

PROPOSED CHANGES TO PART 9 OF THE FED-
ERAL ACQUISITION REGULATION RELATING TO
CONTRACTOR RESPONSIBILITY

HEARING
BEFORE THE
COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

WASHINGTON, DC, OCTOBER 21, 1999

Serial No. 106-37

Printed for the use of the Committee on Small Business



U.S. GOVERNMENT PRINTING OFFICE

60-970

WASHINGTON : 1999

COMMITTEE ON SMALL BUSINESS

JAMES M. TALENT, Missouri, *Chairman*

LARRY COMBEST, Texas	NYDIA M. VELAZQUEZ, New York
JOEL HEFLEY, Colorado	JUANITA MILLENDER-McDONALD,
DONALD A. MANZULLO, Illinois	California
ROSCOE G. BARTLETT, Maryland	DANNY K. DAVIS, Illinois
FRANK A. LoBIONDO, New Jersey	CAROLYN MCCARTHY, New York
SUE W. KELLY, New York	BILL PASCARELL, New Jersey
STEVEN J. CHABOT, Ohio	RUBEN HINOJOSA, Texas
PHIL ENGLISH, Pennsylvania	DONNA M. CHRISTIAN-CHRISTENSEN,
DAVID M. McINTOSH, Indiana	Virgin Islands
RICK HILL, Montana	ROBERT A. BRADY, Pennsylvania
JOSEPH R. PITTS, Pennsylvania	TOM UDALL, New Mexico
JOHN E. SWEENEY, New York	DENNIS MOORE, Kansas
PATRICK J. TOOMEY, Pennsylvania	STEPHANIE TUBBS JONES, Ohio
JIM DEMINT, South Carolina	CHARLES A. GONZALEZ, Texas
EDWARD PEASE, Indiana	DAVID D. PHELPS, Illinois
JOHN THUNE, South Dakota	GRACE F. NAPOLITANO, California
MARY BONO, California	BRIAN BAIRD, Washington
	MARK UDALL, Colorado
	SHELLEY BERKLEY, Nevada

HARRY KATRICHIS, *Chief Counsel*

MICHAEL DAY, *Minority Staff Director*

CONTENTS

Hearing held on October 21, 1999	Page 1
--	-----------

WITNESSES

Davis, Hon. Thomas M., Virginia, United States Representative	4
Lee, Hon. Deidre, Administrator, Office of Federal Procurement Policy	7
Spector, Ms. Eleanor, Director, Defense Procurement, Department of Defense	9
Ballentine, Mr. James, Acting Associate Deputy Administrator, Small Business Administration	11
Schooner, Mr. Steven, Professor of Law, accompanied by Kovacic, William, Professor of Law, GWU Law School	32
Alford, Mr. Harry C., President, National Black Chamber of Commerce	36
Slater, Phyllis Hill, President, Hill Slater, Inc	38

APPENDIX

Opening statements:	
Talent, Hon. James	52
Velazquez, Hon. Nydia	56
Prepared statements:	
Davis, Thomas M	60
Lee, Deidre	66
Spector, Eleanor	73
Ballentine, James	79
Schooner, Steven	90
Alford, Harry C	123
Slater, Phyllis Hill	128
Additional material:	
Statement of Representative James P. Moran	133
Statement of The Associated General Contractors of America	136
Letter to Chairman Talent from R. Bruce Josten, Executive Vice President, U.S. Chamber of Commerce	149
Letter to Chairman Talent from William T. Archey, President and CEO, American Electronics Association	155
Statement of LPA, Inc	167
Letter to Chairman Talent from Stanley E. Kolbe, Jr., Director, Sheet Metal and Air Conditioning Contractors' National Association	177
Press Release of Mechanical-Electrical-Sheet Metal Alliance	179
Memorandum from Francis X. McArdle, Managing Director, The General Contractors Association of New York, Inc	182
Letter to Chairman Talent from Lawrence F. Skibbie, President, National Defense Industrial Association	183
Statement of Gary D. Engebretson, President, Contract Services Association of America	187
Letter to Ms. Laurie Duarte, FAR Secretariat, from Chairman Talent and Ranking Member Velazquez	197
Post-hearing questions submitted to Honorable Deidre Lee	201
Honorable Deidre Lee's response to post-hearing questions	203
Post-hearing questions submitted to Mr. James Ballentine	239
Mr. James Ballentine's response to post-hearing questions	241

THE PROPOSED CHANGES TO PART 9 OF THE FEDERAL ACQUISITION REGULATION RE- LATING TO CONTRACTOR RESPONSIBILITY

THURSDAY, OCTOBER 21, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 11:00 a.m., in Room 2360, Rayburn House Office Building, Hon. James M. Talent [chairman of the Committee] presiding.

Chairman TALENT. The hearing will come to order, please.

I want to welcome everybody. Our hearing today is about a proposed rule change in the Federal Acquisition Regulations and how that proposed change will hurt the small businesses that contract with the government to provide a wide variety of goods and services.

On July 9, 1999, the agencies with primary responsibility for developing federal procurement regulations issued a proposed rule that is purportedly designed to clarify the existing standards by which contracting officers make responsibility determinations prior to the award of a contract.

In particular, the proposed rule would require that contracting officers find that a prospective bidder is not responsible if the contracting officer has persuasive evidence of lack of compliance with tax laws or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws or consumer protection laws. Those are only examples.

In fact, the contracting officer could find a lack of responsibility for violations of any of the regulations in the single-spaced 17 linear feet of the Code of Federal Regulations. Contracting officers' efforts to clarify the responsibility standard permits the contracting officers to find a business non-responsible based on persuasive evidence—a standard of evidence which does not currently exist in civil, criminal, or administrative law.

What the federal agencies view as a clarification, small businesses view as a trap preventing them from being awarded federal government contracts. As Congress recognized when it enacted SBREFA, the Small Business Regulatory Enforcement Fairness Act, it is especially difficult for small businesses to stay abreast of the changes made in the Code of Federal Regulations, much less be experts at complying with all of those rules.

Thus, a series of technical violations, such as not having material safety data sheets, could result in a finding of non-responsibility.

And if one contracting officer finds that the small business lacks appropriate business ethics and integrity, another contracting officer considering the same violations for a different contract would be hard put to reach the opposite conclusion.

The end result is that a small business could be prevented from contracting with the government for what is the regulatory equivalent of a combination of parking and moving violations.

What I find even more distressing is the contracting agencies' lack of concern for the potential adverse consequences to small businesses. The agencies determined that the proposed rule is "not expected to have a significant economic impact on a substantial number of small entities." Well, if you are a government contractor, I can think of no more severe penalty than being prohibited, without appropriate due process procedures and by the ad hoc actions of contracting officers, from doing business with the government.

And little doubt exists that small businesses represent a significant portion of the federal contracting community. In fiscal year 1998, small businesses were awarded nearly three-quarters of all Federal Government procurements with a total value of more than \$33 billion. Potentially adverse significant consequences of the proposed rule have been recognized by numerous small business organizations, including—and I have about 20 listed here. I am not going to read them all—in fact, more than 20—30 or 40. I will put them in the record.

In addition, nearly 600 small business owners have already taken the time to file comments with the Federal Acquisition Regulation Secretariat opposing the proposed rule. A cursory review of a sample shows that these are not simply one-line statements but relatively detailed comments noting the potential consequences that the proposed rule, if implemented, would have on their businesses. I suspect many more small businesses will file comments by the November 8 deadline for filing comments.

Today's hearing will investigate the legal and policy implications of the proposed rule. I expect to examine such issues as how the federal agencies plan to implement the rule and its impact on government procurement efficiency, while maintaining the mandate to increase opportunities at both the contractor and subcontractor level for small businesses.

I am also interested in finding out how the federal agencies plan to implement the proposed rule at the contracting officer level and whether the safety valve of the SBA's Certificate of Competency Program will function in this new responsibility environment.

Let me conclude by saying that I am not opposed—in fact, I support—a Federal Government policy refusing to do business with businesses, big or small, that have been convicted of crimes or have had major civil penalties imposed upon them, or for some other reason that they can understand and attempt to comply with, would render them ineligible to do business with the government.

This rule goes far beyond that point to corral many small businesses within its ambit. These consequences give me great pause. I look forward to a lively and informative discourse on the issues which will begin, I am certain, with the opening statement of our ranking member, who I am pleased to recognize now.

[Mr. Talent's statement may be found in the appendix.]

Ms. VELAZQUEZ. Thank you, Mr. Chairman, and welcome everyone.

I am gratified that we have come together today in this responsible and timely fashion to consider the important issue of Federal Acquisition Regulation and contractor responsibility. Federal contracting and small businesses is one of the most important priorities or topics covered by our Committee. Today, we are here to explore an issue that most of us agree is a matter of common sense.

There is nothing controversial in saying that contractors should abide by environmental and labor laws. We can all agree that contractors should pay their taxes. And there shouldn't be anyone in this room who is uncomfortable with using contractor responsibility to promote acceptable behavior.

For the better part of this century—since the 1920s—the government has been concerned with the corporate responsibility of federal contractors. Since World War II, the government has instituted a formalized process to tie contract procurement with federal responsibility.

And even putting aside the fact that these are questions of regulation and law, nobody—not in the business community and not in government—wants one contractor to be able to circumvent these regulations and create an unlevel playing field. Companies should not have to deal with a competitor that employs unscrupulous methods so that it can undercut others' bids, and government should do what it takes to make sure that doesn't happen.

So let me say one thing at the outset. I do not consider it our job today to debate the importance of contractor responsibility, or whether or not there should be contractor responsibility. Our job today is to determine the best way to ensure contractor responsibility, because even the best idea, improperly implemented, can have unfortunate, unintended consequences.

These regulations need to be structured in an intelligent and effective way. Determining a company's integrity and ethics will always, unavoidably, be at least in part subjective. If we are going to expand the definition of this criteria, we must provide a mechanism for responsibly putting it into practice.

In our efforts to promote responsibility, we must not inadvertently deny small businesses the right to due process or permanently restrict small businesses from competing for government contracts following one or two minor accidental violations. And critically, we must ensure that our efforts to make the process more clear do not inadvertently add confusion and mixed messages where none existed before.

Making sure government contractors are good corporate citizens is little more and little less than common sense. The question we face now is how we make sure we implement this goal with a little common sense.

I am optimistic that we can. I commend the Chairman for holding this hearing today, still weeks before the end of the comment period. He is dealing with this in a responsible manner, and I am committed to doing the same.

Thank you, Mr. Chairman.

[Ms. Velazquez's statement may be found in the appendix.]

Chairman TALENT. All right. We will go right to our first witness and our first panel.

The first witness on that panel is our colleague, the Honorable Thomas Davis from Virginia, who has done a lot of yeoman's work on this, along with Mr. Moran, who couldn't be here.

And thank you for waiting, Tom. Please go ahead.

**STATEMENT OF HON. THOMAS M. DAVIS, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF VIRGINIA**

Mr. DAVIS. Thank you very much, and I know my colleague Mr. Moran has put a statement in the record. And I would ask that my entire statement be in the record, including a statement from a small contractor in my district that we want placed in the record as well.

Let me just say it is a pleasure to appear here with Dee Lee, who I have a very, very high regard for. We have worked together on a lot of issues. Eleanor Spector and I have shared podiums on procurement law through the years and is an expert. And my friend formerly from Mr. Wynn's office, who is part of their flag football team—which I think was undefeated up here on Capitol Hill and he still comes in. [Laughter.]

But they are excellent people, and I think as we get through this today we want to try to get to the nub of what the issues are and our concerns.

I spent 20 years doing procurement law before I came to the Congress. I was general counsel at a company—and special counsel at a company called PRC, which is a billion dollar a year government contractor out in McLean, Virginia. And before that I was with a startup called Advanced Technology and was general counsel and took it public.

Chairman TALENT. We have to get you on the Small Business Committee. [Laughter.]

You think I am kidding. [Laughter.]

Mr. DAVIS. If they will let me keep Commerce. Okay? [Laughter.]

And let me just say, working with this administration, and Dee Lee in particular and Steve Kelman before her, we have made really tremendous progress in procurement. I don't want to lose sight of that. We passed FASA, FARA, the Clinger-Cohen Act.

We developed the GSA multiple award schedules, giving federal agencies greater flexibility to get the products and services they need. And I think the overall record has been an A out of this administration on procurement, and I would be less than remiss if I didn't say that.

We do disagree on the nature of the proposed regulations and how we see it, but it is only a proposed regulation. And we proceed to move forward, I just want to express my concerns on the record.

The regulation issued on July 9th I think takes us backward. I think, first of all, we should do no harm. We have a system now that is not broken. It debars bad actors. Additionally, we will punish people twice if we take away government contracts for alleged environmental labor, consumer-related tax, and antitrust violations—there are cases of double jeopardy—and particularly if these violations have nothing to do with their ability to deliver the best value to the government at the lowest cost.

And that is really what ought to be driving government contracting is getting the best value for our taxpayer, not some incidental issues. And what bothers me the most I think about the proposed regulation goes to the language where it says normally the contracting officer should base adverse responsibility determinations involving violations of law or regulation upon a final adjudication by a competent authority concerning an underlying charge.

And here is the concern. It says, "However, in some circumstances, it may be appropriate for the contracting officer to base an adverse responsibility determination upon persuasive evidence of substantial noncompliance with a law or regulation." In other words, no final determinations, no adjudications, a subjective judgment of the contracting officer. And this can really make for mischief because this is not a predictable path, I think, for contractors to follow.

I agree with Ms. Velazquez in her opening comment that bad actors ought to be put out of it. We have ways to do that now. If this is the goal of this, I think we can work together to do this. But if you are not asking for final determinations from the contracting officer, if you can allow the contracting officer a lot of steeped-up complaints, I think it empowers outside groups to come in, put headlines in newspapers, make all kinds of allegations that would never win an adjudication, but to create that aura that would then empower, or in some cases frees a contracting officer to giving that contract to the contractor who is basically the best qualified to do that. And that is our concern in this.

Remember, contracting officers—this just gives them one more check they have to deal with. In some cases, this can delay the contracting process as they look through allegations to see if they are good allegations or not because it allows them to go beyond determinations by an adjudicating authority. And that is the concern in this case.

Contracting officers, in my judgment, would be unable to award contracts because they can get blitzed with complaints. This is an invitation for other companies to blitz these contracting officers with complaints, and companies can become the victims of baseless accusations. It could particularly harm small businesses that may not be able to defend themselves against these accusations.

It is already happening. Businesses are afraid to publicly comment for fear of retaliation by interest groups. A small business owner in my district was afraid to testify today for fear of retaliation. We have his statement in the record. He feels it may jeopardize his \$3.5 million a year business, which employs eight people. And his comments, as I said before, are in the record.

If we have to delineate these new criteria, let us not go beyond the goal of ensuring good labor practices. We are giving them, otherwise, the ability to force companies and to employ and unionize with allegations, and then going to contracting officers without any kind of final determinations. That is the concern.

If these regulations were applied to the Federal Government, it would preclude them from continuing to carry out their functions. But yet it proposes to apply them to business. But the Federal Government itself is remiss with all kinds of complaints and adjudica-

tions against it, and yet for a small business here, even without a final adjudication, they are held at risk here.

For example, in 1997, according to the Federal Labor Relations Authority, the Federal Government has 5,323 unfair labor practices charges filed against it. The Federal Government reached a collective bargaining impasse 148 times in 1997. For fiscal year 1998, the Occupational Safety and Health Administration issued the Federal Government 1,153 citations. The EPA took 365 enforcement actions against federal facilities in 1996, and fully one-quarter of all federal facilities are not in compliance with the Clean Water and Clean Air Acts.

Lastly, the government has 36,333 unresolved bias cases being investigated by the Equal Employment Opportunity Commission. So the Federal Government is a bad actor in this. They are not applying the criteria here. In many cases, these haven't been adjudicated and they may be groundless.

The Federal Government procures \$28 billion in information technology products a year. The government is the largest purchaser of IT products in the world, and our rapidly-growing economy I think could be harmed if these regulations go too far.

I would like to point out the effectiveness of the contracting process as it currently operates. The administration claims that the proposed regulations clarify the intent of the current law. They claim, therefore, there is no need to be concerned about the new regulations. As an example, they describe a firm—Standard Tank Cleaning Corporation—that was denied a federal contract to clean up an environmentally contaminated site.

The firm was denied the contract because they had past environmental violations. I would counter the administration's argument by noting that we don't have to complicate a process because it worked in this case, without these regulations, by adding—and we don't need to add layers of ambiguous regulations.

I think all of us agree that the instance described above is when a company should be prohibited from performing a government contract; and, indeed, the current regulations worked in that case. If there is a nexus between the violation and the job the company would like to perform, that is entirely appropriate and they ought to be found not to be capable of doing the job.

Unfortunately, these proposed regulations do not use that standard, and it takes to a new threshold of proof that encourages companies, interest groups, and disgruntled employees to use accusations to hurt responsible companies and hurt the day-to-day operation of our nation's procurement system.

Let me just go, finally, and note the current standards for deeming a contractor irresponsible are as follows: adequate financial resources, the ability to meet the required performance schedule, a satisfactory record of performance on other contracts, a satisfactory record of integrity and business ethics, the necessary organization experience, accounting, and operational controls, and the necessary production, construction, and technical equipment and facilities.

These criteria are broadly written to give a contracting officer the flexibility he or she needs to prevent bad actors from contracting with the government. These new regulations, I believe, could en-

sure that the Federal Government and our procurement of goods and services is set back decades.

The proposed regulations ignore all of the streamlining initiatives that this administration has worked so hard to achieve in the past, and I am hopeful that the concerns that I express today will be incorporated in any kind of final regulations. And I appreciate the opportunity to be here today.

[Mr. Davis' statement may be found in the appendix]

Chairman TALENT. Thank you. And I know your schedule is tight. If you can't stick around through the rest of the panel, Tom, we understand.

Next witness is the Honorable Dee Lee, who is the Administrator for the Office of Federal Procurement Policy of the Office of Management and Budget.

We are honored to have you here, Ms. Lee.

STATEMENT OF HON. DEIDRE LEE, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Ms. LEE. Thank you very much.

Good morning, Mr. Chairman, and members of the Committee. I have been invited to appear before you today to discuss the administration's proposal to amend the Federal Acquisition Regulation, the FAR, in three areas—one, contractor responsibility, which is Part 9; and two changes in Part 31, which are regarding reimbursement of certain costs relating to contractor legal proceedings and costs regarding unionization activities.

A proposed rule was published in the Federal Register on July 9th of this year, and the extended comment period—about 120 days—closes on November 8th, in approximately two weeks. We will review all comments that we receive during this period, and we will keep you informed of the next steps following the comment period.

This morning, I would like to briefly discuss the proposed rule. The fundamental purpose of this rule is to protect the taxpayer. Like any private citizen doing business in the commercial marketplace, we want to be assured that the government is doing business with individuals and entities who can be relied upon.

More specifically, we hope to protect the public's interest by having greater assurance that the firms we deal with are responsible citizens—firms that have a record of compliance with law and not a record of repeated serious legal violations. The overarching theme behind the proposed rule is the concept that the Federal Government ought to do business with good citizens who comply with the law.

Currently, FAR 9.104, subparagraph D, concerning general standards of contractor qualifications, states, that to be considered a responsible contractor, a contractor must "have a satisfactory record of integrity and business ethics." This proposed rule would clarify the existing FAR rule by adding examples of what would constitute an unsatisfactory record of integrity and business ethics for the purposes of implementing this long-standing general standard.

We are not proposing to create any lists of unacceptable business firms. We are not proposing to change any debarment or suspension rule currently contained in the FAR. And we are not proposing to change any procedural due process rights that a prospective contractor currently enjoys with respect to the FAR responsibility criteria.

And most importantly, we are not proposing to punish anyone by denying them federal contracts. What we hope to do is protect the public's interest by having a greater assurance that the firms we deal with are responsible citizens.

In addition to the clarifications in the FAR's responsible contractor criteria, we are also proposing two changes to the contract cost principles that are contained in FAR Part 31. The first change would end reimbursement of contract costs incurred for activities designated to influence employees with respect to unionization, either for or against. This is not a new idea; for many years, a large number of federal programs, for example, Medicare and Medicaid, have made these types of costs unallowable as a matter of public policy.

Moreover, this change is in furtherance of the government's long-standing policy to remain neutral with respect to the employer-employee labor disputes. And, of course, there is a great deal of information in Part 22 of the FAR that talks about employee and employer relationships.

Finally, we are proposing a technical change to one of the FAR cost principles to close what we believe to be an existing loophole. At present, the government does not reimburse contractors for their legal expenses where, for example, in a criminal proceeding, there is a conviction, or where in a civil proceeding there is a monetary penalty imposed.

However, there are a number of civil proceedings initiated by the Federal Government that do not result in the imposition of a monetary penalty, but that do involve a finding or adjudication of a violation. And we think that this would be appropriate, to make this change that reimbursement of the contractor's costs would depend on whether or not a violation was found, rather than the remedy imposed.

Additionally, my written statement addresses the four questions posed in your invitation letter. In the interest of time, I will not read those responses here. But I understand they will become part of the record.

Mr. Chairman, and members of the Committee, I would like to reiterate that we want all companies, large and small, to have the opportunity to do business with the government for the taxpayer. And we want that system to be as efficient and effective as possible, supported by the underpinnings of our national social and economic goals.

The overarching theme of this proposed rule, doing business with companies that comply with the laws, is a sound one. We will shortly be receiving the public comments on this rule, and I assure you that we will be very—that they will be very carefully reviewed and discussed.

I am confident there will be ideas on how to improve the proposal, such as the ones brought forth by the Congressman, and I

will commit to you now that I will work with this Committee and others to ensure that the ideas and issues are considered. Working together, we can ensure we are judicious in exercising sound business principles in our acquisition system.

Thank you. I am available to respond to any questions you may have.

[Ms. Lee's statement may be found in the appendix.]

Chairman TALENT. Thank you very much, Ms. Lee.

Our next witness is Ms. Eleanor Spector, the Director of Defense Procurement of the Department of Defense.

**STATEMENT OF ELEANOR SPECTOR, DIRECTOR, DEFENSE
PROCUREMENT, DEPARTMENT OF DEFENSE**

Ms. SPECTOR. Good morning, and thank you for the opportunity to appear before you as the Department of Defense representative to discuss proposed changes to the FAR concerning contractor responsibility.

Since the proposed rule is out for public comment, nothing has yet been put in regulation that would change the way that we do business. As has been mentioned, the comment period closes on November 8th, and as a result of the comments we certainly may make changes to the rule before it goes final.

I will try to address the questions you asked me. Your first question concerned how we determine contractor responsibility now, and if the methodology varies for contracts of different size. In fiscal year 1998, we conducted 6.6 million contract actions with a value of about \$129 billion in DOD. Of these, about 277,000 actions worth \$118 billion were contract actions in excess of \$25,000.

We did an additional 7.5 million purchase card actions—normally, those are under \$2,500—with a total value of \$3.4 billion. As you can see, we conduct a very large number of purchases of greatly different amounts with the vast majority being of relatively low dollar value.

The rules on how to determine contractor responsibility are in Part 9.1 of the FAR. They provide general standards that have to be met, which include adequate financial resources, ability to comply with the delivery schedule, satisfactory record of performance, satisfactory record of business ethics, and the organization, accounting skill, technical ability, and facilities to perform satisfactorily.

For purchases under \$100,000, unless the contracting officer is aware of a specific problem, the primary method to determine contractor responsibility is to check the list of parties excluded from federal procurement and non-procurement programs that is maintained by GSA and is available online. That contains information on firms and individuals that have been suspended, debarred, or otherwise excluded from doing business with the government.

This suspension or debarment would generally be due to an indictment, conviction, or violation of a statutory prohibition, generally related to fraud, although some firms are listed due to repeated poor performance.

Placement on the list is an automatic bar to receiving any contract award for the time that the firm or individual is on it. For larger purchases, there are many resources available to help deter-

mine the responsibility in addition to the suspension and debarment list.

There are the contracting officer's own history files that may contain information on past performance. The Defense Logistics Agency maintains information on how companies have performed for DOD in the past. Another source of information is Dun & Bradstreet that provides detailed financial performance and other information on individual firms.

The most detailed DOD resource is the preaward survey that is conducted by the Defense Contract Management Command. In '98, there were about 2,000 preaward surveys performed. These are generally extremely detailed reviews of a company's ability to perform a proposed contract, and they provide the contracting officer the best and most up-to-date information. They normally cover financial, technical production, quality assurance capabilities, accounting systems, property control systems, safety records, and compliance with other special interest items.

Due to the expense and time required to perform these surveys, they are predominantly used when there is a real question of whether the selected contractor can perform the contract. Because these surveys are likely to remain valid for some time, we use preaward survey monitors who maintain files on contractors, and we consult those preaward survey monitors more often than we do a full-up survey. There were approximately 2,000 calls in '98.

As you can see, the most detailed checks take place on a tiny fraction of the awards that we make. This is due to the sheer volume and that a number of our contracts are awarded to contractors with whom we are familiar and don't need to do these repeated surveys.

Also, we award a number of ordering contracts where we place orders on another agency's contract, and that agency makes the determination of responsibility.

If we know something negative about a firm, or if someone brings a contractor's responsibility into question, we certainly investigate the accusations thoroughly. The short answer to your question is there are various levels of responsibility reviews. Contract size is one consideration, though not the only one.

You asked how the proposed rule would affect the award of DOD contracts and whether contracting officers could make these necessary determinations. Let me explain what I would propose as a way of implementing this.

While contracting officers would remain the primary determiners of responsibility, if this rule is implemented as a final rule, they will need a substantial amount of assistance from the organizations with responsibility for the specific areas that we are adding. Without such support, we will not have readily available means of determining if a contractor is in substantial compliance with labor, employment, tax, environmental, antitrust, or consumer protection laws.

By this, I mean we would need a single point of contact at each of the agencies that has cognizance for compliance with the particular laws. Additional training for contracting officers might also be helpful, but I believe that training would probably require some

experience with a new regulation and might not be available when we first have to implement this.

Your second question asks the effects on the award of DOD contracts. There might be delays, depending upon the complexity of the reviews required. Also, there might be litigation in high-profile cases, if we determine contractors to be non-responsible based on evidence of noncompliance with the laws that I have mentioned. It may also be that these problems will occur seldom enough that there may not be disruption.

Your third question asks whether our contracting officers can determine whether prospective awardees are in compliance. And, again, I think we would need the help of other agencies to do that. You asked what education and training makes contracting officers capable of making such decisions. I will work to see that we get them educated properly, so that we can exercise this responsibility properly.

Your final question is how we expect contracting officers to handle the added responsibility, and, again, we would see that they have the resources they need if this becomes a final rule. And we certainly intend to review any and all comments before we implement any final rule.

I will be pleased to answer any other questions. Thank you.

[Ms. Spector's statement may be found in the appendix.]

Chairman TALENT. Thank you very much.

Our next witness is Mr. James Ballentine, the Acting Associate Deputy Administrator for Government Contracting and Minority Enterprise Development of the Small Business Administration.

Mr. Ballentine, it is a pleasure to have you here.

STATEMENT OF JAMES BALLENTINE, ACTING ASSOCIATE DEPUTY ADMINISTRATOR FOR GOVERNMENT CONTRACTING AND MINORITY ENTERPRISE DEVELOPMENT, U.S. SMALL BUSINESS ADMINISTRATION

Mr. BALLENTINE. Thank you.

