avail. The Department of Labor proved to be a powerful opponent. Congress raised the small purchase threshold to $10,000, but not the threshold for application of the socio-economic programs.

Now that the simplified acquisition threshold is set at $250,000 and, in some cases, as much as $1.5 million, raising the threshold for application of the socioeconomic programs to the simplified acquisition threshold would be an even harder sell. See the definition of "simplified acquisition threshold" in FAR 2.101. But some kind of compromise might be struck if a persuasive case were made. Perhaps dollar threshold should not be the sole basis for application. Perhaps the scope of the procurement could be considered or commerciality. Could COs be trusted to consider other exemption factors without undermining such programs simply for their slight convenience? Are they professional enough to do it responsibly?

Conclusion

The ultimate purpose of the procurement system is to get the right goods and services to the right places at the right times at fair and reasonable prices. Our country is facing a near-term future of regional and international conflict, maybe war between major powers. The procurement system will play a vital role in ensuring our success. In the past, Congress has freed the procurement system from burdensome rules during times of conflict. But that will not be enough today, when we are already behind our potential adversaries in some ways and will not have the kind of time to mobilize that we have had in the past. The procurement system needs to be freed of unduly burdensome rules now. We must balance benefits and administrative costs. We must simplify our contracts and our processes. If only we had an effective procurement advocate, a person who could press the President and Congress for system streamlining and rules revision and relaxation, an experienced, respected Office of Federal Procurement Policy administrator, independent of the Office of Management and Budget and able to speak and act freely. It is long past time to get serious about this.

The grounds maintenance procurement we have discussed in this and the previous article, 38 NCRNL ¶ 44, is trivial, but it is an effective illustration of one serious defect in today's system of procurement policy and procedure—excessive complexity. That defect and other administrative issues, like the rules for competition and source selection, need prompt attention. A grounds maintenance contract may be trivial, but what is even more trivial is yet more analysis of bid protest case law. *VJE*



On the left, the 90-page Army lawn mowing RFQ as posted to sam.gov. On the right, the same RFQ with solicitation provisions, contract clauses, the 525-page Army regulation, and the CFR parts cited in clauses 52.222-26 and 52.222-41 printed out in full text. Approximately 1,500 pages.