Good morning, Mr. Chairman, and members of the Committee. As the Chairman mentioned, my name is James Ballentine, Acting Associate Deputy Administrator for the Office of Government Contracting and Minority Enterprise Development. I am appearing on behalf of SBA Administrator Aida Alvarez, whose schedule does not permit her to be with us today.

It is my pleasure to testify before you today on the SBA's Certificate of Competency (COC) Program as it relates to the proposed changes to Subpart 9.1 of the Federal Acquisition Regulation affecting contractor responsibility. We understand the Committee's interest in this proposed regulation and its potential effect on America's small businesses.

The purpose of the COC program is to ensure that small businesses, especially new firms in the federal marketplace, receive a fair share of government contracts. The COC program, authorized under Section 8(b)(7) of the Small Business Act, affords a small business the right to appeal a contracting officer's responsibility determination.

Where SBA issues a COC, the Small Business Act directs the contracting officers to accept the certification as conclusive and pre-

cludes the contracting officer from requiring the firm to meet any other requirements of responsibility.

In the beginning, the COC program was limited to areas of responsibility dealing with capacity and credit. In 1977, Congress significantly enhanced the COC program, authorizing SBA to issue COCs with respect to all elements of responsibility, including perseverance, integrity, and tenacity. Tenacity and perseverance are those qualities of persistence and steadfast pursuit of an undertaking with the aim to do an acceptable job.

In 1984, Congress further refined the program by requiring SBA to accept COC referrals regardless of the dollar value. Previously, there were no COC referrals for procurements below \$10,000.

Mr. Chairman, in your letter of invitation, you asked several questions. Your first question pertained to how SBA's current COC program works, and to what extent does the program cover general compliance. Upon determining that the apparently successful small business offer is non-responsible for a proposed contract, the contracting officer is required to refer that firm to SBA for a COC determination.

Once SBA receives an acceptable COC referral, SBA contacts the small business, apprises the firm of the reasons surrounding the referral, and offers the firm an opportunity to apply for a COC. SBA gives the small business six working days to submit its COC application and notifies the contracting officer of the date for the COC decision.

The COC application consists of, among other things, written documentation and information to support the firm's ability to perform the proposed contract. The COC specialist reviews the information provided by the contracting officer and the small business. Also, a financial specialist reviews the financial information to determine the applicant's financial capability.

The COC committee, chaired by the COC program supervisor, consists of a COC specialist, a financial specialist, and an attorney. They review the findings and they make recommendations to either issue or deny a COC. An attorney attests to the legal sufficiency of the committee's findings and the supporting information.

The SBA area director for government contracting makes the actual decision to issue or deny a COC based on COC committee's recommendations. Upon receipt of the SBA area office's decision to issue a COC, the contracting officer can, among other things, appeal within 10 working days the decision to SBA headquarters offices of government contracting. On appeal, SBA headquarters can confirm or overturn an area director's decision to issue a COC.

You also asked whether or not the program covers compliance with legal requirements outside the procurement process. SBA has processed some COC referrals where violations of labor laws and tax laws are alleged, such as violations pertaining to prevailing wage rates under the Davis—Bacon Act. In these cases, SBA reviews the totality of circumstances, court-imposed fines, or sentences, weighs the severity of violations, and makes the decision.

SBA also handles COC referrals based on non-responsibility determinations where a small business is unable to meet regulatory requirements imposed on them by other agencies.

SBA tracks the COC process very closely. We track the COC issuance, contract award, and contractor's performance. More than 95 percent of small businesses that receive a COC have successful contract performance with delivery of goods and services on time.

In the second question you asked whether the appeal process under the COC program delays the award of contracts. SBA is required to process a COC referral within 15 working days. Typically, SBA meets this requirement unless there is an appeal of the SBA area director's decision to issue a COC to headquarters.

We believe the COC appeals process is necessary to ensure a level playing field for small businesses in federal procurement.

You asked two or three other questions, which in lieu of time I will surpass. And actually I will submit my written statement for the record, so that we may get to the questions.

Thank you.

[Mr. Ballentine's statement may be found in the appendix.]

Mrs. KELLY [presiding]. Thank you very much, Mr. Ballentine.

As you all have heard, we have been called for a vote. I think we are going to take a short 15-minute break until we can go and vote, and then come back to begin the questioning.

Thank you for your indulgence.

[Recess.]

Chairman TALENT [presiding]. Let me reconvene the hearing. We have another panel, so I am going to go ahead and open it up with my questions. And as members file in, I will recognize them.

Ms. Lee, let me get your opinion of what is now happening, and, Ms. Spector, you may want to—in fact, Mr. Ballentine, you may want to chime in, too. Now, what I am told is that the way the law is now interpreted, a bidder would get excluded for being non-responsible if they have a record of violations or false statements or dishonesty going to the bidding process.

So, in other words, if the government can't trust the statements that they are making in the context of a bid, violations going to honesty that affects your ability to judge the rest of their qualifications, or if they have violations that indicate they are not capable of doing the contract that they are bidding on.

So if they have a history of environmental violations, and they are bidding to do environmental cleanup, that is obviously relevant to that. And those are the two bases on which contractors are declared non-responsible for the purposes of the requirement that they have a satisfactory record of integrity and business ethics. Is that a fair summary of what you now do?

Ms. SPECTOR. Essentially, that is correct. The kinds of things that we look at, related to integrity, right now would be things like commission of a fraud or a criminal offense, related generally to performing or attempting to obtain a contract.

While we look at other compliance's, generally that is what we consider when we say someone is not responsible.

Chairman TALENT. And that makes sense because if they are not—if they have committed violations that undermine the integrity of the bidding process itself, you can't trust anything else they are doing. That certainly would make sense.

Now, is it your interpretation of what you are doing here that you intend to reach out—and maybe I will direct this to Ms. Lee,

and the others may want to comment—you intend to reach out so that procurement officers would have the discretion and I guess the responsibility to declare somebody non-responsible for legal violations that—let us start with legal violations for a second and not get to things that fall short of that. But legal violations that either don't—that don't go to the honesty of that person as a bidder, and also are not related to that particular contract.

So, for example, they were found by the IRS to have not paid their taxes. It was not a criminal violation, let us say, but it is a serious civil violation. They paid the interest. They paid the penalties. Now they are bidding to do shipbuilding for the Navy, or whatever. Is it your intention with this that the contracting officer would look at that history of tax violations and consider whether to declare them non-responsible?

Ms. LEE. Mr. Talent, one of the thrusts behind this is that each contract needs to be looked at individually. And one of the most important things I think of acquisition reform, as Congressman Davis mentioned, is one of the things that we've emphasized to our contracting officers is talk to each other. Don't have this mysterious passing papers back and forth.

So what we are asking the contracting officers to do—and by the way, it is usually a team, their legal team, their technical team. Generally, unless it is very small, it is not an individual. But the team needs to look at that individual circumstance. They need to see what do we have here. They should ask the contractor what is going on here, get the relevant information from others on their team, and discuss it and make a decision that is relevant to that particular issue.

Chairman TALENT. Okay. But what—in your mind, as your agency has issued this, in your mind what is it they are asking questions to determine? Are they asking questions to determine, yes, we did have this IRS problem, we did owe the back taxes? Are they asking questions to determine, look, did you intentionally not do something? Are they asking questions, how big it was, how many times it occurred? And this is the uncertainty that is out there in the small business community that is the problem.

You seem to think—well, go ahead and answer that. What is the purpose of the questions? What are they trying to find out?

Ms. LEE. Well, they would want to find out what the issue was, and, just as you mentioned, the severity, the repetitiveness, and the corrective action. Has it been remedied, and is that remedy—what we are trying to do is protect the taxpayer.

Chairman TALENT. Okay. From what?

Ms. LEE. So if it has been remedied, you need to consider that and say, "Okay, what do I do with this information?"

Chairman TALENT. From somebody who seems to be a recalcitrant repeated violator of federal law—so are you trying to get at people who intentionally violate federal laws?

Ms. LEE. Yes.

Chairman TALENT. Okay. What about people—

Ms. LEE. Pattern, substantial, repetitive, yes.

Chairman TALENT. Intentional violation of any federal laws. Okay. So the question, if it was a tax case, would go to whether they knew they were violating the—law or knew what they were

doing—that they intended to do what they did, or they intended to violate the law.

I am trying to make this difficult for you. I am trying to go through if I was a counsel advising a potential contractor, and they had had some tax problems, I would want to give them advice about how much this might put them in jeopardy in terms of the contracting process.

So are you trying to get at people who take an action knowing it is in violation of federal law?

Ms. LEE. Yes. As well as those who have repeated violations, and then we would ask, “What have you done to remedy that?” If no remedy has been taken, then we need to say, “Okay. What is the risk involved behind this?” If a remedy has been taken, then we need to look at it and say, “Okay. Now where are we, given the facts and circumstances?”

Chairman TALENT. Okay. Now here would be my problem with that. The Federal Government, of course, and state governments as well, regulate the activities of business people and small business people pretty extensively. Now, we all have a sense that some of those regulations are designed to prevent things which all of us would say, even apart from the regulations, you ought not to do. I mean, there is a class of things:

You know, you ought not to fire people because of their race. You ought not to have unguarded buzz saws in your workplace. Even if there wasn’t an OSHA, you ought not to have that. And there is a class of things that go to things that even apart from the regulations you ought not to do.

Then, there is a class of things which are pretty technical in nature. That doesn’t mean that they are not important. But the reasonable person, absent the regulation, might not do them, such as the material safety data sheets, the cash versus accrual method in the IRS. Don’t you think—it is unfair, isn’t it, to say to somebody because they have committed a series of technical violations like that, therefore, you can’t bid on a federal contract?

Ms. LEE. Just patently saying, “Therefore, you can’t bid,” I do think would—is not the objective or the end result we are trying to achieve. What we are trying to do is get enough information and really look at it and say, “What does it tell us? How does it relate to this issue?” And that is the goal. Do we or do we not have a problem or an issue here? Whether that even ends up in a non-responsibility determination, it could just end up being—we have got some concerns here. We would like to see you correct them. It is a learning experience for all of us.

Chairman TALENT. Because sometimes people will settle with the IRS or OSHA or something when they really haven’t—

Ms. LEE. Right.

Chairman TALENT [continuing]. In their own mind done anything wrong, because it is cheaper than fighting it. And you would admit, wouldn’t you, that it would be wrong to say to somebody, “You are non-responsible,” in that kind of an instance, right?

Ms. LEE. I think we would have to look at those circumstances. If there are—

Chairman TALENT. Well, now wait a minute. Can’t you just tell me it would be wrong to say somebody is non-responsible?

Ms. LEE. On a one-time issue, yes.

Chairman TALENT. Yet I will just get at another point, and this comes before the Committee a lot. You have got to put yourself in the position not of the enforcer of the law, which you are now—and you are a fair person, and I think most people who work for you are fair people, and most procurement officers are fair people.

But put yourself in the position of the person who has an awful lot riding on being in compliance with the law. And really, what you have told me is you can't tell me what the law is. You told me that it is going to be up to each set of contracting officers.

And, yes, they are going to be trained, Ms. Spector, and, yes, they will have Mr. Valentine to advise them and everything. But, I mean, these are—if you do a lot of business with the government, and you depend on that, and you have all of these regulations out there you have got to comply with. You don't want to be in a situation where, oh, my gosh, I settled that tax case, and now this contracting officer thinks I am non-responsible.

Do you see what I am saying? It is an arbitrariness that introduces into the law that is alien to our jurisprudence, to sound like a lawyer or that guy from Green Acres, Oliver Wendell, what is his name? [Laughter.]

But, I mean, you have got to look at it from the business owner perspective—that is why you are getting all of these comments from people.

Ms. LEE. Right.

Chairman TALENT. You understand that.

Ms. LEE. Right.

Chairman TALENT. A couple of other points I have got to get in before I let the Committee ask you questions. One of them is, let me read the relevant sentence. And it is really a sentence, so members who haven't read it may want to. It says, "Examples of an unsatisfactory record may include persuasive evidence of the prospective contractor's lack of compliance with tax laws or substantial noncompliance with labor laws, employment laws, environmental laws."

Here is why people are concerned. All right? What is—

Ms. LEE. Mr. Chairman, where are you reading from, so I can follow along.

Chairman TALENT. I am sorry. From Part 9, 9.104–1(d). It is from the Federal Register notice. This is the relevant provision. "Examples of an unsatisfactory record may include persuasive evidence of the prospective contractor's lack of compliance with tax law or substantial noncompliance with labor laws."

Now, first of all, what is persuasive evidence? That is not, as I said in my opening statement, that is not a term of art in the law. It is not like substantial evidence. What would persuasive evidence be?

Ms. LEE. Well, what we were aiming at was, as we have mentioned, was of patterned, substantial, substantive evidence there. We are looking for comments. Our language is not perfect, and I know there have been some people that have actually suggested some improvements in that language. And I think we will get those from the comments, and we will be working to improve that.

But the thrust behind it, again, is that—to use Congressman Davis' term—if you have a bad actor, you need to be aware of it and take the appropriate action.

Chairman TALENT. Okay. Well, then, it seems to be two different standards here. One of them, it is enough if there is a lack of compliance with tax laws, but there must be substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection. Is that intended to be two different standards?

Ms. LEE. I don't believe so. The intention was to make sure that people didn't know it was a one-time trivial issue that said, gee, as you mentioned, one time I didn't fill out my forms. Therefore, I am not eligible. That is not what we are trying to do.

Chairman TALENT. Well, I am going to defer to the other members. But let me just say something to you, and I—you really have to adopt a perspective of people—of the small business people, and particularly small business people who have been trying to break into this system and haven't been able to, or have maybe broken into it and are concerned about getting pushed out.

It is fine to say that contracting officers are going to do this, and we are going to train them, and they are going to be fair and all of that stuff, but subjective decision making has been a means for excluding groups that you have wanted to exclude for other reasons for a long time.

I am not saying at all that that is what you intend. But that is why there is a lot of sensitivity out there. We are going to have a representative from the National Black Chamber and the National Association of Women's Business Owners testify about their concerns about this. And so it is always the more subjective things are, the more somehow it seems like it is the old network that has always gotten things, that continues to get things, and just the new people somehow never seem to be able to comply.

And that is a major concern that I have. I don't know if you would want to comment on it or not.

Ms. LEE. Just that we do not want to exclude—small business is very important. As you know, we have got our small business goals. We have got a lot of activities trying to increase small business participation. The last thing we want to do is put out a rule that has the opposite effect.

Chairman TALENT. Okay. Well, I will recognize the distinguished ranking member for her questions.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Ms. Lee, as you have heard, and I guess by the number of individuals that are here, there is a lot of confusion out there, and small business people are really concerned about this. And we have got to work together to make sure that we have a mechanism in place that will prevent small businesses from being punished—and, of course, that is not the intention of this rule—but at the same time protecting taxpayers' money as you said.

Let me ask some questions. With the proposed clarification of the definition of integrity and ethics, it appears that the goal is to have every contracting officer determine contractor responsibility the same way. If this is so, and a business is determined non-respon-

sible by one contracting officer, logic says that every other contracting officer would also determine the firm non-responsible.

Explain to me why this wouldn't result in de facto debarment.

Ms. LEE. I think you expressed it quite well in your statement, in that what we are looking at is responsibility determination on that action at that time. You are very familiar with debarment, which is a different procedure but which excludes everyone from all government activities, not only procurement activities but personal loans, mortgages, etcetera, if they are through the Federal Government.

So they are two different procedures—the debarment being you are excluded from all, the responsibility being looking at this particular activity at this particular time, and does that contractor have the capability to perform that action.

Ms. VELAZQUEZ. So how do you respond to the contention that the proposed change is a way to circumvent the current debarment regulations? What separates non-responsibility from debarment?

Ms. LEE. Well, currently, we do have a responsibility determination, and we do have business ethics and integrity that are a required determination.

Ms. VELAZQUEZ. Ms. Lee, the reason I ask this is that there appears to be some confusion about an apparent discrepancy regarding antitrust law violation. If you look at Part 9 of the Federal Acquisition Regulation, at 9.406–2, it refers to violation of federal or state antitrust statutes relating to the submission of offers.

Yet, antitrust law violation has been included in the examples in the proposed regulation. If a firm has a violation of an antitrust statute, wouldn't that firm automatically be eligible for debarment?

Ms. LEE. I believe the answer is yes, but I would like to research that further and give you the specifics.

Ms. VELAZQUEZ. So why, then, did you put it in the proposed rule?

Ms. LEE. As an example. We certainly can take that as a comment and see whether that needs to be corrected or changed.

Ms. VELAZQUEZ. Would you get back to me on that?

Ms. LEE. Absolutely.

Ms. VELAZQUEZ. I am concerned about the way these regulations will be implemented in the field. Are you going to suggest to OSHA and other enforcing agencies that they define the threshold of what is considered substantial and communicate this threshold to federal procurement officials?

Ms. LEE. That is not our current plan. We—

Ms. VELAZQUEZ. Why not?

Ms. LEE. Because what we are asking for is information on the individual activity, and then the contracting officer would consult based on that information. They may end up going back to OSHA and saying, "This is what we have. Help us interpret what this means and what we should do with this information."

Ms. VELAZQUEZ. So once you do all of this process, and you come up with a final rule, then what will be the next step, in terms of enforcing agencies? For example, OSHA.

Ms. LEE. Once we go through the process and the comments and put out, say, for example, a final rule, we will certainly do the education process to explain to the contracting officers how we will do

that. We also need to have an outreach program to the agencies that have and will provide some information and see how we can make that the most accessible and the best resources to make sure we have correct information.

Ms. VELAZQUEZ. Regulatory flexibility, Executive Order 12866, is triggered by persuasive evidence of impact on small businesses. It seems to me that the proposed regulations will be covered by this. Why wasn't reg flex triggered?

Ms. LEE. We did the analysis that this was the parenthetical. However, in line with your concerns, we specifically put in the rule and asked people to comment whether they felt that was different, and actually gave them the site and said they can comment back. So I expect to see something in the comments regarding that.

Ms. VELAZQUEZ. Would you consider going back and having at least the implementation portion reviewed by—

Ms. LEE. Absolutely. We will do a review and see where we should go with that.

Ms. VELAZQUEZ. Okay. Ms. Lee, we are going to hear from Steven Schooner, who used to work for the Office of Federal Procurement Policy, who says that the proposed regulation is a significant departure from current procedure, and he believes that reg flex does apply. So how do you respond to this?

Ms. LEE. That we will be happy to look at it, not only hear his opinions, but also look at the public comments and see how other people responded.

Ms. VELAZQUEZ. In your interpretation of the proposed rule, if a complaint is filed with National Labor Relations Board, or if a complaint was filed with EPA, would that be enough grounds for a determination of non-responsibility?

Ms. LEE. In my interpretation, a complaint, no.

Ms. VELAZQUEZ. Ms. Spector, in your opinion, if an accusation alone can be used as grounds for a determination of non-responsibility, how would you train your contracting officers to evaluate accusations?

Ms. SPECTOR. As I have said, Ms. Velazquez, my preference would be for the responsible agencies who administer those laws to advise us if they believe there was substantial noncompliance to prevent disparate interpretations of what was substantial non-compliance.

Short of that, we would have to try to educate our contracting officers. But my preference is that they get the advice from the responsible agency.

Ms. VELAZQUEZ. Ms. Spector, do you think that contracting officers or even the SBA's Certificate of Competency specialist are equipped at all to decipher the national labor relations law and tax law, for example?

Ms. SPECTOR. Not now, they are not. At least I can speak for generally contracting officers.

Ms. VELAZQUEZ. Can COC specialists make judgments about what is persuasive evidence?

Ms. SPECTOR. That I don't know. I believe you would have to ask the COC specialist. I can speak for contracting officers, and, indeed, they are not generally educated in the intricacies of all of the laws.

Ms. VELAZQUEZ. If the contracting officer is required to make a thorough review of the record, must he or she review every previous contract and every type of law that may be violated?

Ms. SPECTOR. It is not clear precisely what would be involved yet. Again, I would have to say my preference would be for there to be a database at each of the relevant agencies that one could call or check because it is not clear precisely how the contracting officer could go about doing this.

Ms. VELAZQUEZ. Does your agency have the resources to start doing this?

Ms. SPECTOR. If it became policy, we would implement it, of course.

Ms. VELAZQUEZ. Ms. Spector, your testimony does not address how your agency determines whether a firm has violated laws. You referred to what you do when firms have previously been evaluated. But what about a new bidder to the Department of Defense?

Ms. SPECTOR. Generally, if it is a new bidder about whom we have concerns, we would do a check on the bidder or a responsibility determination. The way we check now, we check to see that he is not on the suspended or debarred list, the list of parties excluded from federal procurement.

Generally, if he is not, unless we are aware of other violations of the law, we will generally consider that our check. So we check if he is suspended or debarred for fraud or the other factors listed under suspension and debarment. If a company is not on that list, we will check to see if there is any other information we have, and then generally look at his ability to perform the contract.

Ms. VELAZQUEZ. Ms. Lee, you stated—no, I am sorry. Yes. You stated when I asked you—I just want for you to clarify something that you stated. That an accusation will not trigger a finding of non-responsibility. What about several?

Ms. LEE. I am sorry?

Ms. VELAZQUEZ. That one accusation—that an accusation will not trigger a finding of non-responsible. What about several accusations?

Ms. LEE. That could be. It depends what they are, what the degree is, the relevancy to that procurement. There is—as you mentioned, there is subjectivity to this, and that is why we want the people to get the information, to get as accurate information as they can, and then they are going to look at that as a team and do some analysis.

Ms. VELAZQUEZ. Okay. Mr. Ballentine, I just have some questions for you. One of the first things that I did was to look at the Certificate of Competency process. And I know that you are new in your job, but is there any way that the COC process can be streamlined?

Mr. BALLENTINE. Well, one thing I have learned is that they don't allow being new as an excuse for anything. [Laughter.]

We are always looking at ways to streamline the process, and we have done so over the past four to five years. There is a 15-day period right now for us to respond back to a contracting officer. And if that process could in any way be streamlined, we would look into it.

Ms. VELAZQUEZ. When we started preparing for this hearing, one of the things I did was to look at the current process. And I have got to tell you, it seems to me that this application, along with the attachments, will be very difficult to complete in only six days. If there is any way that that could be changed?

Mr. BALLENTINE. As I mentioned, we are mandated to respond within 15 days. The small business has six days to respond. We have nine days to respond. Sometimes that takes a little longer for the small business. We try not to let it go past one or two days, which will take away from our nine-day period. But within that 15 days we get a response out.

Ms. VELAZQUEZ. What I am saying is, not looking at the responses but at the whole process and the application itself, can that be streamlined?

Mr. BALLENTINE. We can look at that. We are happy to work with you on that, if that is possible.

Ms. VELAZQUEZ. Because you understand that now this process is going to be more important in light of the new rule.

Mr. BALLENTINE. Agreed.

Ms. VELAZQUEZ. And so that we make sure that it—make it more user-friendly.

Mr. BALLENTINE. Agreed. We are happy to look at that.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mrs. Kelly is next.

Mrs. KELLY. Thank you, Mr. Chairman.

Ms. Lee, can you provide me with the number of small business contractors who were found to be non-responsible because of a lack of integrity and business ethics?

Ms. LEE. I cannot, but I believe it is in Mr. Ballentine's statistics. I would be just quoting his statistics.

Mrs. KELLY. Do you have that, Mr. Ballentine?

Mr. BALLENTINE. Could you repeat the question, please?

Mrs. KELLY. Can you provide me with the number of small business contractors who were found to be non-responsible because of a lack of integrity and business ethics? Do you have that number?

Mr. BALLENTINE. Over the past three fiscal years, we have had 16 referrals.

Mrs. KELLY. Sixteen?

Mr. BALLENTINE. Just 16 from our end.

Mrs. KELLY. Okay.

Mr. BALLENTINE. And only three of those which we sent forward to COC.

Chairman TALENT. And if the gentlelady would yield just to clarify. That is only that you have seen.

Mr. BALLENTINE. That is what we have seen.

Chairman TALENT. There could be a whole lot more out there that you have not seen.

Mr. BALLENTINE. That is correct.

Chairman TALENT. So we know the number is 16. But if they didn't appeal to them, they wouldn't know about it.

Mr. BALLENTINE. We don't get every referral.

Chairman TALENT. So I guess the answer is they don't know, beyond his 16.

Mrs. KELLY. Is that a correct answer, Ms. Lee?

Ms. LEE. If it is a small business and the non-responsibility determination is made, the contracting officer must notify SBA. SBA, working with some—some small businesses accept that and say, “I saw it. I”—I don’t know that they agree, but they accept it and they don’t pursue the certificate. So there it is different. But if it is a small business—

Mrs. KELLY. So you don’t have any statistics on this, is that what—

Ms. LEE. I have statistics government-wide. We have the small business referrals, but we don’t keep specific records of other—say, large business non-responsibility determination.

Mrs. KELLY. But your rule would apply to all businesses, wouldn’t it?

Ms. LEE. It does now, yes.

Mr. BALLENTINE. Congresswoman, if I may correct that. The 16, that is outside of issues unrelated to capability, and financial. These are related to environmental, tax laws, anything that may be outside of our general purview.

Mrs. KELLY. But you don’t, Ms. Lee, have statistics even on large business, is that correct?

Ms. LEE. No, I do not.

Mrs. KELLY. You have no statistics at all?

Ms. LEE. Correct. We keep statistics on the contracts that we are awarded. We do not keep statistics on the unsuccessful bidders, whether that be responsibility or they just weren’t the best proposal, or they just weren’t the best price.

Mrs. KELLY. Could you venture a guess based on what you know? Or do you want to give me any kind of number you may have on any of the numbers that you do know, on how many people were found non-responsible because of prior criminal violations? Or were they suspended or debarred—I mean, were they suspended or debarred because of a criminal violation? Would you have statistics on that?

Ms. LEE. I do have a copy, although it is online; it is easier. This is a copy of the debarred, suspended, and ineligible. There are a good number of people on the debarred list.

Mrs. KELLY. But what about the debarred for criminal activities is what I am asking.

Ms. LEE. I would venture a guess that is predominant of these, but each individual is different. But that is debarred versus responsibility.

Mrs. KELLY. I want to ask you another question, Ms. Lee. Coming out of a small business background, I recognize that some of these procurement contracts are given to a large contractor who has—who is coming in with a group of bids from subcontractors. Does your rule apply to the subcontractors equally as well as to the large contractor?

Ms. LEE. The Federal Acquisition Regulation currently requires that the prime contractor do the responsibility determinations on their subcontractors. There is some instruction in Part 9 in some instances where, if there is an issue with a subcontractor, the prime would notify the government in some cases.

Mrs. KELLY. How would you envision the prime contractor vouching for the responsibility of the subcontractor without investigating

their tax records or something like that? I mean, the prime contractor under the law is responsible for the subcontractors. And how would you envision the subcontractor under your new proposed rule as finding out information—the prime contractor finding out information about the subcontractor?

Ms. LEE. I don't have a crisp answer for you. We need to certainly do some more of that, but they currently do make that responsibility determination as far as—

Mrs. KELLY. Well, how do they do that?

Ms. LEE [continuing]. Probably more capability—

Mrs. KELLY. How can they do that? If I were a subcontractor, and I were involved in a bid with a prime contractor, and the prime comes to me and says, "I have got to verify that you are okay. Give me your tax records. Show me your books"—I am not so sure I would like to have that happen to me. That is what I am asking you.

Ms. LEE. That we are going to ask—that we are asking for compliance, not necessarily the data behind it. We currently have a certificate that is put in all contracts over \$100,000 that asks people, and they certify, whether or not they are under indictment or whether or not they are on the debarred list. So—

Mrs. KELLY. I am going to run out of time here, and I want to—I just want to ask my question again. And that is, as a prime contractor, I don't want to have a subcontractor who is—who could be or has been disbarred or something. But on the other hand, you are not providing me, as I understand it, with this rule the means of effectively establishing that with my subs.

You are making me responsible for people that I may—that I am afraid that you are going to make me look in their books and things like that. I don't want to do that as a subcontractor. I don't want to show my books to the prime contractor. And I don't want to see the prime contractor held to that high responsibility with the subs, absent something that you are going to give me in that rule to protect my subcontractors and me.

Ms. LEE. Okay.

Mrs. KELLY. And I think that that is something I would like to see you give—I don't know if I am being clear here, but I think it is really—absent some kind of a certified statement—

Ms. MILLENDER-MCDONALD. Would the gentlewoman yield?

Mrs. KELLY. What kind of liability do you think is going to hit the prime contractor?

Ms. MILLENDER-MCDONALD. Will the gentlewoman yield? Because you are making sense. And I certainly would like to see—

Mrs. KELLY. I don't have any time to yield, but—

[Laughter.]

Ms. MILLENDER-MCDONALD. That is why I am trying to go very fast.

Chairman TALENT. If the gentlelady wants to, go ahead. You can run over a little.

Ms. MILLENDER-MCDONALD. Because she is really right on point here with the question that is very ambiguous at this time, or not very clear—I suppose may not be too ambiguous, but it is not clear. If you have—the onerous provisions here will be on the part of the prime contractor, and yet the subcontractor—the prime contractor

is asking the sub to present papers that will clear him or her of any wrongdoings, or to see whether or not they are in compliance.

Where does the—who falls prey to this law, if they are out of compliance? Is it with the subcontractor or the prime, if they are not complying with this Certification of Competency?

Ms. LEE. It is performance-related, so certainly there is a combination thereof. I think it is a very good point, and we need to do—

Ms. MILLENDER-MCDONALD. I think it is an excellent point she made, and I think you should follow up on it to get her an answer. And please give me an answer when she gives it to you.

Mrs. KELLY. Thank you very much.

Ms. Lee, if this law is supposed to clarify—all I am seeing is a lot of obscure possibilities—I think you are going to have to really come back to us with some information about—

Ms. LEE. Well, certainly, as we get the comments in, we will be up here discussing them and telling you what we have got.

Mrs. KELLY. Well, I am worried about one thing. After you get the comments in, can you get—are you going to be talking with us before this rule becomes an actual fact or after?

Ms. LEE. No. Before.

Mrs. KELLY. Thank you.

Chairman TALENT. Ms. Christian-Christensen is next.

Ms. CHRISTIAN-CHRISTENSEN. Thank you, Mr. Chairman, and thank you for holding this hearing. Just based on the questions that have been asked, this is an issue of great concern to us, and I share some of those concerns because our small businesses, our rural businesses, our minority businesses, have a lot of difficulty as it is getting the contracts. And this almost seems as though it is going to make it more difficult.

When Congressman Davis was speaking, he was saying basically the way it exists now, the responsibility exists now, should be satisfactory. It is a good program. The rule as it exists is good. And if it is not broken, why should we be fixing it? I am wondering, what was the impetus to change the rule? I hope this question hasn't been asked. What was happening? What was the experience of the Federal Government with regarding to contracting that caused us to feel that we must change and expand the rule?

Ms. LEE. It certainly was intended to be a clarification. I think there have been some good points made here today that we didn't—it isn't as clear to everyone as we had intended it to be. And I am looking forward to the comments because I know—and people have informally talked to me, even suggesting changes to language or more specific citings. And so we will work through that.

But the intent is to make it clear to our contracting officers that we—that that is part of their decision making process, to make sure that the contractor is responsible.

Ms. CHRISTIAN-CHRISTENSEN. But it is not just clarification. This is an expansion to include other areas of responsibility that were never included, that have nothing to do with contracting and the work to be done. So what was the impetus to include the environmental, the other areas that are now going to be included as you look for the responsibility in the contractor? For what reason are we doing this?

Ms. LEE. We are doing it truly to say we want to make sure that contracting officers look at these issues and to reiterate that those are the kind of things that can be considered as part of business ethics and integrity.

Ms. CHRISTIAN-CHRISTENSEN. Was a study done that showed that businesses, large or small, were not compliant with environmental or labor relations or OSHA or any of the other rules and regulations? Was there a study done? And was it found that businesses were not compliant, and so now it is decided that we must include these as we review the contractors?

Ms. LEE. A separate study, as far as behind this rule, no. There certainly is a lot of information that for other reasons accumulates and summarizes our compliance with other laws. So I would not—there is not a specific study behind this.

Ms. CHRISTIAN-CHRISTENSEN. Okay. I am not sure that the question was answered really to my satisfaction. Let me ask another question. One of the concerns is the vagueness and the subjectivity of the process. What can you tell me to—and the Committee—to show that it is not a subjective and vague process that would leave some companies vulnerable just based on the individual contracting officer—what assurances are there in the rule as it is proposed that take vagueness and subjectivity out of it? What—

Ms. LEE. Vagueness—we certainly don't want to have that issue. There will be—as Ms. Velazquez said, there is some subjectivity. I don't know that we can make it purely objective that says two of these, three of those, equals this. We really do want an analysis and a meaningful analysis of the information and the relativity. We need to work on the vagueness. I believe there still will remain some subjectivity.

Ms. CHRISTIAN-CHRISTENSEN. Okay. Just one—let me ask the first question a different way. What was wrong with the current process?

Ms. LEE. My personal opinion is under the current process you can consider these issues. There were some people that said you cannot, so we said, "Let us make it very clear that you can."

Ms. CHRISTIAN-CHRISTENSEN. Well, I am looking forward to hearing—to seeing what the comments are during the comment period. And I am going to have my contractors make sure to get their comments in, and my district as well, before we make a decision as to whether we can support this or not.

Thank you, Mr. Chairman.

Chairman TALENT. Ms. Millender-McDonald?

Ms. MILLENDER-MCDONALD. Mr. Chairman, thank you, and let me thank you for bringing this very important issue to this Committee. We have been back and forth and have not had a chance to really get wrapped into it until just recently.

Now, what I would like to say, though, is there is a lot of subjectivity to this criteria that you are outlining here. And especially the area that speaks to satisfactory record of integrity and business ethics. And this will all rely on your contracting officer to make this determination. Am I correct?

Ms. LEE. The contracting officer, with their counsel and team, yes.

Ms. MILLENDER-MCDONALD. All right. Now, first of all, the contracting officers, what kind of education do they have?

Ms. LEE. Certainly, that is varied and different. In fact, that is one of my personal initiatives. I would like to see us have an affirmative education requirement. We are working with the Office of Personnel Management on that.

Ms. MILLENDER-MCDONALD. You mean you don't have one?

Ms. LEE. DOD has a very specific—

Ms. MILLENDER-MCDONALD. But, I mean, when you have got to put someone in this type of subjective position, you should certainly be able to discern whether or not these folks are capable of making the decision unbiased. And given that criteria, it is inconceivable to me that you would even come here with these types of recommendations when you are not familiar with, or any one of you, with the contracting officers' background and education.

Ms. LEE. Well, we can certainly give you statistics on that. I just can't give you an "everyone is like this." There is a broad range of—

Ms. MILLENDER-MCDONALD. But there should be a certain criteria that needs to be met—

Ms. LEE. Yes.

Ms. MILLENDER-MCDONALD [continuing]. With reference to—

Ms. LEE. And there is a very formal training program as well.

Ms. MILLENDER-MCDONALD. And is there an orientation given somewhere along this continuum that will help small businesses to know that they are going to be under these types of subjective criteria—a subjective criteria process?

Ms. LEE. Yes. SBA really has quite an aggressive outreach program that they do deal with small businesses and explain to them how to do business with the government. And I think they cover these areas—

Ms. MILLENDER-MCDONALD. That has nothing to do with, though, if they get caught in a tuck, like Mrs. Kelly mentioned, where whose responsibility it is to ensure that a subcontractor is in compliance, whereby the prime contractor is not thrown on a blacklist because he or she was not able to clearly get this information from a subcontractor.

So, there are a lot of things here that we need to look at before we put pawprints on this as law. It is entirely too ambiguous, and small businesses already have problems with trying to clear some of the ambiguity of the law as it is. And then you are going to come up with anything—something like satisfactory record of integrity. My God, that is absolutely open to interpretation by anyone who perhaps might have a biased streak in him or her.

And so this right here becomes extremely problematic for me with your proposed changes. So I wanted to put on record that before anything happens here, I hope we have the opportunity of coming back to talk with you about the comments that have been submitted to you and other factors that you will factor in, given the comments of the members of this Committee, because it is very unclear why we should have this, given the ambiguity of the nature of this outline that you have given to us.

Ms. LEE. I would be happy to work with you and your staff, as I will with—have had and will continue to have many discussions on this.

Ms. MILLENDER-MCDONALD. Mr. Chairman, I regret that I am going to have to leave for schedules that we just find to be almost impossible to keep. But nonetheless, we have made these schedules—because I would be interested in listening to Mr. Alford, Ms. Hill Slater, and—is it Schooner—as to your feel of this particular proposed set of criteria.

So if I can ask Mr. Chairman to get a transcript of this hearing, because I do want to see what they have to say and regret that I will not be here to listen to you.

Thank you, Mr. Chairman.

Chairman TALENT. We would be more than happy to do that. And everybody understands the conflicting schedules of members, and let me say that—

Ms. MILLENDER-MCDONALD. Thank you, Mr. Chairman.

Chairman TALENT [continuing]. The gentlelady from California is punctual in her attendance in this Committee, and I appreciate it. She represents her constituents well in doing that. I thank you for your questions.

Ms. Tubbs Jones is next.

Mrs. JONES. Thank you, Mr. Chairman. I am sighing like this because I used to be the Equal Employment Opportunity Officer for the Northeast Ohio Regional Sewer District and reviewed compliance for EEO issues with the county, with the sewer district. And my background is in the law, and so the concepts that you are talking about don't sound so strange to me, substantial compliance and the like, because those are terms that are actually used by the EEOC in much of what they do.

But I hear the frustration of my colleagues, and probably the people that are coming to speak after them, in the fact that because it has not been clear in the past—the criteria upon which someone is judged for integrity or the like—that now when you make it clear what it is you are using to judge the integrity, it raises all kinds of flags because there are numerous businesses in this country who have been denied opportunities to do business with the government.

And we couldn't clearly state for them why they were denied the opportunity—be they black, white, men, women, urban, suburban, or whatever. I don't really have any questions much different than what my colleagues have already put to you. But what I would suggest to you is that in detailing what will be the criteria or determiners for how someone does business with the government, and in training your compliance officers for determining who will do business with the government, that many factors need to be taken into consideration. And many people need to have the opportunity to comment on the issue.

I hope I don't sound like I am talking around, but I am really saying these are issues that have always been considered but nobody knew you were considering them. And now, as you open the box to let them know, you are going to get issues. But also, I think that it is the right thing to do to let people know upon what you

are basing your determination for compliance and then letting people comment.

With regard to the contractor/subcontractor, I think that is in any situation. We talk about agency and the law. And if you are the prime, you are responsible for the sub. And it doesn't only go to these issues; it goes to many, many other issues. And it is the law. Well, it is the law. I mean, it is the law in any other circumstance, not just in compliance.

So I would just encourage you to give everybody an opportunity to comment and be clear on the basis upon which you are making your determination with regard to either having the ability to do business or not do business with government.

Chairman TALENT. I thank the gentlelady. I have been looking forward to her comments because I wanted to see what she thought from a legal standpoint. Let me just ask a couple more things before we go to our next panel, and they have been waiting very patiently.

And I won't take much time, I will say to the gentlelady.

We have aired this issue, and it is pretty clear to me that there is an awful lot missing from this proposed regulation. What I want to focus on is SBREFA, Small Business Regulatory Enforcement Fairness Act, because I have been trying over and over again to get agencies to understand that if they will really look at that and really try and implement it, that avoids a lot of these problems.

So you certify that this would not have a substantial impact on a significant number of small businesses. But the truth is, as we have seen here, Ms. Lee, your agency isn't sure why you are doing this, and you are not even sure what you are doing. And there is no way you could have been certain it wouldn't have an impact on a substantial number of small businesses.

Isn't that correct?

Ms. LEE. Mr. Talent, we made the assumption that small businesses are in compliance with the law and that this would not change their compliance requirements. It would just make it clearer to them that we were looking at those requirements, and that we did consider them.

Chairman TALENT. Okay. And I am trying to grant you the benefit of good faith because we have had dealings with you and your agency before, and both under you and Mr. Kelman. I think you act that way.

But you can't stand here and say that this is going to vest in procurement officers or their teams. The ability to declare somebody not responsible, based on at least more than one civil violation—which may not even have had to have been adjudicated a civil violation—and then it is not going to change the law. I mean, it is going to change the law.

Ms. LEE. It certainly is going to change the process and highlight this to the contracting officers. They will pay more attention. Absolutely.

Chairman TALENT. If what you want to say is the law always should have been interpreted this way, okay, fine. It hasn't been interpreted that way. That was my first question to you. If I asked Ms. Spector this question, she would tell me, "No, we do not, by and large"—well, tell me. Do you go out and—[laughter]—as an

agency declare people non-responsible for civil violations that aren't related to the contract that they are bidding for?

Ms. SPECTOR. Well, we do look at things like embezzlement or things that are—

Chairman TALENT. Right.

Ms. SPECTOR. Have we looked routinely at this broad array? I would say routinely we do not, except perhaps in egregious situations.

Chairman TALENT. Now maybe they should. And if you could come before the Committee and say, "Look, we found after doing an audit that there were these 15 people who got these big contracts," and they had been guilty of violations of Title VII, or violations of the tax laws or something—a number of them were intentional—I don't want those people doing business with the government either.

But we don't know that that has happened, do we? I mean, do we know that we have given contracts to people who committed a lot of intentional violations of these laws, we don't know that that has happened. I would be surprised that that has happened, and Mr. Kelman tolerated it for years. I mean, I don't think that that has happened. Certainly, we don't know it has happened, do we?

Ms. LEE. No, we do not.

Chairman TALENT. So we may suspect that is out there, and we don't really know the extent of the problem if there is one. We do know we are vesting these contracting officers an awful lot of authority to go further than they now go. That must have an impact on the three-quarters of the people who get contracts who are small businesses, mustn't it not?

Ms. LEE. Like I said, we didn't look at it that way. We did offer and ask for comments on that specific activity, and certainly we will look at those. And I feel like I have an action on that from this Committee.

Chairman TALENT. Yes, and I understand. What I want to get home to you is had you done the regulatory flexibility analysis, which is an analysis of the actual impact and then other ways of accomplishing what you want to accomplish, that is part of what they are supposed to be able to comment on.

And this is, by the way, the law. This is not a suggestion from the Congress. It is the law. It subjects this whole process to a tremendous legal flaw. And in my opinion, I mean, if you went ahead with this and did promulgate a final rule, I think the court would throw it out overnight.

And by the way, if you think about it, if that is true, Ms. Lee, it makes you and your agency a violator of the law. You understand. So, I mean, and I have seen a substantial pattern of non-compliance with SBREFA throughout a lot of federal agencies. I don't suspect you have a lack of integrity here. Okay? I just know you are not used to this. Had you done that, you would have, I think, explored a lot of these issues in the course of doing that regulatory flexibility analysis, and we wouldn't have had to be here telling you about these things. You see?

So what you may want to—what I want to suggest you do is consider pulling this back, doing that analysis, really looking at the impacts this is going to have on small business, doing that anal-

ysis. That is going to cause you, I think, to amend your proposed rule, and then resubmit it for comment. And then I think you will begin to focus on the things that we all agree contractors ought not to do.

I mean, I have no problem with saying if there is somebody out there who is recklessly or intentionally violating some set of federal laws over and over again, I want them to change their management or something before they come to do——

Ms. LEE. Right.

Chairman TALENT. So I agree with you on that. But I am really seriously concerned. And this is the other point on it. Small businesses are particularly concerned because they don't have batteries of lawyers and accountants, and they could get audited a couple of times by the IRS—I mean, I know people in this situation.

Right now, we are having a big fight with the IRS about whether they are going to change their cash accrual method with regard to contracts. And the IRS has taken the position that if you are a painting contractor or something, the paint that you keep on hand to paint people's houses is an inventory. And, therefore, you have to use the accrual method of figuring out how much money you owe. And by the way, they are going to go back in time.

Now, this is a huge controversy. They are probably wrong in doing it. But you could get a couple of contractors who settle a couple of those things and have some violations, and then they can't go paint houses at the Department of Defense anymore. And these are the small business people.

And if I may say, in particular, probably disproportionately the newer ones who don't have a lot of government contract experience—which is disproportionately the women-owned and minority-owned small businesses. And that is why they are here complaining.

So I know I am the fifth person to lecture to you. I don't like to do that. But this should not have come here in this condition before us. So I hope that—yes, I hope that, as others have said, that we get this process into a more constructive pattern. Are we in agreement on that, that we want to do that?

Ms. LEE. Yes, I certainly have an action on this one.

Chairman TALENT. Okay. Good.

And Mrs. Kelly wanted to ask one more question, and I will recognize her and then go to the next panel.

Mrs. KELLY. Thank you, Mr. Chairman.

I just would like to go to Ms. Spector for a minute. I really appreciate your insightful testimony, but I would like your opinion of this rule. Do you think that this proposed rule, if it is implemented, is going to harm our efforts to try to make the government procurement process more efficient?

Ms. SPECTOR. This rule is one of many that we implement via the FAR that is considered by the administration to be aimed at a higher good than efficiency of the contracting process.

The more things we must do and look at, in performing contracts and responsibility determinations, the more time and personnel it will take. Now, there are many higher goods that we implement via our contracts. If the administration determines that this is some-

thing we do need to do to a greater extent than we have already been doing it, we will certainly do that and implement it.

Mrs. KELLY. Thank you, Ms. Spector.

I just wanted to say to Ms. Lee, you hear Ms. Spector raising the issue of it costing more time and money. Have you thought about the cost of this rule to the agencies and in terms of efficiencies? You don't have to answer that now. But when you come back, I would like an answer.

Thank you, Mr. Chairman.

Mrs. JONES. Mr. Chairman, I would like to reclaim some of my time because I don't think—

Chairman TALENT. We recognize the gentlelady.

Mrs. JONES. Thank you.

I want to ask a question. Currently, someone applies for a contract, and the contract—for purposes of determining a contractor's eligibility or compliance, you could consider their integrity and ethics, right?

Ms. LEE. Yes.

Mrs. JONES. But right now, no one really understood what you were included and what integrity and ethics were. Some people understood, but some people are saying to you, "Well, just what does integrity and ethics mean," right?

Ms. LEE. Yes.

Mrs. JONES. Or am I wrong? Am I—

Ms. LEE. You are correct. That is what we are trying to do is put this parenthetical below—

Mrs. JONES. There is a guy that I am hoping is going to testify because he is back there shaking his head, and he is right in front of my eye, so eventually I will ask him the same question. But, in fact, people did not understand what integrity and ethics meant. And so for purposes of trying to be a little clearer on what integrity and ethics meant, you decided that you would set forth compliance with tax, labor, employment, right?

Ms. LEE. That was certainly our intent.

Mrs. JONES. Okay. Thank you. That is all I was asking.

Chairman TALENT. Okay. I thank these witnesses, and we will continue following this issue. And, Mr. Ballentine, if you have suggestions for streamlining the COC process, we are in the middle of reauthorizing and we would be happy to talk with you. Ms. Velazquez took a particular interest in that, so—

Mr. BALLENTINE. Thank you, Mr. Chairman.

Chairman TALENT [continuing]. Now would be the time to talk with staff and let us know what your interests are along those lines. Thank you.

Maybe we can speed up a little bit some of that streamlining you are trying to do.

Now I would ask the second panel to come forward. Thank you for your patience, and, indeed, for being willing to be here. And we will begin with the testimony right away of Mr. Steven Schooner, Esquire, who is a professor of law at George Washington University Law School.

Mr. Schooner? And I am going to skip the extensive achievements of all of these witnesses here. We will just stipulate that

they are all people of great achievements and excellencies in their fields.

Mr. Schooner.

STATEMENT OF STEVEN SCHOONER, ESQUIRE, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. SCHOONER. Thank you, Mr. Chairman. We appreciate the opportunity to appear for you today, and I will work on the assumption that my written comments will become part of the record. I will try to move through the five questions that you posed as briefly as possible.

First, you had asked with regard to the current state of the law, and I think there are a few brief points that are important. First, as this Committee understands, the statutory requirement is only that contracts be awarded to responsible bidders, offerors, or sources, and as a result the contracting officer, by regulation, must assess each contractor who is potentially to receive an award, their abilities and resources, to determine whether they can complete a contract on time and in a satisfactory manner.

But one of the concerns that was referred to earlier is that a firm's repeated failure to be found non-responsible may, at a certain point, suggest a de facto debarment. And that will become extremely important when we talk about the nexus issue in just a moment.

It is also very important to keep in mind, because a number of people used the term "discretion" earlier, that the contracting officer has significant, arguably almost unfettered discretion in determining responsibility.

But if we look at the law, not so much in terms of what the regulations say but what the courts have decided, it appears that historically if a contracting officer is to deny a contractor the opportunity for a contract, to find them non-responsible, they are entitled to a higher standard of due process if it deals specifically with integrity. And it appears here what the regulation is primarily speaking to is issues relating to contractor integrity.

The second question you asked was with regard—

Chairman TALENT. Is that a constitutional holding that they have a higher—that the right to due process is greater in that instance? Is that constitutional or statutory? It is not clear.

Mr. SCHOONER. It is in the courts. I think you could make an argument that it derives from the Constitution because you are being deprived the opportunity, your liberty interests, and the like. But this is not something that we find in the regulations per se.

The second question that you asked is with regard to the need for a nexus between the responsibility determination and the goods or services that the government is actually buying. Now, if we look at what the preaward survey is intended to do, the goal there is to disclose whether this contractor will place the government at risk of eventual default, late delivery, poor quality, or cost overruns.

And so, therefore, we generally do see a very specific nexus there. And you have not heard a lot of talking today, but you have seen in a lot of the literature this loose use of the term "black-listing." And it seems to me that if that term has any applicability

here, it is most applicable if the government is unable to articulate a nexus between the contractor's likelihood of providing the government with customer satisfaction on the one hand and the reason upon which the contracting officer could use to deny them the opportunity to perform that contract.

And it seems to me that if the government cannot, as a matter of regulation, establish that nexus then the regulation has failed.

The third question you asked was whether, in fact, this is an extension of already-existing law or whether it breaks new ground. As you have heard, a fair amount of discussion earlier and I think the FAR drafters have not been persuasive in establishing this as a simple extension.

And I do agree with you, as I indicated in my written comments, that this should have been deemed a significant regulatory action pursuant to the Executive Order. It should have been deemed a major rule. And, clearly, there is a need for regulatory flexibility analysis.

If we simply look at the numbers under the Federal Procurement Data System, basically, we are talking in the neighborhood of \$200 billion a year being awarded in Federal Government contracts. Small businesses are taking approximately 23 percent of those dollars. One-twentieth of one percent of those gets us over the \$100 million threshold, and I think that basically makes the case thereby itself.

So I think that overall it is not very persuasive that this is basically clarifying coverage and adding examples. This is a new significant rule.

The fourth question you asked was how the rule would affect government procurement law. And I think the main issue there is that it shifts the underlying focus of the contracting officer's responsibility determination from a threshold examination of a contractor's resources and abilities and willingness to perform a contract for one purpose and one purpose only—to ensure that a chosen contractor exhibits what they have, what they need, what they should have, to perform the contract, and whether they have sufficient integrity.

And it shifts it from that to basically demanding prospective government contractors a broader and, in my opinion, higher standard of corporate ethics, integrity, and compliance, with a host of laws, regulations, and norms.

And I think that the risk therein is important because, basically, we are working with this amorphous concept of a satisfactory record of integrity and business ethics defined solely by the use of examples and juxtaposing that with an absence of clear thresholds or standards, which leads me to the fifth question, which dealt with persuasive evidence.

Your fifth question with regard to the concept of persuasive evidence—as you recognize, Mr. Chairman, this is not a commonly recognized evidentiary standard, threshold, or burden. And it is unequivocally vague. The obvious concern here is that the only time we see persuasive evidence is in the absence of a final adjudication by a competent authority which would, of course, raise your antenna.

The confusion is unnecessary, and it will result in non-productive and inefficient litigation. It seems to me, as a matter of law, you can take the phrase and interpret it in one of two ways. It is susceptible to two basic interpretations. One is that what the term “persuasive evidence” should mean is that you need so much evidence that the contracting officer is literally bowled over by the tsunami of evidence, indicating that we have a bad actor.

In that case, the term should be replaced with the clear and convincing standard which the legal community is familiar with. In the alternative, it suggests an inappropriately low standard, something potentially even below a preponderance standard, which is fundamentally ill-suited to denying a contractor an opportunity to perform a government contract. So in my opinion, the term “persuasive evidence” should be replaced.

I would also like to echo Congressman Davis’ concerns earlier that the proposal is fundamentally inconsistent with a lot of the goals and, more importantly, the achievements of acquisition reform and acquisition streamlining that we have experienced in the 1990s.

Mr. Chairman, that concludes my statement. But I would like to permit my colleague, Mr. Kovacic, Bill Kovacic, to address a couple of related points. And, of course, we would both be pleased to answer any questions you may have.

[Mr. Schooner’s statement may be found in the appendix.]

Chairman TALENT. Sure. Our next witness is William Kovacic, Esquire, also a professor of law at George Washington University Law School.

STATEMENT OF WILLIAM KOVACIC, ESQUIRE, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. KOVACIC. Thank you, Mr. Chairman.

I would like to simply underscore two questions that have been raised already by members of the Committee in the first panel session. The first is what strikes me in reading the proposed notice and the proposed rule itself is there is absolutely no discussion of the empirical basis for this change in the law.

The rule mentions no accumulated experience that would show that there is a link between bad procurement outcomes and the existing FAR provision. I think the drafters should be pressed to show in what respects the existing responsibility criteria have not only allowed bad actors to routinely play in the process but also to provide goods and services in ways that hurt taxpayers.

That is absolutely no proof in the record—and I noticed during the discussions earlier today, when members of the Committee pressed the witnesses on these points, that there were no direct answers to those questions. In short, a basic regulatory change should not be adopted without that type of empirical basis.

My second and final point is that I think the rule, as drafted, does create extraordinary opportunities for injecting uncertainty into the process. And what is the cost of uncertainty? Greater cost and compliance for affected business people and for the agencies implementing the laws themselves.

Let me focus only on the term “substantial noncompliance,” which is the key ingredient of the responsibility feature.

One asks, "Which jurisdiction's laws will apply? Is it simply federal law? What about state law? What about local laws?" To the extent that all of these, in some sense, deal with integrity, and a failure to abide by the law might be a benchmark of poor integrity. I suspect we ought to be interested in all of them.

What types of laws should be covered? Why doesn't the rule mention, for example, securities law? Export controls? Campaign finance? That is, why shouldn't we go through the U.S. Code and identify all laws to the extent that we equate a failure to abide by the law as an indication of poor integrity?

Last, which events trigger noncompliance? Is it the mere accusation that the law has been broken? Is it the mere commencement of an investigation? Is it the mere filing of a complaint? Is it a settlement of an existing complaint? Or is it an adjudicated violation found by either an administrative or judicial tribunal?

Is it a complaint initiated by the government as plaintiff? Or for most of the laws we are talking about, there are private rights of action. Is every instance in which a private party initiates the private right of action a safeguard that Congress created to prevent default by federal enforcement officials? Or are all private rights of action exercised through complaints also triggering events?

In short, when I read the rule and listen to the comments this morning, I have the image of a contracting officer who is going to be compelled in order to comply fully with the spirit of this measure, to do a comprehensive audit of the firm's recent legal history, that identifies all violations, identifies all complaints, potentially all accusations, all settlements, and develops from that a composite picture of what kind of legal citizen the firm has been.

If they are not going to do this, what is the point of this measure? The danger to some is that this means greater costs. And if there has been any major theme of modern procurement reform in this decade, it is that a failure to take account of those costs can lead to an increase in barriers to entry into the market. It is the lack of firms coming into the market and competing aggressively that ultimately is the biggest threat to taxpayer interest.

This measure at best is an early first draft and would require considerable refinement in order to be suitable for adoption, if at all.

Thank you.

Chairman TALENT. Thank you, Mr. Kovacic.

I look at it from the standpoint—and I think it is quite appropriate to look at it from the standpoint of the taxpayer or the procurement officer. I am looking at it from the standpoint of the average small business person who is considering whether to bid and has yet another series of uncertainties, or perhaps may confront an audit of everything like this, and it might deter them from bidding in the first place.

We have witnesses here who can testify on that issue, and two witnesses with whom the Committee is very familiar and to whom the Committee is grateful for their input over the years and their advocacy on behalf of, on the one hand, the Black Chamber, and on the other hand NAWBO.

So our first witness here is Mr. Harry C. Alford, who is the President of the National Black Chamber of Commerce. Harry, thank you for coming.

**STATEMENT OF HARRY C. ALFORD, PRESIDENT, NATIONAL
BLACK CHAMBER OF COMMERCE**

Mr. ALFORD. Thank you very much, Mr. Chairman, honorable members of the Committee.

Thank you for giving the National Black Chamber of Commerce the opportunity voice our opinion on the important topic of rule changes to Part 9 of the Federal Acquisition Regulation, a.k.a. blacklisting.

As we understand it, under the proposed changes a contracting officer must consider a contractor's overall compliance with a wide variety of federal laws unrelated to government procurement, including, but not limited to, tax, environmental, worker safety, anti-trust, and consumer protection.

A contracting officer that is found in substantial compliance with any of these laws, or similar federal legal requirements, would be required to find the prospective contractor non-responsible. As we understand it, allegations can be filed against an employee without their knowledge and the ability for them to refute or appeal the contracting officer's initial decision to blacklist the contractor.

This highly subjective responsibility determination, based on the vague nature of the proposed standards, would effectively deny contractors due process by making any bid protest to the determination impractical, if not impossible.

The terms "integrity" and "business ethics" seem to come into play in this matter. These terms are purely subjective and are in the eyes of the beholder. What we have here is the possibility of allegation and subjectivity replacing fact and objective measurement in the future of a company doing business with the Federal Government.

Certainly, we believe that anyone doing business with the Federal Government should abide by the existing laws and perform due diligence. We also believe that the FAR provides such guidelines and ensures that business is done with a standard of high integrity and business ethics. The proposed changes open the door to more abuse and increase the chances for successful ill-advised actions and manipulation of contractual outcomes.

In essence, it may allow reckless behavior by the contracting officer and releases him or her from any control or non-biased judgment. There is already enough abuse in the system. We use the term "constructive debarment," which is a process that contracting officers use to prevent certain contractors, for whatever reason, from doing business with the Federal Government.

If the contracting officer is adverse to the involvement of a contractor, protests are raised and eventual COCs—Certificates of Competency—are processed in the attempt to block the contractor or to make his or her efforts in doing business with the Federal Government very costly and excruciating.

There are contracting officers who use the current system to block contractors from doing legal and ethical business. The proposed changes could turn the current road of abuse into a freeway

of abuse. We say enough of the abuse. We will contest the protest and eventually will through the COC process.

The proposed changes would allow a permanent ban on participating in the federal procurement process without recourse. We have enough problems with bias in the procurement process, but at least there is still recourse. The proposed changes amount to a silver bullet to the business, regardless of guilt or innocence.

There is also a question of a double standard. While it would be simple to evoke such penalties on small businesses, how could punishment be met on larger contractors? For example, McDonnell-Douglas, now owned by Boeing, has recently been indicted. Should this giant be permanently barred from federal procurement? Of course not. Such a debarment would negatively affect our national security.

What about the recently convicted Archer Midland Daniels, ADM? Should they now be barred forever? We doubt if this would become a fact?

Chairman TALENT. Harry, will you suspend for a minute? You know, you make a really good point. The only ones they could afford to debar would be the smaller businesses because they don't—McDonnell-Douglas, whom I am pleased to represent, by the way—

Mr. ALFORD. Yes, sir. [Laughter.]

Chairman TALENT. And I am certain that they are innocent of these charges.

Mr. ALFORD. I am sure, too.

Chairman TALENT. But in any event, they make the tactical aircraft for the Navy.

Mr. ALFORD. That is right.

Chairman TALENT. If you debar them, the Navy has no tac air.

Mr. ALFORD. Would we go to Brazil?

Chairman TALENT. That is right. On the other hand, if you were doing business with them, your contract is going to be small enough that, well, somebody else can pick that up and do it. I hadn't even thought of that aspect of it.

Mr. ALFORD. They were gone.

The small businesses cannot show such indispensability. Also, other giant mainstays as IBM, AT&T, Lockheed, etcetera, will also have the luxury of the exemption from effective expulsion per national security as opposed to small businesses.

A recent example of abuse of the present system that would be accelerated by the proposed changes can be found in Indianapolis. A member of ours was awarded a HUD procurement and elected to comply with Section 3 of the HUD Act, which allows a contractor to contract up to 30 percent HUD-funded jobs to people living in public housing and under the poverty level.

This perfect welfare-to-work law has been on the books since 1968, but it meets strong resistance from labor unions. Unfortunately, because of the resistance, only eight cities in this nation abide by this law.

Our member was very successful to the disdain of local unions, and put many people into the workforce for the first time. Meddling from union activists led to our member being officially cited by HUD for employing too many unskilled workers. That was all

right, in that we could take the bad publicity for being cited, and challenge the unfair accusations. Under the proposed changes, however, this admirable contractor would face debarment from federal work forever.

Again, we say that the proposed changes allow too much judgment to the eyes of the beholder. The term "integrity and business ethics" are too debatable and too indefinite. Any fifth grader can reasonably debate that our current Commander in Chief is void of integrity and business ethics.

On another front, our admiration and former Senator Honorable Carolyn Mosley-Braun is having her ambassador appointment being held up because of an applicable Committee member's attack on her ethics. Subjectivity has no place here, and certainly not in the federal procurement.

We see the changes promoting union activity, which all correlation indicates would be detrimental to the utilization of small businesses. Also, such activity would have great negative affect on the utilization of minority businesses, and, even more so, minority workers.

Thank you very much for this opportunity. We hope the current legislation is vigorously enforced and the proposed changes quashed from further progress.

[Mr. Alford's statement may be found in the appendix.]

Chairman TALENT. Thank you, Harry, for your comments.

And our next witness is Phyllis Hill Slater, of Hill Slater, Inc., who is testifying on behalf of the National Association of Women Business Owners.

Phyllis, again, we are grateful to you for taking time out to come down here and testify to us. Thank you.

**STATEMENT OF PHYLLIS HILL SLATER, HILL SLATER, INC.,
NATIONAL ASSOCIATION OF WOMEN BUSINESS OWNERS**

Ms. SLATER. Thank you.

It is no longer good morning but good afternoon to all of the members of the Committee. I thank you for this opportunity to appear before you today—

Chairman TALENT. Make sure the mike is close to you, Phyllis, so we can hear you.

Ms. SLATER [continuing]. To discuss the proposed rule to expand the scope of the responsibility determination of contracting officers.

My name is Phyllis Hill Slater, and I am President of Hill Slater, Inc., an engineering and architectural firm located in Great Neck, New York. I am also past president of the National Association of Women Business Owners, NAWBO, the only nationwide organization representing the interests of women-owned businesses. NAWBO currently has nearly 80 chapters across the U.S., representing 7,000 members, many of which are classified as small business.

This year we are celebrating our 25th anniversary. The inclusion of women- and minority-owned businesses in the federal procurement process has been a major focus of our organization since its inception. As of this year, there are a total of 9.1 million women business owners in the U.S., generated \$3.6 trillion in sales. This group employs over 27.5 million people.

In 1997, however, only 5,622 women-owned businesses were involved in federal procurement contract actions, amounting to \$3.3 billion or 2.1 percent of contract awards—a figure that is still far—too far below the five percent goal established by the Federal Acquisition Streamlining Act of 1994.

I will speak more about this goal and how we might achieve success at the conclusion of my remarks here today.

It is NAWBO's position that the proposed rule to expand the scope of the responsibility determination of contracting officers to consider compliance of federal, statutory, and regulatory requirements, constitutes a substantial change in government procurement policy and could impose a great burden on women-owned businesses.

We believe this proposed rule would, number one, increase the cost of doing business with the Federal Government. It is our concern that small businesses may be required to provide assurances and evidence of compliance and responsibility on a broad range of federal policy issues that may not pertain to their business at all.

Many small businesses do not have the financial or legal resources to provide that evidence. Not only would proof of compliance cost more than most companies could afford, the time necessary to research, confirm, document, and whatever else may be required would be an unfair burden on small business.

In addition, the amount of paperwork required to document total responsibility and compliance would be enormous and in direct conflict with NAWBO's position on the Federal Paperwork Reduction Act. Not only would small business be affected, we believe the proposed regulation would impose a tremendously increased burden on the Small Business Administration to provide Certificates of Competency for small businesses for every federal regulation.

Number two, women-owned businesses are frequently included in the proposals submitted by prime contractors to help meet the prime's need to include women and minority firms. However, the women-owned company is often eliminated from the procurement once the contract is let. This is a whole other story.

This proposed rule could create an environment where women-owned firms would be required by prime contractors to provide proof of responsibility or compliance, that they might even be able to afford, but could also require disclosure of proprietary information that would, in fact, diminish the firm's competitiveness in the marketplace.

Number three, the proposed rule, we believe, expands the capability of federal contracting offices to ultimately decide, capriciously and arbitrarily, the future of small business. I want to read to you a quote from a recent testimony given by Karen Hastie Williams, Esquire, who was with the Office of Federal Procurement Policy during the Carter administration.

"The proposed regulations are inconsistent and affirmatively harmful to the procurement reform trends of the last decade."

In conclusion, I want to emphasize that we believe the interests of women-owned businesses and the Federal Government would be much better served if contract offices and procurement officials were held accountable for their role in increasing the access to procurement opportunities for women.

We would like more emphasis on concrete solutions to meeting the five percent goal, rather than devising new layers of costly bureaucratic procedures to further discourage women-owned businesses from participating in government contracting.

Thank you.

[Ms. Slater's statement may be found in the appendix.]

Chairman TALENT. Thank you, Phyllis. And, I should have said this to Ms. Lee when she was here. There does seem to be a trend on when they do the streamlining, why that tends to hurt small business. And then when they add new requirements, that tends to hurt small business as well.

I haven't been as big a fan of the streamlining as some other people here. That, as you said, Phyllis, is another issue.

I am going to ask one question and then defer to Ms. Tubbs Jones for her questions. And let me play a little bit—I don't want to say the devil's advocate—but I see a clue of what they are aiming at here, assuming that they are aiming at what it appears they are aiming at. There is no ulterior agenda here. And I think I agree with that, and I want you to tell me whether I am right or wrong in agreeing with it.

I don't have a problem. In fact, I kind of want the government, in determining the integrity of the people it is doing business with, to be a little broader than my understanding is that they have been today. So, in other words, just—right now it seems that they say, "Look, if you are not an embezzler, or you haven't made a false statement on the bid, then we are only going to look at any violations that are in the context of this contract that we are awarding." So we don't care if you have been a felon in a tax case or something.

First of all, is that true? This is just for the professors. And to what extent do they look beyond those kind of narrow considerations? And would you have a problem with a narrowly written rule that said, "Look, if you have a pattern of adjudicated violations of a serious and substantial nature in certain areas, we are going to declare you non-responsible"? Tell me what you think about that.

Of course, the other two witnesses can comment if they want.

Mr. SCHOONER. Mr. Chairman, first let me say that in the discussion earlier and the questions that went to Ms. Lee and Ms. Spector, I believe that given the breadth of the questions they may not have been as accurate in their responses in the context that you actually are referring to.

First, when we talk about that absence or the concern with regard to business integrity and ethics, it is not just that you have to have been convicted of a fraud related to the bid. The nexus that we are looking for is generally related business ethics.

So, for example, if you have a history of basically business-related ethical-type problems, that is enough. And those are the kind of things that come up all the time. So, for example, particularly with concern to the small business community, there are former federal contractors in the federal penitentiary today who had improperly certified their small business size status.

There are other firms who had had numerous problems with regard to be they defective products, product substitution, false

claims, improper certifications, representations. The question generally, though, is: does this regulation bring into the mix relevant issues of business ethics?

And I think the point that concerns me—and it also is the point that my colleague Professor Kovacic spoke to—is given the small number of examples they gave, they haven't given us a very good box to work with, and they haven't demonstrated a nexus that those actual items or laws or norms or regulations are the kind of things we need to focus on in determining who is a proper business partner for the government.

Chairman TALENT. Okay. Well, let me throw the eggs in the fire. I am basically in agreement with what you all have been saying. But let us suppose somebody applied for a contract, let us say with the Department of Defense. And they had been adjudicated and maybe in civil actions, over a period of years, of a number, a pattern of violations, let us say, of Title VII.

So they were just found to have been—they had a policy of just saying, “Well, I don't think there are a lot of these firms out there, but there are some. We just don't like hiring women. And we have got this old boy network, and we are not comfortable with women. We don't think they can act professionally, and we don't hire them.”

And there is a lot of adjudicated civil violations of that. I don't have a problem with the government saying, “You know, we would really—if you are going to be that flagrant in terms of your violation of an important public policy, we don't want to do business with you.”

And I talked to Ms. Lee afterwards, and she said, “Well, yeah, but they may be able to remedy that by getting rid of the HR vice president who was in charge of that policy and getting somebody new,” and so on. We can do that, can't we, without opening up all of these uncertainties in these other areas?

Mr. SCHOONER. I think that the other blurring that took place in the questions going back and forth is there a distinction today between individual responsibility determinations and what leads to suspensions and debarments. Repeated violations, as you indicate, in which we have final adjudications that demonstrate problems are the kind of things that would lead a contractor to eventually be suspended or debarred.

The concern here is that with no nexus to how we perform or whether you are actually a good citizen, I believe was the term used earlier, you may have a number of allegations where it has been suggested that you have problems, but they haven't reached the final adjudications.

I suggest to you, under the regulatory and statutory scheme today any contractor who has repeatedly been nailed in final adjudications by competent authorities, they will show up on the debarred and suspended list today.

Chairman TALENT. Today. Is that your feeling, Mr. Kovacic?

Mr. KOVACIC. I agree, and I think that the circumstance that you described before, Mr. Chairman, in fact, gets picked up today in existing practice. And the concern that I would have with the measure as presented now is that it sweeps in a host of activities that fall well short of that adjudicated violation by an administrative

authority or a judicial authority, that it picks up all kinds of events that aren't necessarily good proxies for a lack of integrity.

Chairman TALENT. Yes. And see, I agree very much with what Harry said, and I think Phyllis was saying also. And you all may want to comment on this. I believe that there is, in a lot of agencies, an established network, and they just typically give the contracts to the same set of people. And they resist anybody breaking into that.

Now, whether that network exists because of just that is the way they have always done it, or whether it is just because of some bias that is a little bit less defensible, or both, I think it does exist in a lot of agencies. And this really would be, wouldn't it, Harry, another excuse for them to use in keeping out the people that they don't want to let in for other reasons?

Mr. ALFORD. Sir, let me first say that the National Black Chamber of Commerce has a very good relationship with Boeing and with Texaco. They have had some serious Title VII problems. Still, we stand by them, and they have taken care of their Title VII problems at great expense.

There is one member of ours—Pyrocap—that is a fire suppressant, trying to sell to the Department of Interior for use in forests. The career path of buyers in the Department of Interior is that they retire and then go to work for Monsanto, the chief competitor of Pyrocap. Even though they are superior in tests and lower in price, Pyrocap cannot sell to the Department. Guess why? It is there. So this would be another reason that it could find out where Pyrocap did not cross a T or dot an I. Get rid of them.

Chairman TALENT. Yes. Monsanto is another fine company headquartered in my district. [Laughter.]

But, Harry, I don't know if you are doing this deliberately, but—[laughter]—the point is very well taken. I am on the Armed Services Committee, and I have seen this—when they leave the service and then they retire and they become a consultant for, and then the company they become a consultant for gets a lot of the business. I am not even saying that is necessarily wrong.

But the problem that—what I really want to drive home to him, the way I think your testimony has done, is that she is not going to be supervising each one of these contract awards. They are going to be made by people who have complex sets of reasons for doing what they are going to do. And it is fine to say, "Oh, yes, we are just going to root out all of these bad actors," but you can also use it to say, "Oh, we really question that person's ethnics."

One of the things I really like about small business, small business is a way—one of the few ways left for people who maybe have had some problems in their background but have that old entrepreneurial spirit to turn things around and get their lives going. But they have got a few things in their background that you could use if you wanted to in denying them contracts.

Mr. ALFORD. Sure.

Chairman TALENT. Do you know what I mean? I mean, what else are they going to do? If you have got some problems in your background, maybe a suspended sentence for something—when you were a kid, for drug use or you went joyriding with a car, you are

not going to get into MIT and get a Ph.D. Do you know what I mean?

But you can start a small business and become successful, and then apply to the government. And all of a sudden, you don't have the integrity now to do the contract. And I just don't think they are sensitive enough to the fact that that is going to happen out there. Or if the government doesn't do it, the prime uses it as the excuse for never using the woman contractor that they listed in order to get the contract in the first place.

Mr. ALFORD. One of our biggest fan clubs are people who are incarcerated, and we get letters daily from various correctional facilities, people saying, "I am going to get out, and the only thing I can do with my life is become an entrepreneur. I can't find a job. Help me become an entrepreneur." We are developing a division for ex-offenders.

Chairman TALENT. Yes. Phyllis, please, go ahead.

Ms. SLATER. Yes. I just wanted to—Deidre Lee kept talking about the fact that she is going to have this hearing; she is waiting for the comments. I would like—I don't know whether it is possible or not, but I would like the testimony here today, and all of the comments made today, be made part of the comments for her hearing because I would hate for any of them not to get on part of the record. I don't know if that is possible.

Chairman TALENT. That is a good suggestion. I was going to talk to Ms. Velazquez about trying to submit a joint letter with some comments from members of the Committee who wish to sign on about our concerns in this regard. I think she got the message. I want to work with her on it.

And as I said, I think there is some room—a real desire to clarify the existing system, which is certainly not a model of clarity, is probably a good idea. But I don't know when she has gone too far.

Mrs. Tubbs Jones, I took longer than I wanted to. I want to recognize you.

Mrs. JONES. Thank you, Mr. Chairman.

Professor Schooner, are you suggesting that integrity and ethics is not already in the regulation currently for someone who provides review—a contract compliance person to consider?

Mr. SCHOONER. Let me—

Mrs. JONES. Yes or no.

Mr. SCHOONER. I am not sure I understood exactly what you were saying, but let me—

Mrs. JONES. Then let me ask it again, so we can be specific as to what I am asking you. I am asking you, is the term "integrity and ethics" as a requirement used by contract compliance persons to determine whether someone can be compliant for purposes of government contracts?

Mr. SCHOONER. Yes. The correct term in the regulation today is satisfactory record of integrity and business ethnics.

Mrs. JONES. Thank you. So that is there.

Mr. SCHOONER. Right. And let me also say—

Mrs. JONES. Let me take to the next question, and then you can say whatever else you want to say, because what I am trying to suggest to you and Mr. Kovacic and Mr. Alford and Ms. Hill Slater, not necessarily that this piece is the best piece of change in regula-

tion, but that currently you have contract officers who review and consider integrity and business ethics without anything to help them make the determination of what integrity and business ethics are.

So, therefore, before you just throw the baby out with the bath water, that you should also consider whether or not there is room for trying to be clearer to the people who you vest with this discretion. And it is all subjective. I don't care what anybody in this room says. If you put a person and you give them something to say, something to review, whatever, there is subjectivity that comes into the process. That there may be room at least for some consideration.

Now you can tell me what you wanted to say.

Mr. SCHOONER. I just want to be unequivocally clear, to the extent that we are on the record, that I——

Mrs. JONES. We are on the record.

Mr. SCHOONER. I believe that integrity is one of the single most important and defining characteristics of the United States federal procurement system. I have spoken to dignitaries in foreign countries, and I have represented the United States outside of the country in talking about the federal procurement system.

And let me also mention that if you speak to any of my students in my classes, they will tell you that I say that our entire system runs on three basic bulwarks. First, there is——

Mrs. JONES. Well, define "integrity."

Mr. SCHOONER. Wait. First is competition, second is transparency, and third is integrity.

Mrs. JONES. Define "integrity."

Mr. SCHOONER. Integrity, as it affects us in our federal procurement system, there is a front end and a back end. In terms of the front end, it is a fundamental threshold with regard to the contracting officer through a preaward survey's determination of whether this contractor will basically fulfill the promise in which they enter into.

But more importantly, what is very important to keep in mind in our procurement system, our procurement system is layered very deeply with a staggering array of statutory and regulatory requirements that define what integrity means. It is compliance with a host of specific regulations, some of which are mentioned here, some of which are not, some of which are more important and some of which are less important.

But just so you know, in government contracts today, every major government contractor in the country has a compliance program. And people like ourselves go into these companies to train them what compliance means. And so let there be no doubt in your mind that government contractors do have an idea as to what integrity means in terms of compliance with the appropriate laws and rules. The——

Mrs. JONES. There is no doubt in my mind.

Mr. SCHOONER. Okay.

Mrs. JONES. What I am suggesting to you, sir, is that because integrity and ethics may not be any more specifically delineated, in some instances it leaves opportunity for the compliance officer to consider whatever he or she would want to consider in the deter-

mination. And that perhaps it may not be a bad idea to delineate a little more. Do you disagree with that statement?

Mr. SCHOONER. I believe that I do not disagree with you that integrity is something important for the contracting officer to determine when awarding a contract. The only concern that I have tried to voice with regard to the proposed regulation is that it is vague. For example, I would sense that——

Mrs. JONES. Is it any more vague than what it already is, though?

Mr. SCHOONER. Much more vague, ma'am. I believe that you might——

Mrs. JONES. If you don't define "integrity and ethics," how could integrity and ethics be more vague than when it is defined?

Mr. SCHOONER. When I speak to the vagueness, what I specifically refer to, for example, is we were talking earlier—I believe that a final adjudication by a competent authority is a very good benchmark as to whether someone has broken the law; whereas, I personally believe, as a matter of law, that an allegation by a competitor is not. And I believe that is where the vagueness——

Mrs. JONES. And you think that because it goes on to speak to—and I don't have the language in front of me—that that includes an allegation and that a compliance officer with good experience would include just the allegation? Where is my piece of paper?

Mr. SCHOONER. Specifically, as I suggested in my testimony, the main concern that I have is that they distinguish in the supplemental information, they say that, normally, the contracting officer should base adverse responsibility determinations involving violations of law or regulation upon a final adjudication by a competent authority concerning the underlying charge. And I agree with that.

My concern begins when they go on to say, "However, in some circumstances, it may be appropriate for the contracting officer to base an adverse responsibility determination upon persuasive evidence, which is meaningless, of substantial noncompliance, which is meaningless, with the law or regulation." And then they go on to say here, but not in the regulation, that it can't be isolated or trivial. That is where my concerns with regard to the vagueness of this regulation lies.

Mrs. JONES. And I want to back up and say that right now you don't believe that compliance officers do that without it being delineated.

Mr. SCHOONER. Under the standards today, they cannot basically just pick something out of the air, because there are due process rights. If, in fact, you——

Mrs. JONES. You are still in a classroom, if you don't believe it happens. And that is why these two people seated here, Mr. Alford and Ms. Slater, are suggesting that the issue be—or pushing the issue as well is because based on their experience of being women and African-American doing business with the country that has happened. And they still insist, you can't—it is——

Mr. SCHOONER. I believe I am agreeing with you, ma'am, but I guess the point that I am trying to make—as I said at the beginning, the contracting officer has a staggering amount of discretion to, if they want to, take advantage of a contractor based on these allegations.

Mrs. JONES. No question.

Mr. SCHOONER. This broadens the contracting officer's right to disenfranchise a small business, a small disadvantaged business, or someone else—

Mrs. JONES. I suppose we disagree on whether or not when you give a compliance officer greater—more instruction, it expands or detracts. I think it distracts from their ability—you have so much discretion versus expands. But I guess that is why we are disagreeing on this point.

Let me hear from Mr. Alford and Ms. Slater real quickly, and then—because Mr. Kovacic is your colleague, and I have been having someone sit in my office for an hour and 15 minutes because it was so important for me to be here that I am going to run out—Mr. Alford, Ms. Slater, actually, I am speaking to the Chamber in Las Vegas in a couple of weeks.

Mr. ALFORD. Good.

Mrs. JONES. Yes. Go ahead.

Mr. ALFORD. I will make sure they treat you right.

Mrs. JONES. I would appreciate it, because I don't have Monsanto or any of these other places in Cleveland, Ohio. [Laughter.]

Chairman TALENT. Next time you meet in Las Vegas you may want to consider asking the Chairman to accompany you. [Laughter.]

Mr. ALFORD. We have a convention there in June, sir, and perhaps you can—

Chairman TALENT. Thank you. [Laughter.]

If I can stay away from the tables, I will be fine.

Mrs. JONES. Okay. Go ahead. I want to give you a chance to comment or—and my legal background forces me to cross examine. My husband says I cross examine. But anyway—son says it, too. Any commentary you want to add or comment that you haven't already made before I leave—I hate I have to leave, but at least I did stay. Everybody else left. Okay. Go ahead.

Mr. ALFORD. Well, ma'am, it is certainly a struggle out there, and your predecessor has stepped in on behalf of these constituents in a very admirable way. I think Congressman Stokes was basically one of the founders of the National Association of Minority Contractors.

Mrs. JONES. I was at your event where you gave an award last year, I think.

Mr. ALFORD. And Dominick Ozanne, when he had contractors. And Dominick would tell you that it is just literally hell for a small business to do work with the Federal Government on a consistent basis.

Now, one thing I am finding out as we try to branch out internationally, that when we take our businesses to Brazil, to Ghana, to other places, one comment I constantly hear is that, "Hey, if I am qualified and capable, I am going to get this job." What a concept. It is different. And I think the racial animus and the way we do business in this country still exists. And having instruments that could be misused in that animus is very dangerous for us.

Mrs. JONES. And so the bottom line is you say, no matter what, you believe this empowers a contract compliance officer to misuse it more than it does to require him to set forth or have identifiable

means of either saying you comply or don't comply, if I have said that question right.

Mr. ALFORD. It takes him to want to be very powerful, to want to be—

Mrs. JONES. More powerful than he or she already is?

Mr. ALFORD. Yes, ma'am. Lord and God. You have got—I have got a contractor in Jersey with \$3 million in bondable—bondable \$3 million, \$1½ million cash money in the bank, 20 years track record outstanding work, and he has to go through the COC process for a \$100,000 job, to do a little roof at a naval installation.

Mrs. JONES. But this is in—the COC is in place with regard to—regardless of this regulation.

Mr. ALFORD. He can always come back and win his case through the COC process. Once he is debarred forever, it is over.

Mrs. JONES. Okay.

Mr. ALFORD. There is no recourse.

Ms. SLATER. I agree also that there is always—the weakest link in the whole procurement chain is personal bias, and we are under that gun all the time. I think that this just gives more ammunition, just different ways to get at whomever they want to get at. And it is very costly for the small business person to have to be able to comply with some of the things that they will be asking for.

At best now, the whole procurement process is not set up for—to be user-friendly to women, minorities, or a small business in general. I think it is just—it is just going to be even more onerous with the rules as it states.

The other thing I wanted to talk about was the SBREFA. I have been on SBREFA Enforcement Board now since they first put people out there. It is about two years now I think I have been serving on the SBREFA Board for Region 2. And what I don't understand is how things like this get this far with SBREFA in place. I thought that we are supposed to have some kind of a watchdog—

Chairman TALENT. If the gentelady—I am sorry.

Ms. SLATER. Well, no. I was going to say I can't answer the question.

Chairman TALENT. If the gentelady would yield, they get—the enforcement mechanism of SBREFA is ultimately—the real hammer is an appeal in court from the final regulation. And then, of course, such oversight as we provide here, which really is a nicer word for "harassment," that we provide here, to try and make sure that they do what they are supposed to be doing.

So at this proposed stage, they get around having to conduct the analysis of the impact on small business by certifying up front, as they have done here. They just certify it is not going to have a substantial impact on small business. So if you certify that, then you don't have to go through the analysis.

Now, that makes the whole rule very vulnerable in court. In my judgment, if they went ahead and promulgated this, apart from the Administrative Procedure Act challenges, which the professors know more than I—this thing is just dead in court because a judge is going to look at this and say, "What do you mean it doesn't have a substantial impact?"

So that is one of the reasons I make this point to the agencies. You are going to get this thing knocked out eventually. But in the

meantime, we all go through this, which we could avoid if they would just do the analysis in the first place and hear these concerns.

And so the short of it is, yes, this process—I think there is a good chance that they will pull this thing and redo it. I don't want to put words in her mouth, but I hope that they do, and largely because—in part, because of SBREFA. So it is out there and it is helping, but it would help more if they would follow it. I mean, it really would.

Mrs. JONES. Mr. Kovacic, before I run out the door, I don't want to think—

Mr. KOVACIC. Yes, ma'am.

Mrs. JONES [continuing]. Want you to think that I didn't give you a chance to tell me whatever you wanted to tell me. I saw you hurriedly making notes or whatever, so please be heard.

Mr. KOVACIC. I would just echo Steve's comment that I do believe that this, rather than providing guidance, adds murk. And my concern would be that, in particular, by potentially widening the orbit of events that could trigger a disqualification, it increases discretion rather than limits it. But I would completely share your suggestion that clarifying regulatory provisions is generally a desirable end. My fear is that this one doesn't do it.

Mrs. JONES. Let me ask you, if this were—this regulation specifically was a clarifier and did not lead to the disbarment or whatever else, would it be something that you could be—what would be a guide for the officer? Would you have—

Mr. KOVACIC. A true clarification, I think, would be helpful, though I would, as a couple of your colleagues were asking before—and I don't recall her name, but your—

Mrs. JONES. Juanita Millender-McDonald.

Mr. KOVACIC. As your colleague put it so well, I think; that is, what was the inspiration for this? Is OFPP actually getting feedback from its contracting officers who say, "We are adrift"? And I would like to know how often, how frequently, they have gotten that. And my intuition in listening to the previous panel is that kind of feedback hasn't been received.

Mrs. JONES. I want to, Mr. Chairman, thank you very much for the opportunity to be a part of this discussion and to each of you, Professor, Professor—I used to be afraid of professors when I was in law school. It is good not to be afraid of—

[Laughter.]

Mr. SCHOONER. We are friendly.

Mrs. JONES. I am kidding. Mr. Alford, Ms. Slater, thank you very much for the opportunity to—

Chairman TALENT. Mrs. Tubbs Jones, I am sure the professors find it hard to believe that you were ever afraid of anybody.

Mrs. JONES. Oh, I was. I was. [Laughter.]

Chairman TALENT. I thank you for sticking around and for your comments. I was looking forward to them. I think they were really good.

Unless anybody else has anything to add, I think we have vetted the issue pretty well. I am going to, without objection, have the record left open for 10 days for written questions that members of

the Committee may wish to make, and I want to thank everybody for their attendance and their comments.

The hearing is adjourned.

[Whereupon, at 2:08 p.m., the Committee was adjourned.]

A P P E N D I X

STATEMENT
OF
JIM TALENT
CHAIRMAN
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
WASHINGTON, DC
OCTOBER 21, 1999

Our hearing today is about how an obscure proposed rule change in the Federal Acquisition Regulations will hurt the small businesses that contract with the government to provide a wide variety of goods and services. I have called today's hearing to seek a fuller understanding of the proposed rule and how its vague standards will be implemented by federal agency procurement personnel.

On July 9, 1999, the agencies with primary responsibility for developing federal procurement regulations issued a proposed rule that supposedly would "clarify" the existing legal standards by which contracting officers make responsibility determinations prior to the award of the contract. In particular, the proposed rule would require that contracting officers find that a prospective bidder is not responsible if the contracting officer has "persuasive evidence" of "lack of compliance" with the tax laws or "substantial noncompliance" with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws. Of course, these are only examples. In fact, the contracting officer could find a lack of responsibility for violations of any of the regulations in the single-spaced 17 linear feet of the Code of Federal Regulations. The contracting agencies' efforts to clarify the responsibility standard permits the contracting officers to find a business non-responsible based on "persuasive evidence" -- a standard of evidence which does not currently exist in civil, criminal, or administrative law.

What the federal agencies view as a clarification, small businesses may view as a trap preventing them from being awarded federal government contracts. As Congress recognized when it enacted the Small Business Regulatory Enforcement Fairness Act, it is especially difficult for small businesses to stay abreast of the changes made in the 17 linear feet of single-spaced rules set forth in the Code of Federal Regulations much less be experts at complying with all of those rules. Thus, a series of technical violations, such as not having Material Safety Data Sheets, could result in a finding of non-responsibility. And if one contracting officer finds that the small business lacks appropriate business ethics and integrity, I fail to see how another contracting officer considering the same violations for a different contract could reach the opposite conclusion. The end result is that a small business could be prevented from contracting with the government for what is the regulatory equivalent of a combination of parking and moving violations. I find that both problematic and distressing.

What I find even more distressing is the contracting agencies lack of concern for the potential adverse consequences to small businesses. The agencies determined that the proposed rule “is not expected to have a significant economic impact on a substantial number of small entities.” Well if you are a government contractor I can think of no more severe penalty than being prohibited without appropriate due process procedures and by the ad hoc actions of contracting officers from doing business with the government. And little doubt exists that small businesses represent a significant portion of the federal contracting community. In fiscal year 1998, small businesses were awarded nearly three-quarters of all federal government procurements with a total value of more than 33 billion dollars. The potentially adverse significant consequences of the proposed

rule has been recognized by numerous small business organizations including: American Bakers Association, American Broiler Manufacturers Association, Associated Builders & Contractors, American Consulting Engineers Council, American Electronics Association, American Fire Sprinkler Association, Associated General Contractors, American Hotel & Motel Association, American Road & Transportation Builders Association, American Staffing Association, American Trucking Association, Computing Technology Industry Association, Contract Services Association, Copper & Brass Fabricators Council, Environmental Industry Association, Food Distributors International, Hospital Central Services Association, Independent Electrical Contractors Association, National Association of Manufacturers, National Association of Women Business Owners, National Black Chamber of Commerce, National Council of Agricultural Employers, National Defense Industrial Association, National Federation of Independent Business, National Mining Association, National Roofing Contractors Association, National Soft Drink Association, National State Route Mail Contractors Association, National Stone Association, Small Business Survival Committee, and the United States Chamber of Commerce. In addition, nearly 600 small business owners have already taken the time to file comments with the Federal Acquisition Regulation Secretariat opposing the proposed rule. A cursory review of a sample shows that these are not simply one-line statements but relatively detailed comments noting the potential consequences that the proposed rule, if implemented, would have on their businesses. I suspect many more small businesses will file comments by the November 8 deadline for filing of comments.

Today's hearing will investigate the legal and policy implications of the proposed rule. I expect to examine such issues as how the federal agencies plan to implement this

rule and its impact on government procurement efficiency while maintaining the mandate to increase opportunities at both the contractor and subcontractor level for small businesses. I also am interested in finding out how the federal agencies plan to implement the proposed rule at the contracting officer level and whether the safety valve of the SBA's certificate of competency program will function in this new responsibility environment. The committee also will hear from small business representatives about the potential adverse impact that the rule will have on their businesses.

Let me conclude by saying that I am not philosophically opposed to the federal government refusing to do business with businesses that have been convicted of crimes or have had major civil penalties imposed on them and upheld in court. However, this rule goes far beyond that non-controversial point to corral many small businesses within its ambit. It is these consequences that give me great pause and I look forward to a lively and informative discourse on these issues.

I will now recognize the ranking member, the distinguished gentlelady from New York for whatever statement she may wish to make.

Statement by Congresswoman Nydia M. Velázquez
Regarding
Federal Acquisition Regulation and Contractor Responsibility

October 21, 1999

Thank you. I am gratified that we have come together today, in this responsible and timely fashion, to consider the important issue of federal acquisition regulation and contractor responsibility. Federal contracting and small businesses is one of the most important topics covered by our committee. Today, we are here to explore an issue that most of us agree is a matter of common sense.

There is nothing controversial in saying that contractors should abide by environmental and labor laws. We can all agree that contractors should pay their taxes. And there shouldn't be anyone in this room who is uncomfortable with using contractor responsibility to promote acceptable behavior.

For the better part of this century – since the 1920's – the government has been concerned with the corporate responsibility of federal contractors. Since World War II, the government has instituted a formalized process to tie contract procurement with federal responsibility.

And even putting aside the fact that these are questions of regulation and law, nobody – not in the business community, and not in government – wants one contractor to be able to circumvent these regulations and create an unlevel playing field. Companies should not have to deal with a competitor that employs unscrupulous methods so that it can undercut others' bids; and government should do what it takes to make sure that doesn't happen.

So let me say one thing at the outset: I do not consider it our job today to debate the importance of contractor responsibility, or whether or not there should be contractor responsibility. Our job today is to determine the best way to ensure contractor responsibility. Because even the best idea, improperly implemented, can have unfortunate, unintended consequences.

These regulations need to be structured in an intelligent and effective way. Determining a company's "integrity and ethics" will always – unavoidably – be at least in part subjective. If we are going to expand the definition of this criteria, we must provide a mechanism for responsibly putting it into practice.

In our efforts to promote responsibility, we must not inadvertently deny small businesses their right to due process; or permanently restrict small businesses from competing for government contracts following one or two minor, accidental violations. And critically, we must ensure that our efforts to make the process more clear do not inadvertently add confusion and mixed messages where none existed before.

Making sure government contractors are good corporate citizens is little more and little less than common sense. The question we face now is how we make sure we *implement* this goal with a little common sense.

I am optimistic that we can. I commend the Chairman for holding this hearing today, still weeks before the end of the comment period. He is dealing with this in a responsible manner, and I am committed to doing the same. Thank you.

THOMAS M. DAVIS
11TH DISTRICT, VIRGINIA

Congress of the United States
House of Representatives
Washington, DC 20515-4611

TESTIMONY OF THE HONORABLE TOM DAVIS
ON PROPOSED CHANGES TO PART 9 AND 15 OF THE
FEDERAL ACQUISITION REGULATIONS
COMMITTEE ON SMALL BUSINESS
OCTOBER 21ST, 1999

Mr. Chairman, thank you for inviting me to participate in today's hearing. Before I came to Congress in 1995, I worked for PRC as their general counsel. As a major government contracting firm, one of the primary areas I handled was problems in the government procurement process. Prior to 1994, the federal procurement system simply did not work. It took months to procure IT products and the products were usually obsolete as soon as an agency received them, and as a contractor, you were often subjected to unnecessary audits that significantly hampered your ability to get the job done. Additionally, if a contractor did not get a contract, you protested and protested. The process was highly politicized and all the parties involved knew the system was broken.

We have made tremendous progress since that time. I have been fortunate enough to work closely with the Administration on a number of the procurement reforms that we have implemented. We have created the multiple awards schedule at the General Services Administration (GSA), and given federal agencies greater flexibility to go out and find the products and services they need. We worked together and passed the Clinger-Cohen Act, FASA, FARA, and the FAIR Act. We took the politics out of procurement and made it possible for our government to operate more efficiently.

That is why I have grave concerns about the regulations issued by the Administration on July 9th, 1999. These proposed regulations will hamstring the procurement process and take us back to the days of contractors protesting, and protesting. I understand that we all represent constituent groups we try to support and assist, but I would hope we all remember to first do no harm. We have a system that is not broken, it debars bad actors, and we have laws on the books that punish businesses for breaking our Nation's environmental, labor, tax, and anti-trust laws. Businesses already pay fines if they violate any of the laws mentioned

in the proposed regulations and suffer a blackmark on their reputation. The regulations issued by the Administration will now punish businesses twice for past bad actions and discourage businesses from competing for federal contracts.

I am equally concerned about the level of lobbying that the Administration has employed to keep Members of Congress from participating in the public comment process on these proposed regulations. When I began to collect signatures for the letter I sent over to OMB Director Jacob Lew in September, my democratic colleagues told me they had been asked to overlook their concerns and not sign my so-called partisan letter. That shocked and surprised me. I have always worked on a bipartisan basis for effective procurement reforms. Additionally, I was surprised that Dee Lee, my good friend and the Director of the Office of Federal Procurement Policy at the Office of Management and Budget did not know that the Administration was lobbying my colleagues. I think this indicates the political nature of the proposed regulations and indicates that the Administration has not adequately considered whether or not these regulations will harm the procurement process.

Contracting officers throughout the government will be unable to perform their job duties, instead they will spend their time responding to a blizzard of accusations offered by competing companies, and various interest groups. The process will again be mired by protests and agencies will not be able to get the services they need in a timely manner. We will waste taxpayers' dollars and encourage less efficient companies to contract with the government. Small businesses could often be hardest hit. Many small businesses get their first opportunity by contracting with the government. Now they may find themselves the victim of baseless accusations--accusations they may not be able to afford to defend themselves against. As a matter of fact, the regulations have already created an atmosphere of fear for businesses. A small business owner in my Congressional district was concerned that if he testified before this Committee today, he could face possible retaliation when pursuing future government contracting opportunities. I would like to summarize and insert his comments into the record today:

Let me begin by saying thank you to Mr. Tom Davis for pinch-hitting for me by reading this statement. Though I would enjoy interacting with this honorable floor, my instincts tell me to not be present, to stay behind the scenes. I do not want to take on the potential responsibility of being the target of any persons or groups with an agenda by being present today. I am afraid to come forward against these proposed regulations-- risking the future success of my business and tarnishing my business reputation.

Our firm is an information technology networking firm specializing in the design and integration of high speed, cutting edge LAN/WAN technologies. Our customer base is comprised of federal, state, and commercial clients. With corporate headquarters in Northern Virginia, we provide solutions all over the country. We are a small, women-owned business with several multi-year government contracts. As a young company with less than \$10 million in revenues, we would not be where we are today without a lot of hard work, some connections, and putting our house and retirement dollars on the line for our American dream-- to have our own company and make a difference in the lives of our family, our employees, and our community.

I am a passionate believer in accountability, and when it comes to government procurements, we strive for an even playing field. We expect everyone to be held to the same bar that we must compete by. I have years of experience in the field, and interact with hundreds of government procurement staff in any given year. I have seen lots of things happen in the procurement process. At the end of the day, there are more good procurements than bad, but there is still more work that needs to be done to prevent procurement practices that limit competition, increase government waste, and stall small business success. After all, these are my tax dollars at work, too. Let me say thanks to all of you who are striving to fix the bad. Please focus your efforts on improving our procurement system instead of creating new loopholes and expanding contracting ambiguities as these proposed regulations recommend.

When I read the draft regulations about contractor responsibility criteria changes, I cringe. What benefit will come of this other than pandering to one side or another? In the real procurement world, there are more than enough rules to keep us all honest. The Federal Acquisition Regulations (FAR) has a clearly defined procedure for suspension and debarment that gives the contractor and the agency an equal opportunity to present their case. Labor and employment laws provide additional practices and restrictions the contractor is required to abide by with suspension and debarment again clearly defined as the fine for noncompliance. Let's start by enforcing what we already have on the books before adding inappropriate and ill-defined regulations that will make it more difficult for the small business contractor and government to abide by the rules.

Just two weeks ago, during the final days of FY99, we were involved in a specific procurement that exemplifies where we, like many other small businesses, get stuck in a lose-lose situation. In this particular example at a government hospital in Texas, a CO required all bidders to be part of a GSA Schedule, or GWAC contract. We have a broad GSA program, are certified in the network products requested and submitted a bid. We were high by \$684 on a \$72,000 job. On the face of it we lost. Fine, it was a competitive award. However, upon scrutiny, the winning bidder misrepresented their GSA Schedule contract, and misrepresented their certification to purchase and install this product from

the manufacturer. Bringing this information to the attention of the CO was less than productive-- he emphatically refused to re-compete the deal, claiming end of year workload and paperwork. After several days of back and forth, the CO accepted an unsolicited bid from a third source (referred by the winning bidder) with a completely different contract number, and modified the award with the identical dollar amount as the original award.

So, my options are, to protest the award and if I win, pay all (and probably more) profit made on the deal to the protest lawyer, and risk establishing myself as a pain-in-the-neck to this CO for protesting and never be considered for any future requirements managed by that CO. Or, I take it on the chin and hope the CO does not consider me a pain-in-the-neck on the next requirement, since I played along with him and did not protest this award. Either way, we lose, and the government loses by not calling on the carpet a contractor who knowingly misrepresented a government contract. Where is the accountability?

I recount this example to you not because I want to harm the reputation of this or any other CO, but instead to stress to you that sometimes even the most clear procurement procedures are misinterpreted in their application. Good or bad, this CO made a decision with the discretion afforded in procurement regulation. While no amount of regulation, no matter how specific can, or should, completely eliminate the CO's decision-making ability, these proposed regulations allow for too much discretion. Inconsistent application resulting in slow contract award and increased protests and litigation will harm not only the contractor, but the agency through decreased competition, increased paperwork, and increased overhead costs. In reviewing the proposed regulations, I remain unclear on how to fulfill its requirements. If I'm having difficulty determining how to abide by these regulations, I believe a CO will have an equally difficult time interpreting them for enforcement.

I believe the costs of the proposed regulations far outweigh any assessed benefit. Allowing these regulation to be finalized will create a purchasing environment that is not competitive and will harm all parties involved.

Respectfully Submitted,

Company Vice President & Business Owner

This is not unique to small businesses. When I first became aware of these

proposed regulations, I was upset to discover that many large companies are afraid to publicly oppose these regulations lest they be labeled a bad actor, or become the future target of an interest group. We all believe law abiding and ethical companies should receive government contracts but we have no evidence to suggest that this is not the situation presently.

If we would like to ensure that criteria are delineated that requires companies contracting with the government have good labor practices, let's do that without giving unions the ability to force companies and employees to unionize. These regulations go much farther than prohibiting companies with poor labor practices from contracting with the government. I believe these regulations as currently written, if applied to federal agencies, would prohibit agencies from continuing to carry out their functions. The federal government, itself, has substantial violations in a number of the areas set forth in the July 9th regulations.

For instance, in 1997, according to the Federal Labor Relations Authority (FLRA) the federal government had 5,323 unfair labor practices charges filed against it. The federal government reached a collective bargaining impasse 148 times in 1997. For FY1998, the Occupational Safety and Health Administration issued the federal government 1,153 citations. The Environmental Protection Agency took 365 enforcement actions against federal facilities in 1996, and fully one-quarter of all federal facilities are not in compliance with the Clean Water and Clean Air Acts. Lastly, the government has 36,333 unresolved bias cases being investigated by the Equal Employment Opportunity Commission.

Additionally, I have serious concerns about the worker retention and retraining language included in these proposed regulations. Nowhere have we as the legislative branch of our government codified a definition or standard of worker retention and retraining. In the state of Virginia, we currently face severe worker shortages particularly among technology companies. Technology companies lure employees away from one another, and individuals are able to shop their unique skills around from company to company. Small businesses open and split into two new businesses almost instantly, as rapidly as our changing and new technologies emerge. If we develop these new artificial standards, will companies that have struggled with personnel shortages find themselves no longer able to compete for government contracts? The federal government procures \$28 billion in information technology products a year. The government is the largest purchaser of IT products in the world. Will our rapidly growing IT economy be crippled by vague regulations? If we need to mandate worker retention and retraining goals, we should do that through the legislative process and determine

how such regulations should be written.

Also, I would like to point out the effectiveness of the contracting process as it currently operates. The Administration claims that the proposed regulations clarify the intent of current law. They claim, therefore, there is no need to be concerned about the new regulations. As an example, they describe a firm (Standard Tank Cleaning Corporation) that was denied a federal contract to clean up an environmentally contaminated sight. The firm was denied the contract because they had past environmental violations. I would like to counter the Administration's argument by noting that we should not complicate a process that is already working by adding layers of regulations. I think all of us agree that the instance described above is when a company should be prohibited from performing a government contract. If there is a nexus between the violations and the job the company would like to perform, that is entirely appropriate. Unfortunately, these regulations do not use the current standards, this takes us to a new threshold of proof that encourage companies, interest groups, and disgruntled employees to use accusations to hurt responsible companies and hurt the day-to-day operation of our Nation's government.

The current standards for deeming a contractor irresponsible are as follows:

- (1) Adequate financial resources;
- (2) the ability to meet the required performance schedule;
- (3) a satisfactory record of performance on other contracts;
- (4) a satisfactory record of integrity and business ethics;
- (5) the necessary organization, experience, accounting, and operational controls; and
- (6) the necessary production, construction, and technical equipment and facilities.

These criteria are broadly written to give a contracting officer the flexibility he or she needs to prevent bad actors from contracting with the government. These new regulations will only ensure that the federal procurement of goods and services is set back ten years. The proposed regulations ignore all of the streamlining initiatives that this Administration supported and worked to pass.

Again Mr. Chairman, I would like to thank you for holding this hearing today. I hope this hearing is the first step towards negotiating language with the Administration that will do no harm. There is no demonstrated need for these new regulations, if we must issue these regulations let's do so by working together to ensure that we make government less effective and efficient.



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

**TESTIMONY OF DEIDRE A. LEE
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY,
OFFICE OF MANAGEMENT AND BUDGET,
BEFORE THE U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
OCTOBER 21, 1999**

Mr. Chairman and Members of the Committee:

I have been invited to appear before you today to discuss the Administration's proposal to amend the Federal Acquisition Regulation (FAR) concerning contractor responsibility, as well as to change the rules governing reimbursement of certain costs relating to contractor legal proceedings and unionization activities.

A proposed rule was published in the Federal Register on July 9, 1999 (64 FR 37360). The extended 120-day comment period closes on November 8, 1999. We will review all comments that we receive during this period, and we will keep you informed following the comment period.

This morning, I would like to briefly discuss the proposed rule before responding to the questions in your letter of invitation. The fundamental purpose of this proposal is to protect the Federal Government. Like any private citizen doing business in the commercial marketplace, we want to be assured that the Government is doing business with individuals and entities who can be relied upon. More specifically, we hope to protect the public's interest by having greater assurance that the firms

record of repeated serious legal violations. The overarching theme behind the proposed rule is the concept that the Federal Government ought to do business with good citizens who comply with the law.

Currently, FAR 9.104(d), concerning general standards of contractor qualifications, states that to be considered “responsible,” a contractor must: “Have a satisfactory record of integrity and business ethics.” This proposed rule would clarify the existing FAR rule by adding examples of what would constitute an unsatisfactory record of “integrity and business ethics” for the purposes of implementing this long-standing general standard. Specifically, this rule proposes to add a parenthetical statement that a prospective contractor’s failure to comply with various laws, including criminal laws, tax laws, health and safety laws, labor and employment laws, and consumer protection laws, constitutes a potential basis for finding that a contractor does not have a satisfactory record of “integrity and business ethics” for the purpose of being awarded Federal contracts.

We are not proposing to create any list of unacceptable business firms. We are not proposing to change any debarment or suspension rule contained in the FAR. We are not proposing to change any procedural due process rights that a prospective contractor currently enjoys with respect to the FAR responsibility criteria. And, most importantly, we are not proposing to “punish” anyone by denying them Federal contracts. What we hope to do is protect the public’s interest by having a greater assurance that the firms we deal with are responsible citizens. Again, the overarching goal behind the proposed rule is the concept that the Federal

Government ought to do business with good citizens who comply with the law.

In addition to the clarifications to the FAR “responsible contractor” criteria, we are also proposing two changes to the contract cost principles that are contained in FAR Part 31. The first change would end reimbursement of contract costs incurred for activities designed to influence employees with respect to unionization decisions (either for or against unionization). This idea is not new. For many years, a large number of Federal programs (Medicare, Medicaid, etc.) have made these types of costs unallowable as a matter of public policy. Moreover, this change is in furtherance of the Government’s long-standing policy to remain neutral with respect to employer-employee labor disputes (FAR Part 22). Clearly, reimbursement of one party’s costs with respect to these matters does not constitute a policy of neutrality.

Finally, we are also proposing a technical change to one of the FAR cost principles to close what we believe to be an existing loophole. At present, the Government does not reimburse contractors for their legal expenses where, for example, in a criminal proceeding, there is a conviction; or where, in a civil proceeding, there is a monetary penalty imposed. However, there are a number of civil proceedings initiated by the Federal Government each year against various contractors that do not result in imposition of a monetary penalty, but which do involve a finding or adjudication that a contractor has violated a law or regulation, and where appropriate remedies are then ordered. We believe that reimbursement of a contractor’s legal costs should depend on whether or not a contractor

is found to have violated a law or regulation, rather than upon the exact nature of the legal remedy imposed. Taxpayers should not have to pay the legal defense costs associated with adverse decisions against contractors, especially where the proceeding is brought by an agency of the Federal Government.

I will now turn to the specific questions in your letter of invitation.

How will an expanded contractor responsibility program promote efficiency or otherwise affect the efficiencies achieved during the past five years in the Federal procurement process?

An efficient, economical and well-functioning procurement system requires the award of contracts to organizations that meet high standards of integrity and business ethics and have the necessary workplace practices to assure a skilled, safe, stable and productive workforce. This proposal seeks to further the Government's use of best practices by ensuring the Government does business only with high-performing and successful companies that work to maintain a good record of compliance with applicable laws. Currently, Contracting Officers consider many factors and sources of information in making responsibility determinations. The proposal highlights the role of the Contracting Officers and the other members of the acquisition team in this regard.

How will the contractor responsibility expansion affect, if at all, the ability of small businesses to obtain government contracts? If it adversely affects small businesses, how does your office, the FAR Council, and the President plan to ameliorate these impacts so that small businesses will be able to obtain their share of Federal contracts as mandated by Congress?

We do not believe that the proposed rule will adversely affect the ability of small businesses to be awarded government contracts, primarily because we believe that this rule clarifies an existing regulatory authority. However, I do not want to generalize about any particular situation, including those involving small businesses, where a contractor might be found not to be "responsible." Each situation will depend upon the specific facts and circumstances presented. Mr. Ballentine will discuss the protections afforded to small businesses through the Small Business Administration's Certificate of Competency program.

Why did the FAR Council determine that the proposed change would not have a significant economic impact on a substantial number of small entities (i.e., why did it certify the rule pursuant to the Regulatory Flexibility Act)?

We anticipate that the proposed rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*

primarily because most contracts awarded to small entities do not involve the use of formal contractor responsibility surveys and procedures. To the extent that a clarification of the existing responsibility rule, by way of adding examples, does have an impact, it will be primarily on larger contracts and contractors -- especially those that involve significant dollar expenditures. In addition, the proposed cost principle changes should not have a significant impact on small entities, because many contracts awarded to these recipients use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not require the submission of cost or pricing data or other information, and thus do not require the application of the FAR cost principles.

In recognition of possible differing views on this initial Regulatory Flexibility Act determination, the Administration's proposal invites comments from small businesses and other interested parties on this issue. I want to emphasize that the Administration is committed to a strong small business program. This rule does not lessen the commitment to small businesses.

As a corollary to the previous question, why did OMB determine that this rule did not raise a significant policy/novel legal issue and declare it to be a "major rule" pursuant to Executive Order 12866?

The proposed rule also was not considered a significant rule under Executive Order 12866, and

it was not considered to present any novel policy or legal issues, because it merely adds examples to an existing regulatory policy that have been in place for many years. As such, we do not expect it to have a significant economic impact on the procurement community or on the economy more generally.

I hope I have addressed and clarified some of the more prominent issues concerning the Administration's recent proposal. We intend to review the public comments we receive on this matter very carefully.

I will be pleased to answer any questions you may have.

**TESTIMONY OF ELEANOR R. SPECTOR
DIRECTOR, DEFENSE PROCUREMENT
BEFORE THE U.S. HOUSE OF
REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS
OCTOBER 21, 1999**

**TESTIMONY OF ELEANOR R. SPECTOR
DIRECTOR, DEFENSE PROCUREMENT
BEFORE THE U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS
OCTOBER 21, 1999**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today as the Department of Defense (DoD) representative to discuss the proposed changes to the Federal Acquisition Regulation (FAR) concerning contractor responsibility. I am pleased to respond to the specific questions you asked.

Since the proposed rule is still out for public comment, nothing has yet been put in regulation that would change the way we do business. The public comment period closes on November 8, 1999. As a result of these comments, changes may be made to the proposed FAR coverage prior to its publication as a final rule.

Your first question concerned how we determine contractor responsibility currently and if the methodology varies for contracts of different size. In FY 1998, DoD conducted 6.6 million contract actions with a value of approximately \$128.8 billion. Of these, approximately 277,000, worth \$118 billion, were contract actions in excess of \$25,000. There were also an additional 7.5 million purchase card actions, normally under \$2,500, with a total value of \$3.4 billion that year. So, as you can see, the Department conducts a very large number of purchases of greatly different amounts with the vast majority, however, being of relatively low dollar value. The rules on how to determine contractor responsibility are contained in the FAR, Part 9.1. They provide general standards that must be met, which include adequate financial resources to perform the contract, ability to comply with the delivery schedule, a satisfactory record of performance, a satisfactory record of business ethics and integrity, and the organization,

accounting skill, controls, technical ability and facilities to perform satisfactorily. For purchases under \$100,000, unless the contracting officer is aware of a specific problem, the primary method of determining contractor responsibility is to check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs. This list, maintained by GSA and available on-line, contains current information on firms and individuals who have been suspended, debarred or otherwise excluded from doing business with the Federal government. This is generally due to an indictment, conviction or violation of a statutory prohibition (generally fraud related), although some firms are listed due to repeated poor performance. Placement on this list is an automatic bar to receiving any contract award for the time that the firm or individual is on it.

For larger purchases, there are many resources available to help determine responsibility in addition to the List. In addition to the contracting officer's own history files, which may contain information on past performance, the Defense Logistics Agency maintains information on how companies have performed for DoD in the past. Another source of information is Dun and Bradstreet, which provides detailed financial, performance and other information on individual firms. The most detailed DoD resource is a pre-award survey, conducted by the Defense Contract Management Command. In CY 1998, there were approximately 2,000 pre-award surveys performed. These are generally extremely detailed reviews of a company's ability to perform a proposed contract and they provide the contracting officer the best and most up to date information. They normally cover a firm's financial capability, technical capability, production capability, quality assurance capability, accounting system, property control, safety and environmental record, compliance with special interest items and a variety of other areas. Due to the expense and time required to perform these surveys, they are predominantly used when there is a question of whether the selected contractor can perform the contract. Because these surveys are likely to remain valid for some time, the Department utilizes Pre-Award Survey Monitors, whose files contain information of past pre-award surveys and any recent

information, such as the possibility of labor strife, or recent poor performance, that would be of interest to the contracting officer. Contracting officers can sometimes call the Pre-Award Survey Monitor to obtain this information. Approximately 2,213 calls of this nature were made in CY 1998.

As you can see, the most detailed checks on responsibility take place in a tiny fraction of the awards DoD makes. There are several reasons for this. One is the sheer volume of our business that inevitably limits what we can do. Another is that many of our contracts are awarded to firms that have long established and satisfactory track records with DoD. In addition, a large number of purchases over \$25,000 are done electronically through established contractual vehicles, such as GSA Federal Supply Schedules, Indefinite Delivery Indefinite Quantity contracts awarded by DoD or other Federal buying agencies and Blanket Purchase Agreements. When using these or similar contracting vehicles, the contractor's responsibility was determined by the organization awarding the initial contract. If, however, the contracting officer knows anything negative about the firm, or if someone brings a contractor's responsibility into question, we would investigate the accusations thoroughly. So the short answer to your question is that there are various levels of responsibility reviews and that contract size is one consideration, although not the only one, in determining how detailed a review is done.

Your other questions ask how the proposed rule would affect the award of DoD contracts, whether our contracting officers will be able to make the necessary determinations and what kind of additional training would be necessary to insure contracting officers can handle the added responsibility. Before I address these questions, I would like to explain how I believe we would implement the proposed language assuming it becomes a final rule.

While contracting officers will remain the primary determiners of contractor responsibility, they will need a substantial amount of assistance from the organizations with

responsibility for the additional considerations being added to the FAR. Without such support, DoD contracting officers would have no readily available means of determining if a contractor were in “substantial noncompliance” with labor laws, employment laws, tax laws, environmental laws, antitrust laws or consumer protection laws.

In order for our contracting officers to make expeditious decisions concerning responsibility that consider the added areas of concern, the agencies responsible for each of the areas would have to establish a single point of contact or a central clearing house of current information. By this I mean that the National Labor Relations Board (NLRB) would probably have to establish a system whereby contracting officers can obtain specific, detailed information on decided cases. The same process would apply for the other new responsibility criteria. Labor and employment laws not covered by the NLRB would be the responsibility of the Department of Labor. Tax laws would fall under the Internal Revenue Service or the Department of Treasury. Environmental laws would fall under the Environmental Protection Agency. Antitrust laws would come under the Department of Justice and so on. These organizations are the experts in these fields. Once given detailed information about final decisions in specific cases, which include the agency’s position as to whether there was “substantial noncompliance” or a clear violation of law, contracting officers can make a judgment as to whether the contractor in question has a satisfactory record of integrity and business ethics that would permit award of a contract.

Additional training for DoD contracting officers might also be helpful, although I believe useful training would probably require some experience with the new regulation and might not be available at the outset.

Your second question asks what the effect of this change would be on the award of DoD contracts. Initially there might be delays depending on the complexity of the reviews required.

Finally, there may be litigation in high profile cases if we determine contractors to be nonresponsible based on evidence of noncompliance with tax, labor, environmental, anti-trust or consumer protections laws. It may also be that these potential problems will occur so seldom that they will not significantly disrupt the Department's procurement activity.

The third question asks whether our contracting officers can determine if prospective awardees are in compliance with a host of unrelated laws. As I have just indicated, I believe that to do so in an effective manner will require the assistance of the agencies responsible for the enforcement of these laws.

Your next question asks what education and training makes contracting officers capable of making such decisions. When the proposed change is made to the FAR, I will work with my counterparts to insure that there is adequate information available at the working level procurement offices so our people can properly exercise this responsibility.

The final question asks how do we expect our contracting officers to handle this added responsibility. We will do what is necessary to make sure they have the resources available to implement the coverage.

I hope I have addressed your questions concerning the proposed changes to the FAR. We intend to review the public comments we receive on this matter very carefully before proceeding to issuance of any final rule.

I will be pleased to answer any questions you may have.



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

STATEMENT OF

JAMES BALLENTINE

ACTING ASSOCIATE DEPUTY ADMINISTRATOR

GOVERNMENT CONTRACTING AND

MINORITY ENTERPRISE DEVELOPMENT

U.S. SMALL BUSINESS ADMINISTRATION

BEFORE THE

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

OCTOBER 21, 1999

**Testimony of James Ballentine
Acting Associate Deputy Administrator
Office of Government Contracting and Minority Enterprise Development
U.S. Small Business Administration
October 21, 1999**

Good Morning Mr. Chairman and members of the Committee. I am James Ballentine, Acting Associate Deputy Administrator for the Office of Government Contracting and Minority Enterprise Development at the U. S. Small Business Administration (SBA). I am appearing on behalf of SBA Administrator Aida Alvarez, whose schedule does not permit her to be with you today. It is a pleasure to testify before the Committee about SBA's Certificate of Competency (COC) Program as it relates to the proposed changes to Subpart 9.1 of the Federal Acquisition Regulation (FAR) effecting contractor responsibility. We understand the Committee's interest in this proposed regulation and its potential affect on America's small businesses.

The proposed change to FAR Subpart 9.1 amends current coverage and gives examples of contractor responsibility considerations in the areas of integrity and business ethics. The proposed regulation also makes unallowable certain costs regarding unionization and legal expenses related to defense of specific judicial or administrative proceedings brought by the Federal Government.

Specifically, I am here today to respond to the questions posed in Chairman Talent's invitation letter to Administrator Alvarez. Before responding to the questions, I would like to give a brief overview of the history of SBA's COC program.

Long before the Small Business Administration was created, the Congress recognized the need to help small businesses receive Federal contracts. The Certificate of Competency (COC) program had its beginning during World War II as part of the Small Business Mobilization Act of 1942 (PL 77-603). This legislation established, among other things, the War Production Board with authority to review and certify the competency of a small business to perform a specific Government contract. After the war ended in 1945, the COC program was transferred between several agencies. In 1951, the program was placed in the Small Defense Plants Administration (SDPA), the precursor to the Small Business Administration. Two years later, the SDPA was recast into the SBA by the Small Business Act of 1953.

The purpose of the COC program is to ensure that small businesses, especially those newly entering into the Federal marketplace, receive a fair share of Government contracts. This, in turn, helps the Government to supplement and diversify its sources of supplies and services. The COC program is authorized under section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)). It affords a small business the right to appeal a contracting officer's "nonresponsibility" determination. Where SBA issues a COC, the Small Business Act directs contracting officers to accept the certification as conclusive and precludes the contracting officer from requiring the firm to meet any other requirements of responsibility. At its inception, the COC program was limited to only those areas of "responsibility" dealing with capacity and credit. Capacity is a term of art in Government procurement and has been defined as the overall ability to meet quantity, quality and delivery requirements of a contract. Capacity also encompasses the

company's ability to perform; their management and organization; their technical experience and expertise; their knowledge and skills; and their equipment and facilities. Credit is defined as the financial capability to perform a contract, plus other commitments.

In 1977, Congress significantly enhanced the COC program by authorizing SBA to issue COCs with respect to all elements of responsibility including perseverance, integrity, and tenacity. These additional elements of responsibility were distinct from the original issues involving capacity and credit. In addition, Congress authorized SBA to review a small business's eligibility for award of a contract under the provisions of the Walsh-Healey Public Contracts Act. Walsh-Healey required that a contractor be either a manufacturer or regular dealer in the materials, supplies, or services it provides to the Government or uses during the performance of a Government contract. There was a perception in Congress that contracting officers were finding small businesses ineligible under Walsh-Healey to avoid awarding them contracts. However, the Federal Acquisition Streamlining Act of 1994 repealed the specific provision in Walsh-Healey dealing with eligibility as a manufacturer or regular dealer. In 1984, Congress further refined the COC Program by requiring Government contracting officers to refer and SBA to accept COC referrals regardless of the dollar value. Prior to 1984, COC referrals were not required for procurements below \$10,000.

A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess the

“responsibility” to perform a specific Federal contract. The COC is conclusive and the contracting officer is prohibited from denying award of a contract on the basis of nonresponsibility. The COC program has evolved from an *ad hoc* wartime initiative to a cornerstone of the Government’s specialized programs to assist small businesses.

Mr. Chairman, I would now like to respond to the specific questions addressed as presented in your invitation letter.

How does the current Certificate of Competency program work and to what extent does the program cover general legal compliance?

Upon determining that the apparent successful small business offeror is non-responsible for award of a contract, the contracting officer is required to refer that firm to SBA for a COC determination. The contracting officer’s COC referral consists of a copy of the solicitation, the proposal submitted by the small business, the abstract of bids or price negotiation memorandum, pre-award survey (where applicable), a written determination and finding of nonresponsibility and any other information used by the contracting officer to arrive at the nonresponsibility determination. Once SBA receives an acceptable COC referral, SBA contacts the small business (by telephone where practicable, by mail in all cases), appraises the firm of the reasons surrounding the referral, and offers the firm an opportunity to apply for a COC. This is usually the first time that the small business is apprised of the contracting officer’s negative determination. SBA notifies the small business of the due date for submitting its COC application. SBA gives the small business 6 working days to submit its COC application, unless the contracting

officer agrees to grant additional time. SBA also notifies the contracting officer of the date that SBA must make its COC decision. The small business's COC application is reviewed upon receipt and assigned to a COC Specialist to process.

The COC application consists of written documentation and information to support its performance of the proposed contract, its adherence to the solicitation's requirements, and any other information the firm deems necessary to document its ability to perform the proposed contract. The COC Specialist reviews all the information supplied by the contracting officer and the small business and any other information developed during the course of the COC review. In addition, a Financial Specialist reviews the financial information to determine the applicant's financial capability to perform the proposed contract plus all other projected work over the contract period. Each specialist generates a written report that recommends issuance or denial of the COC. The reports are included in the COC case file that is sent to the COC Review Committee.

The Committee is chaired by the COC Program Supervisor and consists of a COC Specialist, Financial Specialist and an Attorney. The committee reviews the case file and makes a recommendation to either issue or deny the COC. The Committee's recommendation must be accompanied by a supporting statement from the attorney that attests to the legal sufficiency of the committee's findings and the supporting information contained in the COC case file. The SBA Area Director for Government Contracting makes the actual decision to issue or deny a COC based on the COC Committee

recommendations. Once SBA reaches a decision, the contracting officer is notified. Upon receipt of the SBA Area Office's decision to issue a COC, the contracting officer can, among other things, appeal the decision to SBA Headquarters. On appeal, SBA Headquarters can confirm or overturn an Area Director's decision to issue a COC.

In response to whether or not the program covers compliance with legal requirements outside the procurement process, SBA has processed some COC referrals where violations of labor laws and tax laws are alleged. These labor law issues deal with violations pertaining to prevailing wage rates for certain trades under the Davis Bacon Act. In these cases, SBA would look to the totality of circumstances, court imposed fines or sentences, weigh the severity of violations and reach a decision to issue or deny the COC.

Also, SBA receives and processes COC referrals based on nonresponsibility determinations where a small business is unable to meet regulatory requirements imposed by other agencies. For example, there is a service requirement that requires the transportation of materials over land by truck. The Department of Transportation requires that a truck driver take a break after so many hours of driving. If the small business can not meet this requirement, SBA can take no action to waive this requirement. However, SBA tries to determine whether the small business understands the requirement and more importantly, what action the small business is taking to comply. Again, SBA looks at all the circumstances involved in reaching its decision. Where a small business demonstrates prior to award of a contract that it has taken action

to correct and prevent recurrence of the nonresponsibility issues, SBA would be inclined to issue a COC. More than 95 percent of all SBA certified contractors perform successfully and on time.

Does the appeal process under the Certificate of Competency program delay the award of contracts?

SBA regulations require SBA to process a COC referral within 15 working days after it is received, unless the contracting officer agrees to allow additional time. Typically, SBA meets this 15 working day requirement. Additional time may be incurred where a contracting officer appeals the SBA Area Director's decision to issue a COC to SBA Headquarters. We believe the time it takes to process a COC is necessary to ensure that a level playing field is maintained for small businesses in the Federal procurement arena.

How many appeals does the SBA currently handle from contracting officers who find that a small business is not responsible?

SBA uses the term "COC referral" to mean appeals received from contracting officers relating to non-responsibility of small businesses. From 1996 to 1998, SBA received 1257, 796, and 531 COC referrals respectively. This represents an insignificant portion, .006 percent, of all contract actions reported in the Federal Procurement Data System.

Of those appeals identified in the preceding question, how many times does the SBA overturn the determination made by the contracting officer?

SBA typically issues COCs on 25 percent of all COC referrals it receives. Of the 1257 COC referrals in 1996, SBA received 606 COC applications and issued 258 COCs. Of the 796 COC referrals in 1997, SBA received 404 COC applications and issued 203 COCs. Lastly, of the 531 COC referrals in 1998, SBA received 241 COC applications and issued 134 COCs.

Does the SBA Certificate of Competency program have the staff and personnel to currently assess compliance with a host of laws unrelated to the performance of the contract?

SBA believes that its existing staffing levels are sufficient to process the current number of COC referrals relating to this issue. The COC Program is administered through SBA's six Area Offices with 14 COC specialists distributed within these offices. In addition, each Area Office has an attorney and financial specialists that assist in the COC process. With these staff resources, SBA already processes some COC integrity referrals that are based on laws unrelated to contract performance. Examples include issues involving federal taxes, failure to pay the prevailing wage rates on past Federal contracts, allegations of fraud against the Government, Environmental Protection Agency violations and others. From 1996 to 1998, SBA received 16 COC referrals based on integrity.

The COC program procedures contain guidelines for processing COC referrals relating to integrity issues. The procedures direct the COC Specialist to review the referral with the assistance of SBA's Counsel to determine if the referral contains sufficient information to process. The COC guidelines also discuss the type of information a contracting officer must submit to support a nonresponsibility determination based on a lack of integrity. SBA also provides policy guidance for dealing with debarments, suspensions, convictions and indictments as well as investigations pertaining to the referred small business. The COC case file must contain a written report from SBA's Counsel discussing the case from a legal standpoint and discussing any relevant litigation or ongoing investigations. SBA Counsel must give an opinion on the legal sufficiency of the evidence to support issuance or denial of the COC.

Does the SBA expect that the expansion of the contractor responsibility determinations will increase the number of competency appeals and, if so, what impact will that have on the system?

SBA can not predict what affect the pending change to FAR Subpart 9.1 would have on the COC program. Data obtained from the General Services Administration, Federal Procurement Data System, reveals that approximately 45,000 individual small businesses received contracts valued over \$25,000 in fiscal year 1998. If only 10 percent of those companies are effected by this proposed regulation, the COC workload could increase significantly. Although the full effect of the proposed rule cannot be estimated at this time, we believe the proposed change could result in an increase in the number of non-responsibility determinations for small businesses. This could impact our ability to

meet our regulatory mandate to process COCs in a timely manner at current staffing levels.

Mr. Chairman, in conclusion, I look forward to working with you to continue exploring methods to expand opportunities for and protect the interest of small business in the Federal procurement arena. I will be happy to answer any questions you may have.

STATEMENT OF

PROFESSOR STEVEN L. SCHOONER and
PROFESSOR WILLIAM E. KOVACIC
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

before the

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS

October 21, 1999

Mr. Chairman, Congresswoman Velazquez, and members of the Committee, we appreciate the opportunity to appear before you today. As you are aware, the proposed rule¹ addressing contractor responsibility and labor regulation costs has generated extensive debate and consternation within the Federal procurement community.

Questions Presented

You asked that we address five questions.

- (1) *What is the current state of the law with respect to contractor responsibility (i.e., what does the law currently provide with respect to a contracting officer's ability to deny a putative awardee [the contract] for lack of responsibility under Part 9 of the FAR)?*

For the last fifty years, the primary Federal procurement statutes have required that contract awards be made only to "responsible" bidders, offerors, or sources.² The Federal Acquisition Regulation (FAR), as did its predecessor regulations, expressly requires that a contracting officer cannot award a contract without making an affirmative determination of

¹ 64 Fed. Reg. 37,360 (July 9, 1999).

² See, e.g., 10 U.S.C. § 2305, 41 U.S.C. § 253.

contractor responsibility.³ Thus, the contracting officer must assess the contractor's abilities and determine whether the contractor can complete the work on time and in a satisfactory manner. In assessing a contractor's abilities, the contracting officer typically analyzes a firm's financial resources; its ability to comply with the delivery schedule; the quantity and quality of the firm's facilities and equipment; the firm's performance record; the firm's record of business ethics and integrity; the firm's expertise, management, and technical capability; and, of course, the firm's possession of or ability to obtain appropriate licenses and permits. The contracting officer's determination assesses both the firm's existing resources and its ability to obtain resources it may not possess.⁴

The contracting officer also considers a contractor's tenacity or will to perform, because ability to perform means little if a contractor chooses not to apply appropriate resources. The contracting officer must confirm the contractor's integrity, because the government must rely upon the contractor's agreement. The contracting officer must also conclude that the contractor is eligible (under certain statutes and regulations) to perform the work and that the contractor has sufficient internal controls to promote various social and economic goals superimposed upon the procurement process. Arguably, a distinction exists between the contractor's ability or willingness to perform an individual contract and its eligibility to do business with the

³ FAR 9.103. While the contracting officer must make the affirmative determination, the "prospective contractor must affirmatively demonstrate its responsibility. . . ." FAR 9.103(b).

⁴ See, e.g., *Robert E. Director of Rhode Island, Inc. v. Goldschmidt*, 516 F. Supp. 1085 (D.R.I. 1981), where the court found that Director was a responsible firm to construct nine 270-foot Coast Guard cutters -- at the time, the largest Coast Guard contract ever -- despite the fact that Director "had not previously performed a contract of this magnitude, [and] did not have either personnel or facilities necessary to perform the contract. . . ."

government in the specific context. Some eligibility issues may fall outside of the responsibility rubric. (For example, in certain circumstances, the government may deem a large business, a foreign firm, a firm owned by a government employee, or a firm that has done related work for the government, ineligible for award of a contract.) In this context, debarred or suspended firms are ineligible for award of government contracts. A firm's repeated failure to be found responsible may suggest a *de facto* debarment.

The law distinguishes between the concepts of responsibility and responsiveness. To the extent that responsiveness entails an objective determination, responsibility is subjective, and the contracting officer enjoys broad discretion. Whereas the contracting officer determines responsiveness at the time of bid opening, responsibility is determined at the time of award. The contracting officer determines whether all bidders are responsive, but need only make an affirmative determination of responsibility with regard to the successful offeror. Responsiveness applies to sealed bid procurements, while the contracting offer must determine responsibility in both sealed bid and competitively negotiated procurements.

The contracting officer wields significant discretion in determining responsibility. Specifically, the General Accounting Office (GAO) Bid Protest Regulations state that "GAO shall summarily dismiss . . . specific protest allegations that . . . are not properly before GAO[.]" such as a contracting officer's affirmative determination of responsibility⁵ or a certificate of

⁵ "Because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met." 4 C.F.R. § 21.5(c).

competency.⁶ Conversely, where the contracting officer intends to reject an otherwise successful offer for lack of integrity, the contractor enjoys greater due process rights.⁷

(2) *Is it appropriate, as a matter of good government procurement law, to require the existence of some nexus between a finding of responsibility and the goods or services the government intends to procure?*

Responsibility plays an important role in ensuring a number of the basic tenets of our public procurement system. Offers of low prices or attractive technologies prove a false economy if a firm cannot fulfill its contractual promises. The pre-award survey, an important component of the responsibility determination, should disclose whether award to the contractor places the government at risk of eventual default, late delivery, poor quality, cost overruns, etc.

Thus, a nexus generally exists between the responsibility determination and the goods or services the government seeks to procure. The general standards of responsibility, articulated in FAR 9.104-1, appear relevant to the Government's ability to obtain needed goods, services, or construction. Similarly, the causes for debarment, FAR 9.406-2, and suspension, FAR 9.407-2, seem calculated to avoid firms whose bad acts relate to the procurement process and its related standards and policies.

While we find the term "blacklisting" generally inappropriate for a meaningful discourse on this topic, proponents of the term score the greatest number of points if the Federal

⁶ "Any referral made to the Small Business Administration pursuant to sec. 8(b)(7) of the Small Business Act, or any issuance of, or refusal to issue, a certificate of competency under that section will not be reviewed by GAO absent a showing of possible bad faith on the part of government officials or a failure to consider vital information bearing on the firm's responsibility. 15 U.S.C. 637(b)(7)." 4 C.F.R. § 21.5(b)(2).

⁷ See, e.g., *Viktoria-Schaefer International v. Army*, 659 F. Supp. 85, 86-87 (D.D.C. 1987), citing *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980).

Government fails to articulate a nexus between (1) a contractor's likelihood of providing the Government with a high degree of customer satisfaction in a given procurement and (2) any reason (other than a legitimate *eligibility* criteria) upon which the contracting officer could rely to deny that contractor the opportunity to perform the contract.

(3) *Does the proposed expansion of contractor responsibility constitute a simple extension of already existing law or does it pose novel legal and policy questions in the arena of government procurement law?*

Clearly, the FAR drafters suggest that the proposed regulations constitute a simple extension of already existing law.⁸ At various levels, the drafters' position raises serious questions. For example, the drafters suggest that the proposed rule is neither a significant regulatory action pursuant to Executive Order 12866, nor a major rule under 5 U.S.C. § 804, implying that the proposed regulation's effect upon the economy will be less than \$100 million.⁹

⁸ Unfortunately, it is difficult to assess the proposed rule outside of the context of its commonly acknowledged genesis. See, e.g., *Presidential Suitors Gore, Gephardt Woo AFL-CIO; Eager To Enlist Support Early, 2 Court Labor at Annual Meeting*, CHICAGO TRIBUNE, page 4 (February 19, 1997) ("Gore announced three new federal initiatives. One would require government contractors 'for the first time as a matter of formal policy' to demonstrate a 'satisfactory record of labor relations and other employment practices.' . . . He also said the government will no longer reimburse the legal expenses of businesses for costs they incur in defending against unfair labor practice claims, and that it would bar contractors from being reimbursed for money spent to fight union organizing efforts. Third, Gore said that President Clinton would issue an executive order instructing federal departments to use comprehensive collective-bargaining agreements on large, government-funded construction projects."); *Gore, Gephardt 'Audition' for Unions; AFL-CIO Hears From Two Top Democrats Angling for 2000*, THE HOUSTON CHRONICLE, page a4 (February 19, 1997).

⁹ While we do not here address the accuracy of news reporting or political speech content, we note that the press reported that: "The vice president's staff claimed the directive, which requires no congressional approval, would affect hundreds of billions of dollars in federal spending." *Presidential Suitors Gore, Gephardt Woo AFL-CIO; Eager To Enlist Support Early, 2 Court Labor at Annual Meeting*, CHICAGO TRIBUNE, page 4 (February 19, 1997).

The \$100 million threshold represents approximately one twentieth of one percent of annual Federal procurement spending.¹⁰

Moreover, the drafters conclude that the rule will not have a significant economic impact upon a substantial number of small entities pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 601. Despite the fact that small businesses receive approximately 23 percent of Federal procurement dollars each year,¹¹ the FAR drafters suggest that "most of those contracts . . . do not involve use of formal responsibility surveys."¹² The FAR drafters also may have concluded, but not specifically mentioned, that small businesses are somewhat insulated from the brunt of the responsibility requirements due to the Small Business Administration's (SBA's) Certificate of Competency (COC) program. If a contracting officer finds a small business concern nonresponsible (with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting), FAR Subpart 19.6 explains that, upon application by the small business firm, the SBA may issue a COC stating that the firm is responsible for the purpose of receiving and performing a specific Government contract.

Consistent with the FAR drafters' assertion of the rule's insignificance, the proposed rule could be dismissed as redundant. The FAR already contains an extensive regulatory scheme,

¹⁰ For Fiscal Year 1998, the Federal Procurement Data System (FPDS) reported 11.6 million procurement actions worth \$197 billion.

¹¹ For Fiscal Year 1998, the FPDS reported that small businesses received \$42.5 billion out of a total of approximately \$182 billion in available procurement dollars.

¹² 64 Fed. Reg. 37,361 (July 9, 1999). For this reason, no Initial Regulatory Flexibility Analysis was performed.

derived from a host of related statutes,¹³ that address contractor behavior with regard to labor and employment. Along those lines, the proposed rule could be perceived as inconsistent with the clear guidance at FAR 22.101-1(b) that: "Agencies shall remain impartial concerning any dispute between labor and contractor management. . . ."

Nonetheless, as discussed above and below, we believe that the proposed regulations represent a significant departure from established procurement law, practice, and policy. The proposed regulations do not clearly demonstrate a nexus between the potential causes for exclusion and the Government's ability to obtain specific goods, services, or construction. For that reason, we are not persuaded by the FAR drafter's assertion that the proposed rule is intended "to clarify coverage concerning contractor responsibility considerations, by adding examples. . . ." Rather, we sense that this proposed rule breaks new ground.

(4) *From a purely academic point of view, how will the broadened scope of contractor responsibility affect government procurement law?*

The broadened scope of contractor responsibility threatens to shift the underlying focus of the contracting officer's responsibility determination. Currently, the contracting officer's analysis entails a threshold examination of a contractor's resources, abilities, and willingness to perform a specific contract. The legal justification for this assessment derives from the statutory predicate that the Government must only award a contract when it believes the contractor can and will provide the Government with the benefit of its bargain. Thus, the current legal regime

¹³ See, e.g., the Davis-Bacon Act, 20 U.S.C. § 276a and FAR Subpart 22.4; the Service Contract Act, 41 U.S.C. §§ 351-357 and FAR Subpart 22.10; the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 and FAR Subpart 22.6; and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-333 and FAR Subpart 22.3.

anticipates that the contracting officer will ensure that a chosen contractor exhibits sufficient integrity to fulfill its contractual promises. The goal of this statutorily mandated exercise is to confirm that taxpayers' dollars procure contractually described goods or services (rather than merely purchase a lawsuit).

The proposed rule envisions a different regime. The proposed rule directs contracting officers to demand of prospective government contractors a broader (arguably higher) standard of corporate ethics, integrity, and compliance with a host of laws, regulations, and norms. Each of the examples offered by the FAR drafters derive from existing law. Accordingly, we acknowledge that an effort to increase corporate compliance with the nation's law and regulations is a laudable goal. We urge caution, however, in promulgating an open-ended rule establishing norm compliance as a prerequisite to performing a Federal contract. The greatest risk lies in the amorphous merger between (1) defining a "satisfactory record of integrity and business ethics" solely by use of examples and (2) the absence of clear thresholds or standards (see, for example, the discussion below relating to "persuasive evidence").¹⁴

Nonetheless, the broadened scope could prove entirely academic unless contracting officers alter their behavior based upon the revised regulation.¹⁵ As the present OFPP Administrator, Deidre Lee, consistently preaches to the Federal acquisition workforce,

¹⁴ While the FAR drafters suggest, in a background parenthetical, that "isolated and trivial" violations would not lead to adverse responsibility findings, this caveat is absent from the proposed regulation.

¹⁵ See generally, Steven L. Schooner, *Book Review: Change, Change Leadership, and Acquisition Reform*, 26 PUBLIC CONTRACT LAW JOURNAL 467 (1997) (suggesting that the behavioral status quo benefits from inertia).

implementation is the key to acquisition reform. It is difficult to envision how the Executive agencies, particularly the major procuring agencies, would seek to implement these changes.

Bear in mind that, in competitively negotiated procurements, at the point at which contracting officers must determine responsibility, the same contracting officer (or a related source selection official) has determined that the Government's best interests are served by award of the contract to the chosen offeror. Absent pointed internal agency guidance (or direction), contracting officers lack incentives to task their pre-award survey teams to ferret out independent evidence of, for example, "substantial noncompliance with labor laws[.]" As discussed below, we would expect the pre-award survey team be cognizant of "violations of law or regulation" that are *relevant* to prospective contract performance where there has been "a final adjudication by a competent authority[.]" These violations could lead to suspension or debarment,¹⁶ which have more far reaching ramifications than an individual negative responsibility determination. Assuming that no formal adjudications demonstrate that the intended awardee routinely violates relevant laws or regulations, the contracting officer lacks incentive to obtain, let alone weigh, evidence of activity not obviously relevant to contract performance.

Conversely, pointed agency direction to contracting officers, which would appear in the public domain, could encourage competitors to identify and/or allege noncompliance with, for example, labor laws. Moreover, particularly in sealed bid procurements (where the contracting officer enjoys limited discretion in choosing the selected offeror), the contracting officer's ability

¹⁶ See generally, FAR Subpart 9.4.

to avoid awarding a contract to an individual firm would be greatly enhanced.

- (5) *How do you interpret the concept of "persuasive evidence" as used in the proposed changes to Part 9? What do you feel the contracting officer should use as a basis for concluding whether or not "persuasive evidence" exists?*

The term "persuasive evidence" proves problematic. Because the term is not a commonly recognized evidentiary standard, threshold, or burden,¹⁷ it is vague. Any confusion in this regard is unnecessary and will result in nonproductive and inefficient litigation.¹⁸ Because the term lacks precision, a Federal appellate court eventually will determine the term's meaning.¹⁹ If the FAR Council disagrees with the court's interpretation, changes to the regulation likely will follow.

Currently, however, we must interpret the phrase in the context in which it arises. The supplementary information provided by the FAR Council suggests that any use of the "persuasive evidence" standard assumes that the responsibility determination in issue has *not* been the subject of "a final adjudication by a competent authority concerning the underlying charge."²⁰ Further, the drafters offer a parenthetical elaboration of "persuasive evidence of substantial noncompliance with a law or regulation." The drafters suggest the "facts and

¹⁷ The term is used only in rare situations and typically without extensive explanation. See, e.g., 28 U.S.C. §§ 1068a(b)(1), 1103a(b)(1), where the term is used in the context of higher education institutions seeking waivers.

¹⁸ The FAR drafters ignored an obvious, related analogy. FAR Subpart 9.4, which addresses debarment, suspension, and ineligibility, uses and defines the terms "preponderance of the evidence" and "adequate evidence." FAR 9.403.

¹⁹ See, e.g., *Dantran, Inc. v. Labor*, 171 F.3d 58, 69-71 (1st Cir. 1999) (successful challenge to a debarment based upon Service Contract Act violation), where the appellate court struggles with an "odd standard of review[.]"

²⁰ 64 Fed. Reg. 37,360 (July 9, 1999).

circumstances in each such case will require close scrutiny and examination."

Clearly, the term does not arise to the highest evidentiary standard, "beyond a reasonable doubt." Beyond that, the phrase seems susceptible to two basic interpretations. First, and most optimistically, the phrase could suggest an expectation that, before taking action, the contracting officer must be thoroughly persuaded or literally bowled over by a tsunami of evidence. Interpreted this way, the phrase might begin to approach the higher standard of "clear and convincing" evidence,²¹ thus posing a greater hurdle than a mere "preponderance" standard²² -- tilting the balance would not be enough. This interpretation, as a matter of fairness, would make sense in this context, where the contracting officer lacks a final adjudication by a competent authority. Thus, the contracting officer should not take action unless the overwhelming weight of the evidence presented persuaded him or her that, even in advance of final adjudication by a competent authority, the contractor could not be deemed responsible.

The second, more pessimistic, interpretation of the language suggests a low -- in our opinion, inappropriately low -- threshold. Analogizing to the legal concept of the "burden of persuasion," the phrase could refer to a sufficient volume of evidence to persuade the contracting

²¹ See, e.g., Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 NEW YORK UNIVERSITY LAW REVIEW 385, 420 (1985).

²² See generally, Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 627, 633-34 (1994), identifying a wealth of scholarly work addressing burdens of proof and persuasion (see particularly, footnote 2) and describing the preponderance standard: "The nearly universal standard in civil cases requires the person bearing the burden to establish the relevant elements to greater than a .5 probability."

officer *in the absence of rebuttal* by the contractor. In our adversarial litigation regime, adjudicators implicitly or explicitly assign to one party the burden of persuasion until, once the balance has tilted, the burden shifts to the opposing party. Here, where the premise is that there has been no final adjudication by a competent authority, the phrase could refer solely to a sufficient body of evidence to persuade the contracting officer of its validity. In such a context, absent the opportunity for rebuttal, the phrase could suggest a standard well below the "preponderance" standard. Were that the FAR drafters' intent, such a low standard seems ill suited to permit the contracting officer to deny an apparent awardee a Federal contract.

The term "persuasive evidence" should be replaced. If the FAR drafters intended the phrase to reflect a daunting burden of proof -- an intent we believe is warranted by the context in which the phrase is used -- they should substitute the term "clear and convincing evidence." If, however, the FAR drafters intended the phrase to reflect a lesser burden, they should use the term "preponderance of the evidence." Because we deem such a burden of proof insufficient in this context, we discourage such an approach.

With regard to your query as to what the contracting officer should use as a basis for concluding whether or not "persuasive evidence" exists, it is important to remember that this evidence acts as a surrogate for a final adjudication by a competent authority.²³ This context

²³ Again, a nonresponsibility determination under the proposed regime would not necessarily have an obvious nexus to the specific contract to be awarded. As such, it raises the specter of a *de facto* debarment. In such a scenario, we favor the due process aspects of proceeding to final adjudication rather than vesting the contracting officer with unfettered discretion. A contractor's right to challenge a debarment in court is far greater than its ability to challenge a contracting officer's responsibility determination. See generally, *A to Z Maintenance Corp. v. Dole*, 710 F. Supp. 853, 861 (D.D.C. 1989) (debarment for Service Contract Act

(continued...)

leaves little room for discretion. The contracting officer might be able to accept, for example, a contractor's written admission of an enumerated violation, such as a settlement agreement. While a criminal indictment may prove sufficient in some circumstances, a letter from the Department of Justice -- merely indicating the existence of an investigation or an intent to indict - - should not.

Conclusion

Mr. Chairman, that concludes our statement. For your convenience, we have attached to this statement (1) a brief bibliography and (2) the relevant FAR text. Thank you for the opportunity to allow us to share this information with you. We would be pleased to answer any questions you may have.

²³(...continued)
violations upheld), in which the court "recognizes the severity of the debarment sanction" and notes that "the Court is uncomfortable with the unforgiving impact that its decision will have on A to Z, Mr. Williams and A to Z's employees."

APPENDIX A

SELECTED BIBLIOGRAPHY

Sheila C. Stark, *"Blacklisting" and Eligibility for Award: The Potential Impact of the Administration's Proposed Changes to FAR Parts 9 and 31*, 39 Contract Management 11 (October 1999).

JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 404-54 (Geo. Wash. U., 3d ed., 1998).

Patricia L. VanDenBrocke, Government Contractor Responsibility: A Definitive Review (1992) (unpublished LL.M. Thesis, George Washington University Law School).

Bernard J. McKay, Suspension and Proposed Debarment of Contractors in the Department of Defense: A Question of Present Responsibility? (1991) (unpublished LL.M. Thesis, George Washington University Law School).

RICHARD J. BEDNAR, ET AL., CONSTRUCTION CONTRACTING 60-87 (Geo. Wash. U. 1991).

Richard E. Prins, Responsibility Determinations: Undeveloped Government Protection (1990) (unpublished LL.M. Thesis, George Washington University Law School).

Gerald P. Norton, *The Questionable Constitutionality of the Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?*, 18 Public Contract Law Journal 633 (1989).

Marc F. Efron and Susan M. Muchmore, *Certificates Of Competency*, Briefing Papers No. 87-11 (Federal Publications, Oct. 1987), updated with 1988 Revision Note.

Alan Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 Wisconsin Law Review 1.

Lisa A. Everhart, *"Graylisting" Of Federal Contractors: TRANSCO Security, Inc. Of Ohio v. Freeman and Procedural Due Process Under Suspension Procedures*, 31 Catholic University Law Review 731 (1982).

Jon W. Peterson, The SBA's Certificate of Competency Procurement Assistance Program: An Examination (1981) (unpublished LL.M. Thesis, George Washington University Law School).

Alfred A. Gray, *Responsiveness Versus Responsibility: Policy and Practice in Government Contracts*, 7 Public Contract Law Journal 46 (1974).

Paul Shnitzer, *Responsibility Of Bidders*, Briefing Papers No. 72-4 (Federal Publications, Aug. 1972), updated with 1973 Revision Note.

Edger G. Merson, Determination of Responsibility of a Prospective Government Contractor (1971) (unpublished LL.M. Thesis, George Washington University Law School).

Frederic T. Suss, *Set Asides and Certificates of Competency -- Positive Programs for Small Business in Government Procurement*, 29 Law and Contemporary Problems 418 (1964).

Paul H. Gantt & Irving R. M. Panzer, *The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts*, 25 George Washington University Law Review 175 (1957).

Arthur S. Miller, *Administrative Discretion in the Award of Federal Contracts*, 53 Michigan Law Review 781 (1955).

Vaughn C. Ball, *Blacklisting Federal Contractors*, 28 Washington University Law Quarterly 147 (1943).

APPENDIX B

FEDERAL ACQUISITION REGULATION EXCERPTS

Subpart 9.1--Responsible Prospective Contractors

9.100 Scope of subpart.

This subpart prescribes policies, standards, and procedures for determining whether prospective contractors and subcontractors are responsible.

9.101 Definitions.

"Preaward survey" means an evaluation by a surveying activity of a prospective contractor's capability to perform a proposed contract.

"Responsible prospective contractor" means a contractor that meets the standards in 9.104.

"Surveying activity" means the cognizant contract administration office or, if there is no such office, another organization designated by the agency to conduct preaward surveys.

9.102 Applicability.

(a) This subpart applies to all proposed contracts with any prospective contractor that is located-- (1) In the United States, its possessions, or Puerto Rico; or (2) Elsewhere, unless application of the subpart would be inconsistent with the laws or customs where the contractor is located.

(b) This subpart does not apply to proposed contracts with-- (1) Foreign, State, or local governments; (2) Other U.S. Government agencies or their instrumentalities; or (3) Agencies for the blind or other severely handicapped (see Subpart 8.7).

9.103 Policy.

(a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

(b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. If the prospective contractor is a small business concern, the contracting officer shall comply with Subpart 19.6, Certificates of Competency and Determinations of Responsibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see Subpart

19.8.)

(c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

9.104 Standards.

9.104-1 General standards.

To be determined responsible, a prospective contractor must-- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a)); (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments; (c) Have a satisfactory performance record (see 9.104-3(b) and Subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2; (d) Have a satisfactory record of integrity and business ethics; (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a).) (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

9.104-2 Special standards.

(a) When it is necessary for a particular acquisition or class of acquisitions, the contracting officer shall develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors.

(b) Contracting officers shall award contracts for subsistence only to those prospective contractors that meet the general standards in 9.104-1 and are approved in accordance with agency sanitation standards and procedures.

9.104-3 Application of standards.

(a) Ability to obtain resources. Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, the contracting officer shall require acceptable evidence of the prospective contractor's ability to obtain required resources (see 9.104-1(a), (e), and (f)). Acceptable evidence normally consists of a commitment or explicit arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel. Consideration of a prime contractor's compliance with limitations on subcontracting shall take into account the time period covered by the contract base period or quantities plus option periods or quantities, if such options are considered when evaluating offers for award.

(b) Satisfactory performance record. A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination. If the pending contract requires a subcontracting plan pursuant to Subpart 19.7, The Small Business Subcontracting Program, the contracting officer shall also consider the prospective contractor's compliance with subcontracting plans under recent contracts.

(c) Affiliated concerns. Affiliated concerns (see "Affiliates" and "Concerns" in 19.101) are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the contracting officer shall consider the affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility.

(d) Small business concerns. (1) If a small business concern's offer that would otherwise be accepted is to be rejected because of a determination of nonresponsibility, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether or not to issue a Certificate of Competency (see Subpart 19.6). (2) A small business that is unable to comply with the limitations on subcontracting at 52.219-14 may be considered nonresponsible.

9.104-4 Subcontractor responsibility.

(a) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and 9.405-2 regarding debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect the

Government's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility.

(b) When it is in the Government's interest to do so, the contracting officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility.

9.105 Procedures

9.105-1 Obtaining information.

(a) Before making a determination of responsibility, the contracting officer shall possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards in 9.104.

(b)(1) Generally, the contracting officer shall obtain information regarding the responsibility of prospective contractors, including requesting preaward surveys when necessary (see 9.106), promptly after a bid opening or receipt of offers. However, in negotiated contracting, especially when research and development is involved, the contracting officer may obtain this information before issuing the request for proposals. Requests for information shall ordinarily be limited to information concerning-- (i) The low bidder; or (ii) Those offerors in range for award.

(2) Preaward surveys shall be managed and conducted by the surveying activity.

(i) If the surveying activity is a contract administration office-- (A) That office shall advise the contracting officer on prospective contractors' financial competence and credit needs; and (B) The administrative contracting officer shall obtain from the auditor any information required concerning the adequacy of prospective contractors' accounting systems and these systems' suitability for use in administering the proposed type of contract.

(ii) If the surveying activity is not a contract administration office, the contracting officer shall obtain from the auditor any information required concerning prospective contractors' financial competence and credit needs, the adequacy of their accounting systems, and these systems' suitability for use in administering the proposed type of contract.

(3) Information on financial resources and performance capability shall be obtained or updated on as current a basis as is feasible up to the date of award.

(c) In making the determination of responsibility (see 9.104-1(c)), the contracting officer shall consider relevant past performance information (see Subpart 42.15). In addition, the contracting

officer should use the following sources of information to support such determinations: (1) The List of Parties Excluded from Federal Procurement and Nonprocurement Programs maintained in accordance with Subpart 9.4. (2) Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices. (3) The prospective contractor--including bid or proposal information, questionnaire replies, financial data, information on production equipment, and personnel information. (4) Commercial sources of supplier information of a type offered to buyers in the private sector. (5) Preaward survey reports (see 9.106). (6) Other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations. (7) If the contract is for construction, the contracting officer may consider performance evaluation reports (see 36.201(c)(2)).

(d) Contracting offices and cognizant contract administration offices that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully shall promptly exchange relevant information.

9.105-2 Determinations and documentation.

(a) Determinations. (1) The contracting officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. When an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the contracting officer shall make, sign, and place in the contract file a determination of nonresponsibility, which shall state the basis for the determination.

(2) If the contracting officer determines and documents that a responsive small business lacks certain elements of responsibility, the contracting officer shall comply with the procedures in Subpart 19.6. When a certificate of competency is issued for a small business concern (see Subpart 19.6), the contracting officer may accept the factors covered by the certificate without further inquiry.

(b) Support documentation. Documents and reports supporting a determination of responsibility or nonresponsibility, including any preaward survey reports and any applicable Certificate of Competency, must be included in the contract file.

9.105-3 Disclosure of preaward information.

(a) Except as provided in Subpart 24.2, Freedom of Information Act, information (including the preaward survey report) accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government.

(b) The contracting officer may discuss preaward survey information with the prospective contractor before determining responsibility. After award, the contracting officer or, if it is appropriate, the head of the surveying activity or a designee may discuss the findings of the

preaward survey with the company surveyed.

(c) Preaward survey information may contain proprietary and/or source selection information and should be marked with the appropriate legend and protected accordingly (see 3.104-3).

9.106 Preaward surveys.

9.106-1 Conditions for preaward surveys.

(a) A preaward survey is normally required only when the information on hand or readily available to the contracting officer, including information from commercial sources, is not sufficient to make a determination regarding responsibility. In addition, if the contemplated contract will have a fixed price at or below the simplified acquisition threshold or will involve the acquisition of commercial items (see Part 12), the contracting officer should not request a preaward survey unless circumstances justify its cost.

(b) When a cognizant contract administration office becomes aware of a prospective award to a contractor about which unfavorable information exists and no preaward survey has been requested, it shall promptly obtain and transmit details to the contracting officer.

(c) Before beginning a preaward survey, the surveying activity shall ascertain whether the prospective contractor is debarred, suspended, or ineligible (see Subpart 9.4). If the prospective contractor is debarred, suspended, or ineligible, the surveying activity shall advise the contracting officer promptly and not proceed with the preaward survey unless specifically requested to do so by the contracting officer.

9.106-2 Requests for preaward surveys.

The contracting officer's request to the surveying activity (Preaward Survey of Prospective Contractor (General), SF 1403) shall-- (a) Identify additional factors about which information is needed; (b) Include the complete solicitation package (unless it has previously been furnished), and any information indicating prior unsatisfactory performance by the prospective contractor; (c) State whether the contracting office will participate in the survey; (d) Specify the date by which the report is required. This date should be consistent with the scope of the survey requested and normally shall allow at least 7 working days to conduct the survey; and (e) When appropriate, limit the scope of the survey.

9.106-3 Interagency preaward surveys.

When the contracting office and the surveying activity are in different agencies, the procedures of this section 9.106 and Subpart 42.1 shall be followed along with the regulations of the agency in which the surveying activity is located, except that reasonable special requests by the contracting office shall be accommodated.

9.106-4 Reports.

(a) The surveying activity shall complete the applicable parts of SF 1403, Preaward Survey of Prospective Contractor (General); SF 1404, Preaward Survey of Prospective Contractor -- Technical; SF 1405, Preaward Survey of Prospective Contractor--Production; SF 1406, Preaward Survey of Prospective Contractor--Quality Assurance; SF 1407, Preaward Survey of Prospective Contractor--Financial Capability; and SF 1408, Preaward Survey of Prospective Contractor--Accounting System; and provide a narrative discussion sufficient to support both the evaluation ratings and the recommendations.

(b) When the contractor surveyed is a small business that has received preferential treatment on an ongoing contract under Section 8(a) of the Small Business Act (15 U.S.C. 637) or has received a Certificate of Competency during the last 12 months, the surveying activity shall consult the appropriate Small Business Administration field office before making an affirmative recommendation regarding the contractor's responsibility or nonresponsibility.

(c) When a preaward survey discloses previous unsatisfactory performance, the surveying activity shall specify the extent to which the prospective contractor plans, or has taken, corrective action. Lack of evidence that past failure to meet contractual requirements was the prospective contractor's fault does not necessarily indicate satisfactory performance. The narrative shall report any persistent pattern of need for costly and burdensome Government assistance (e.g., engineering, inspection, or testing) provided in the Government's interest but not contractually required.

(d) When the surveying activity possesses information that supports a recommendation of complete award without an on-site survey and no special areas for investigation have been requested, the surveying activity may provide a short-form preaward survey report. The short-form report shall consist solely of the Preaward Survey of Prospective Contractor (General), SF 1403. Sections III and IV of this form shall be completed and block 21 shall be checked to show that the report is a short-form preaward report.

9.107 Surveys of nonprofit agencies serving people who are blind or have other severe disabilities under the Javits-Wagner-O'Day (JWOD) Program.

(a) The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee), as authorized by 41 U.S.C. 46-48c, determines what supplies and services Federal agencies are required to purchase from JWOD participating nonprofit agencies serving people who are blind or have other severe disabilities (see Subpart 8.7). The Committee is required to find a JWOD participating nonprofit agency capable of furnishing the supplies or services before the nonprofit agency can be designated as a mandatory source under the JWOD Program. The Committee may request a contracting office to assist in assessing the capabilities of a nonprofit agency.

(b) The contracting office, upon request from the Committee, shall request a capability survey

from the activity responsible for performing preaward surveys, or notify the Committee that the JWOD participating nonprofit agency is capable, with supporting rationale, and that the survey is waived. The capability survey will focus on the technical and production capabilities and applicable preaward survey elements to furnish specific supplies or services being considered for addition to the Procurement List.

(c) The contracting office shall use the Standard Form 1403 to request a capability survey of organizations employing people who are blind or have other severe disabilities.

(d) The contracting office shall furnish a copy of the completed survey, or notice that the JWOD participating nonprofit agency is capable and the survey is waived, to the Executive Director, Committee for Purchase From People Who Are Blind or Severely Disabled.

Subpart 9.4--Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart-- (1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2; (2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of "ineligible" in 9.403); and (3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405(b)), it does not prescribe policies and procedures governing declarations of ineligibility.

9.401 Applicability.

In accordance with Public Law 103-355, Section 2455 (31 U.S.C. 6101, note), and Executive Order 12689, any debarment, suspension or other Governmentwide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, shall be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Governmentwide exclusion initiated on or after August 25, 1995, under this subpart shall also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with

responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

(c) When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

9.403 Definitions.

"Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliates." Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

"Agency," as used in this subpart, means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

"Civil judgment" means a judgment or finding of a civil offense by any court of competent jurisdiction.

"Contractor," as used in this subpart, means any individual or other legal entity that--

(a) Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or (b) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another

contractor.

"Conviction" means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

"Debarment," as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is "debarred."

"Debarring official" means-- (a) An agency head; or (b) A designee authorized by the agency head to impose debarment.

"Indictment" means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

"Ineligible," as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

"Legal proceedings" means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

"List of Parties Excluded from Federal Procurement and Nonprocurement Programs" means a list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about parties debarred, suspended, or voluntarily excluded under the Nonprocurement Common Rule or the Federal Acquisition Regulation, parties who have been proposed for debarment under the Federal Acquisition Regulation, and parties determined to be ineligible.

"Nonprocurement Common Rule" means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

"Preponderance of the evidence" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

"Suspending official" means-- (a) An agency head; or (b) A designee authorized by the agency head to impose suspension.

"Suspension," as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is "suspended."

"Unfair trade practices," as used in this subpart, means the commission of any or the following acts by a contractor:

(1) A violation of Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(2) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, et seq.) or any similar bilateral or multilateral export control agreement.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the head of the agency to which such certificate was furnished.

....

9.405 Effect of listing.

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head or a designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(e)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors included on the List of Parties Excluded from Procurement Programs as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties (see Part 28).

(d)(1) After the opening of bids or receipt of proposals, the contracting officer shall review the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(2) Bids received from any listed contractor in response to an invitation for bids shall be entered on the abstract of bids, and rejected unless the agency head or a designee determines in writing that there is a compelling reason to consider the bid.

(3) Proposals, quotations, or offers received from any listed contractor shall not be evaluated for award or included in the competitive range, nor shall discussions be conducted with a listed offeror during a period of ineligibility, unless the agency head or a designee determines, in writing, that there is a compelling reason to do so. If the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider such proposals, quotations, or offers.

(4) Immediately prior to award, the contracting officer shall again review the List to ensure that no award is made to a listed contractor.

....

9.406-2 Causes for debarment.

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(a) The debarring official may debar a contractor for a conviction of or civil judgment for--

(1) Commission of fraud or a criminal offense in connection with-- (i) Obtaining; (ii) Attempting to obtain; or (iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

(4) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. 102-558)); or

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b)(1) The debarring official may debar a contractor, based upon a preponderance of the evidence, for--

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as-- (A) Willful failure to perform in accordance with the terms of one or more contracts; or (B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by-- (A) Failure to comply with the requirements of the clause at 52.223-6, Drug-Free Workplace; or (B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(iii) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. 102-558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Pub. L. 102-558)).

(2) The debarring official may debar a contractor, based on a determination by the Attorney General of the United States, or designee, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989). The Attorney General's determination is not reviewable in the debarment proceedings.

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

....

9.407-2 Causes for suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, of--

(1) Commission of fraud or a criminal offense in connection with-- (i) Obtaining; (ii) Attempting to obtain; or (iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

(4) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by-- (i) Failure to comply with the requirements of the clause at 52.223-6, Drug-Free Workplace; or (ii)

Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504);

(5) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see section 202 of the Defense Production Act (Pub. L. 102-558));

(6) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub. L. 102-558)); or

(7) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

Subpart 19.6--Certificates of Competency and Determinations of Responsibility

19.601 General.

(a) A Certificate of Competency (COC) is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting) for the purpose of receiving and performing a specific Government contract.

(b) The COC program empowers the Small Business Administration (SBA) to certify to Government contracting officers as to all elements of responsibility of any small business concern to receive and perform a specific Government contract. The COC program does not extend to questions concerning regulatory requirements imposed and enforced by other Federal agencies.

(c) The COC program is applicable to all Government acquisitions. A contracting officer shall, upon determining an apparent successful small business offeror to be nonresponsible, refer that

small business to the SBA for a possible COC, even if the next acceptable offer is also from a small business.

(d) When a solicitation requires a small business to adhere to the limitations on subcontracting, a contracting officer's finding that a small business cannot comply with the limitation shall be treated as an element of responsibility and shall be subject to the COC process. When a solicitation requires a small business to adhere to the definition of a nonmanufacturer, a contracting officer's determination that the small business does not comply shall be processed in accordance with Subpart 19.3.

(e) Contracting officers, including those located overseas, are required to comply with this subpart for U.S. small business concerns.

19.602 Procedures.

19.602-1 Referral.

(a) Upon determining and documenting that an apparent successful small business offeror lacks certain elements of responsibility (including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting), the contracting officer shall-- (1) Withhold contract award (see 19.602-3); and (2) Refer the matter to the cognizant SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located, in accordance with agency procedures, except that referral is not necessary if the small business concern-- (i) Is determined to be unqualified and ineligible because it does not meet the standard in 9.104-1(g); provided, that the determination is approved by the chief of the contracting office; or (ii) Is suspended or debarred under Executive Order 11246 or Subpart 9.4.

(b) If a partial set-aside is involved, the contracting officer shall refer to the SBA the entire quantity to which the concern may be entitled, if responsible.

(c) The referral shall include-- (1) A notice that a small business concern has been determined to be nonresponsible, specifying the elements of responsibility the contracting officer found lacking; and (2) If applicable, a copy of the following: (i) Solicitation. (ii) Final offer submitted by the concern whose responsibility is at issue for the procurement. (iii) Abstract of bids or the contracting officer's price negotiation memorandum. (iv) Preaward survey. (v) Technical data package (including drawings, specifications and statement of work). (vi) Any other justification and documentation used to arrive at the nonresponsibility determination.

(d) For any single acquisition, the contracting officer shall make only one referral at a time regarding a determination of nonresponsibility.

(e) Contract award shall be withheld by the contracting officer for a period of 15 business days

(or longer if agreed to by the SBA and the contracting officer) following receipt by the appropriate SBA Area Office of a referral that includes all required documentation.

19.602-2 Issuing or denying a Certificate of Competency (COC).

Within 15 business days (or a longer period agreed to by the SBA and the contracting agency) after receiving a notice that a small business concern lacks certain elements of responsibility, the SBA Area Office will take the following actions:

- (a) Inform the small business concern of the contracting officer's determination and offer it an opportunity to apply to the SBA for a COC. (A concern wishing to apply for a COC should notify the SBA Area Office serving the geographical area in which the headquarters of the offeror is located.)
- (b) Upon timely receipt of a complete and acceptable application, elect to visit the applicant's facility to review its responsibility.
- (1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer.
- (2) The SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but may presume responsibility exists as to elements other than those cited as deficient.
- (c) Consider denying a COC for reasons of nonresponsibility not originally cited by the contracting officer.
- (d) When the Area Director determines that a COC is warranted (for contracts valued at \$25,000,000 or less), notify the contracting officer and provide the following options:
 - (1) Accept the Area Director's decision to issue a COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale for the decision; or (2) Ask the Area Director to suspend the case for one or more of the following purposes:
 - (i) To permit the SBA to forward a detailed rationale for the decision to the contracting officer for review within a specified period of time.
 - (ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file and to attempt to resolve any issues.
 - (iii) To submit any information to the SBA Area Office that the contracting officer believes the SBA did not consider (at which time, the SBA Area Office will establish a new suspense date

mutually agreeable to the contracting officer and the SBA).

(iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under 19.602-3. However, there is no contracting officer's appeal when the Area Office proposes to issue a COC valued at \$100,000 or less.

(e) At the completion of the process, notify the concern and the contracting officer that the COC is denied or is being issued.

(f) Refer recommendations for issuing a COC on contracts greater than \$25,000,000 to SBA Headquarters.

19.602-3 Resolving differences between the agency and the Small Business Administration.

(a) COCs valued between \$100,000 and \$25,000,000. (1) When disagreements arise about a concern's ability to perform, the contracting officer and the SBA shall make every effort to reach a resolution before the SBA takes final action on a COC. This shall be done through the complete exchange of information and in accordance with agency procedures. If agreement cannot be reached between the contracting officer and the SBA Area Office, the contracting officer shall request that the Area Office suspend action and refer the matter to SBA Headquarters for review. The SBA Area Office shall honor the request for a review if the contracting officer agrees to withhold award until the review process is concluded. Without an agreement to withhold award, the SBA Area Office will issue the COC in accordance with applicable SBA regulations.

(2) SBA Headquarters will furnish written notice to the procuring agency's Director, Office of Small and Disadvantaged Business Utilization (OSDBU) or other designated official (with a copy to the contracting officer) that the case file has been received and that an appeal decision may be requested by an authorized official.

(3) If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its procuring agency's Director, OSDBU, or other designated official, within 10 business days (or a time period agreed upon by both agencies) that it intends to appeal the issuance of the COC.

(4) The appeal and any supporting documentation shall be filed by the procuring agency's Director, OSDBU, or other designated official, within 10 business days (or a period agreed upon by both agencies) after SBA Headquarters receives the agency's notification in accordance with paragraph (a)(3) of this subsection.

(5) The SBA Associate Administrator for Government Contracting will make a final determination, in writing, to issue or to deny the COC.

(b) SBA Headquarters' decisions on COCs valued over \$25,000,000. (1) Prior to taking final

action, SBA Headquarters will contact the contracting agency and offer it the following options:

- (i) To request that the SBA suspend case processing to allow the agency to meet with SBA Headquarters personnel and review all documentation contained in the case file; or
 - (ii) To submit to SBA Headquarters for evaluation any information that the contracting agency believes has not been considered.
- (2) After reviewing all available information, the SBA will make a final decision to either issue or deny the COC.
- (c) Reconsideration of a COC after issuance. (1) The SBA reserves the right to reconsider its issuance of a COC, prior to contract award, if-- (i) The COC applicant submitted false information or omitted materially adverse information; or (ii) The COC has been issued for more than 60 days (in which case the SBA may investigate the firm's current circumstances).
- (2) When the SBA reconsiders and reaffirms the COC, the procedures in subsection 19.602-2 do not apply.
- (3) Denial of a COC by the SBA does not preclude a contracting officer from awarding a contract to the referred concern, nor does it prevent the concern from making an offer on any other procurement.

19.602-4 Awarding the contract.

- (a) If new information causes the contracting officer to determine that the concern referred to the SBA is actually responsible to perform the contract, and award has not already been made under paragraph (c) of this subsection, the contracting officer shall reverse the determination of nonresponsibility, notify the SBA of this action, withdraw the referral, and proceed to award the contract.
- (b) The contracting officer shall award the contract to the concern in question if the SBA issues a COC after receiving the referral. An SBA-certified concern shall not be required to meet any other requirements of responsibility. SBA COC's are conclusive with respect to all elements of responsibility of prospective small business contractors.
- (c) The contracting officer shall proceed with the acquisition and award the contract to another appropriately selected and responsible offeror if the SBA has not issued a COC within 15 business days (or a longer period of time agreed to with the SBA) after receiving the referral.

**HEARING ON THE PROPOSED CHANGES TO PART 9 OF THE FEDERAL
ACQUISITION REGULATION RELATING TO CONTRACTOR
RESPONSIBILITY**

OCTOBER 21, 1999

**HOUSE SMALL BUSINESS COMMITTEE
HONORABLE JAMES M. TALENT, CHAIR
HONORABLE NYDIA M. VELAZQUEZ, RANKING MINORITY**

TESTIMONY BY:

**HARRY C. ALFORD
PRESIDENT/CEO
NATIONAL BLACK CHAMBER OF COMMERCE, INC.**

**1350 CONNECTICUT AVE., NW SUITE 825, WASHINGTON, DC 20036
202-466-6888, FAX 202-466-4918
www.NationalBCC.org**

Mr. Chairman, honorable members of the Committee, thank you for giving the National Black Chamber of Commerce the opportunity to voice our opinion on the important topic of rule changes to Part 9 of the Federal Acquisition Regulation (FAR) AKA "Blacklisting".

As we understand it under the proposed changes, a contracting officer must consider a contractor's overall compliance with a wide variety of federal laws unrelated to government procurement including, but not limited to, tax, environmental, worker safety, antitrust, and consumer protection. A contracting officer that found substantial non-compliance with any of these laws or similar federal legal requirements would be required to find the prospective contractor non-responsible. As we understand it, allegations could be filed against an employer without their knowledge and the ability for them to refute or appeal the contracting officer's initial decision to blacklist the contractor. This highly subjective "responsibility" determination, based on the vague nature of the proposed standards, would effectively deny contractors due process by making any bid protest to the determination impractical, if not impossible.

The terms "integrity" and "business ethics" seem to come into play in this matter. These terms are purely subjective and are in the "eyes of the beholder". What we have here is the possibility of allegation and subjectivity replacing fact and objective measurement in the future of a company doing business with the federal government.

Certainly, we believe that anyone doing business with the federal government should abide by the existing laws and perform due diligence. We also believe that the FAR

provides such guidelines and ensures that business is done with a standard of high integrity and business ethics. The proposed changes open the door to more abuse and increase the chances for successful ill-advised actions and manipulation of contractual outcomes. In essence, it may allow reckless behavior by the contracting officer and releases him/her from any control or non-bias judgement.

There is already enough abuse in the system. We use the term "constructive debarment" which is a process that contracting officers use to prevent certain contractors, for whatever reason, from doing business with the federal government. If the contracting officer is adverse to the involvement of the contractor, protests are raised and eventual "COC's", certificates of competency, are processed in the attempt to block the contractor or to make his/her efforts in doing business with the federal government very costly and excruciating. There are contracting officers who use the current system to block contractors from doing legal and ethical business. The proposed changes could turn the current "road of abuse" into a "freeway of abuse".

We say enough of the abuse. We will contest the protests and eventually win through the COC process. The proposed changes would allow a permanent ban on participating in the federal procurement process, without recourse. We have enough problems with bias in the procurement process but at least there is still recourse. The proposed changes amount to a "silver bullet" to a business regardless of guilt or innocence.

There is also a question of a double standard. While it would be simple to evoke such penalties on small businesses, how could punishment be met on larger contractors? For example, McDonnell Douglas (now owned by Boeing) has recently been indicted. Should this giant be permanently barred from federal procurement? Of course not! Such

a debarment would negatively affect our national security. What about the recently convicted Archer Midland Daniels (ADM)? Should they now be barred forever? We doubt if this would become fact. The small businesses cannot show such indispensability. Also, other giant mainstays such as IBM, ATT, Lockheed, etc. will also have the luxury of exemption from effective expulsion (per national security) as opposed to small businesses.

A recent example of abuse of the present system that would be accelerated by the proposed changes can be found in Indianapolis. A member of ours was awarded a HUD procurement and elected to comply with Section 3 of the HUD Act, which allows a contractor to contract up to 30% HUD funded jobs to people living in public housing or under the poverty level. This perfect "welfare to work" law has been on the books since 1968 but it meets strong resistance from labor unions. Unfortunately, because of the resistance only eight (8) cities in this nation abide by the law. Our member was very successful, to the disdain of local unions, and put many people into the workforce for the first time. Meddling from union activists led to our member being officially sited by HUD for "employing too many unskilled workers". That was all right in that we could take the bad publicity for being sited and challenge the unfair accusations. Under the proposed changes, however, this admirable contractor would face debarment from federal work forever.

Again we say that the proposed changes allow too much judgement to the "eyes of the beholder". The terms "integrity" and "business ethics" are too debatable and indefinite. Any fifth grader can reasonably debate that our current Commander-in-Chief is void of integrity and business ethics. On another front, our admiration and former Senator,

Honorable Carolyn Mosely Braun, is having her ambassador appointment held up because of an applicable committee member's attack on her "ethics". Subjectivity has no place here and certainly not in federal procurement.

We see the changes promoting union activity, which all correlation indicates, would be detrimental to the utilization of small businesses. Also, such activity would greatly have a negative impact on the utilization of minority businesses and, even more so, minority workers.

Thank you very much for this opportunity. We hope the current legislation is vigorously enforced and the proposed changes quashed from further progress.

TESTIMONY OF
PHYLLIS HILL SLATER,
PRESIDENT,
HILL SLATER INC.
ON BEHALF OF
THE NATIONAL ASSOCIATION OF WOMEN BUSINESS OWNERS
BEFORE
COMMITTEE ON SMALL BUSINESS
IN THE U. S. HOUSE OF REPRESENTATIVES
Thursday, October 21, 1999

Good morning, Mr. Chairman and members of the committee. Thank you for the opportunity to appear before you today to discuss the proposed rule to expand the scope of the responsibility determination of contracting officers.

My name is Phyllis Hill Slater and I am President of Hill Slater Inc., an engineering and architectural firm located in Great Neck, Long Island, New York. I am also a past president of the National Association of Women Business Owners, or NAWBO, the only nationwide organization representing the interests of women owned businesses. NAWBO currently has nearly 80 chapters across the U. S. representing 7000 members, many of which are classified as small businesses. This year we are celebrating our 25th anniversary. The inclusion of women and minority owned businesses in the federal procurement process has been a major focus of our organization since its inception.

As of this year, there are a total of 9.1 million women business owners in the U.S. generating 3.6 trillion dollars in sales. This group

employs over 27.5 million people. In 1997, however, only 5,622 women-owned business were involved in federal contract actions amounting to \$3.3 billion, or 2.1% of contract awards, a figure that is still far too far below the 5% goal established by the Federal Acquisitions Streamlining Act of 1994. I'll speak more about this goal and how we might achieve success at the conclusion of my remarks here today.

It is NAWBO's position that the proposed rule to expand the scope of the responsibility determination of contracting officers to consider compliance with a full panoply of federal statutory and regulatory requirements constitutes a substantial change in government procurement policy and could impose a great burden on women-owned businesses.

We believe the proposed rule would

1. Increase the cost of doing business with the federal government. It is our concern that small business may be required to provide assurances and evidence of compliance and responsibility on a broad range of federal policy issues that may not pertain to their business at all. Many small

businesses do not have the financial or legal resources to provide that evidence. Not only would proof of compliance cost more than most companies could afford, the time necessary to research, confirm, document and whatever else may be required would be an unfair burden on small business. In addition, the amount of paperwork required to document total responsibility and compliance would be enormous and in direct conflict with NAWBO's position on the federal paperwork reduction act. Not only would small business be affected. We believe the proposed regulation would impose a tremendously increased burden on the Small Business Administration to provide Certificates of Competency for small business for every federal regulation.

2. Women-owned businesses are frequently included in proposals submitted by prime contractors to help meet the prime's need to include women and minority firms. However, the women-owned company is often eliminated from the procurement once the contract is let. This proposed rule could create an environment where women-owned firms would be required by prime contractors to provide "proof of responsibility or compliance" that they might even be able to afford, but

could also require disclosure of proprietary information that would in effect diminish that firm's competitiveness in the marketplace.

3. The proposed rule, we believe, expands the capability of federal contracting officers to ultimately decide capriciously and arbitrarily, the future of a small business. I want to read to you a quote from recent testimony given by Karen Hastie Williams, who was with the Office of Federal Procurement during the Carter Administration, "The proposed regulations are inconsistent and affirmatively harmful to the procurement reform trends of the last decade."

In conclusion, I want to emphasize that we believe the interests of women-owned businesses, and the federal government, would be much better served if contract officers and procurement officials were held accountable for their role in increasing access to procurement opportunities for women. We would like more emphasis on concrete solutions to meeting the 5% goal rather than devising new layers of costly bureaucratic procedures to further discourage women-owned businesses from participating in government contracting.

COMMITTEE
ON
APPROPRIATIONS
SUBCOMMITTEE ON DEFENSE
SUBCOMMITTEE ON
DISTRICT OF COLUMBIA
RANKING MINORITY MEMBER
SUBCOMMITTEE ON INTERIOR

COMMITTEE
ON
BUDGET

Congress of the United States
House of Representatives
Washington, DC 20515-4606

Statement by Congressman James P. Moran
Before the House Small Business Committee
Regarding Proposed Changes to Federal Acquisition Regulations
October 21, 1999

JAMES P. MORAN
8TH DISTRICT OF VIRGINIA

WASHINGTON OFFICE:
2238 RAYBURN HOUSE
OFFICE BUILDING
WASHINGTON, DC 20515-4608
(202) 225-4376
FAX: (202) 225-0017

DISTRICT OFFICE:
5115B FRANCONIA RD.
ALEXANDRIA, VA 22310
(703) 971-4700
FAX: (703) 922-8436
www.house.gov/moran

Thank you for this opportunity to comment on the Administration's proposed rule modifying federal acquisition regulations (FAR) parts 9 and 31, commonly referred to as the "blacklisting" rule.

It is clearly in the public interest for the federal government to do business with companies that work to maintain a good record of compliance with all applicable laws. Similarly, those businesses which have a track record of non-compliance with the law cannot expect to become or remain government contractors. After careful review, I have concluded that the proposed rule is a solution in search of a problem. It will do little to advance the public interest and could have substantial adverse impact on competitiveness and transparency.

Current law requires that the government award contracts to responsible contractors. The FAR include a number of provisions detailing what constitutes a responsible contractor, including having "a satisfactory record of integrity and business ethics . . .". Numerous unscrupulous contractors have been barred from contracting with the government under these procedures.

The proposed rule would "clarify" that "an unsatisfactory record may include . . . substantial noncompliance with [various] laws". Whether this change is significant depends on the interpretation of *substantial noncompliance*. While the background notes to the proposed rules suggest that substantial noncompliance "should be repeated and substantial violations

establishing a pattern or practice by a prospective contractor” they also note that “[t]he facts and circumstances of each such case will require close scrutiny and examination.”

It is hard to see how the proposed rules “clarify” anything. If anything, these rules make the contracting process more arbitrary. By requiring case by case analysis without any clear cut standards, contractors will have little guidance. Furthermore, one can easily see how such a lack of standards might be manipulated to serve political purposes, thus favoring or harming particular types of contractors that might otherwise be equal.

In addition, the proposed rule indicates that “an unsatisfactory record may include persuasive evidence of the prospective contractor’s lack of compliance with tax laws”. Unfortunately, there is no guidance as to what constitutes *persuasive evidence*. Does persuasive evidence mean a criminal conviction or is a finding of civil liability necessary? Would a finding of fraud constitute persuasive evidence? Is any finding of deficiency necessary or is a mere audit enough? What about de minimus errors or arithmetic errors? Principles of due process would seem to require some type of adversarial proceeding in which the contractor had an opportunity to defend himself, yet the proposed rule is silent on this point indicating that mere allegations may be enough to disqualify a contractor. Additionally, I am concerned that this rule would have a chilling effect on contractors who seek to settle with the Internal Revenue Service rather than challenge a notice of deficiency.

It is easy to see how a significant number of firms with de minimus violations or allegations of violations could be effectively barred from the federal contract process. By complicating the federal procurement process, fewer contractors are likely to participate. These factors will inevitably lead to less competition and a corresponding increase in costs to the government and decrease in quality of bids from contractors. Since existing rules adequately provide for debarment of irresponsible contractors, the adverse consequences of enacting the proposed rule cannot be justified.

Some additional factors which I would urge the Committee to consider as it reviews this matter are the impact that such a rule might have on sectors of our economy with a high rate of mergers and acquisitions, such as the high technology sector. For example, to what extent will a firm be impacted by the track record of a business it has recently acquired? What if a U.S. firm seeks to acquire a foreign company? Should the acts of companies which operate in different cultures impact the federal procurement process? Will the impact be severe enough or the consequences so uncertain as to have a chilling effect on mergers? These consequences could have a serious impact not only on specific firms, but on our economy generally. By hindering mergers and acquisitions in this extremely dynamic field, we will be placing another hurdle in front of American companies. If we want to remain competitive in the global economy, it is critical that we do not erect unnecessary barriers to American businesses.

Since the impact of this proposed rule is likely to be so severe, and since there is little evidence that current laws and regulations are ineffective, I have urged the Administration to withdraw its proposed rule. I would urge the Committee to take appropriate action should the Administration insist upon this inappropriate change in procurement policy.

Statement
Of
The Associated General Contractors of America
Regarding
Proposed Blacklisting Regulations
Before the
House Small Business Committee
On
October 21, 1999



The Associated General Contractors of America (AGC) is a national trade association of more than 33,000 firms, including 7,500 of America's leading general contracting firms. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects and site preparation/utilities installation for housing development.

The Associated General Contractors of America
333 John Carlyle Street, Suite 200, Alexandria, VA 22314 • Phone: 703.548.3118 • FAX: 703.837.5407

The Associated General Contractors of America (AGC) is the nation's largest and oldest construction trade association, founded in 1918. AGC represents more than 33,000 firms, including 7,500 of America's leading general contracting firms. AGC's general contractor members have more than 25,000 industry firms associated with them through a network of 101 AGC chapters. AGC member firms are engaged in the construction of the nation's commercial buildings, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation, and utilities installation for housing developments.

To AGC's regret, the Clinton Administration shows no signs of backing away from its controversial July 9 proposal to amend the Federal Acquisition Regulation (FAR) enabling federal contracting officers to "blacklist" any federal contractor for arbitrary and nebulous reasons (Attachment A). AGC believes the proposed regulatory changes would alter how contracting officers conduct responsibility determinations. It would change the review standard from one that is based on performance to one that is based on favoritism. In short, this proposal politicizes the federal procurement process.

The proposed regulations would amend the FAR by adding several examples of what may constitute an unsatisfactory record of integrity and business ethics. While this seems harmless, the proposed regulations are so vague that law-abiding contractors would be subject to a non-responsibility determination for reasons unrelated to performance. Federal contracting officers would become "supercops" responsible for enforcing everything from safety standards, to tax regulations, to environmental requirements. Rather than determining who is the most qualified contractor, contracting officers will be determining guilt or innocence, often without the facts or final adjudication. This is not the best way to administer federal contracts or the best way to enforce federal laws.

The proposal would require contracting officers to take action against a firm whenever they found "persuasive evidence" of a "lack of compliance" with federal tax laws or "substantial noncompliance" with federal labor, employment, environment or antitrust laws, or "other consumer protections." It would also create a new requirement that all federal contractors have "the necessary workplace practices addressing matters such as training, worker retention, and legal compliance to assure a skilled, stable, and productive workforce."

The use of the term "substantial noncompliance" will create tremendous uncertainty as to what constitutes the review standard. Think about it. What does the term mean? It sounds like another term that some lawyer invented to pay for his children's college education. Instead of clarifying the standard review determination process, the administration's proposed rule confuses it. In the administration's own documents, persuasive evidence could be "alleged violations" (Attachment B, page 2).

Further, these "do as I say, not as I do" regulations would set an untenable standard that even the federal government could not meet. For example, in fiscal year 1998, federal employee unions filed 5,704 unfair labor practice charges against the federal government and the

Occupational Safety and Health Administration issued 2,124 citations to the federal government. More recently, rampant violations of the Fair Labor Standards Act have been brought to light, leading to a class action lawsuit against the Department of Justice. If the Department of Justice's attorneys cannot figure out how to comply with the complicated regulations of the FLSA, how is the average businessperson expected to comply?

Altogether, as Attachment C indicates, there were over 60,000 allegations, citations, violations, and enforcement actions taken against the federal government in 1997 and 1998. If the government were to impose the blacklisting regulations upon itself, the Clinton Administration would likely be determined nonresponsible for contracts under the proposed blacklisting regulations. Under the proposal, a contracting officer could determine that any uncertain combination of the federal government's 60,000 charges would suffice to meet a standard of "substantial noncompliance."

Federal regulations already provide for the debarment or suspension of contractors who lack business ethics and integrity required to perform federal work. A list of suspended or debarred contractors is maintained for a contracting officer's reference to ascertain if a contractor is eligible for a contract award. This list is compiled by the General Services Administration after a company or individual has been given notice that action is being taken against them. Debarment and suspension is outlined in FAR Part 9-4. Notification requirements and time frames are specified. The opportunity to rebut charges a contractor believes are unfair or false is also described. The existing process does not deny a contractor due process when the federal government is deciding whether or not to deprive a company of economic opportunity.

At its recent Midyear Meeting in Chicago, the AGC Board of Directors unanimously passed a resolution that included strongly worded opposition to the regulations. AGC's resolution notes that federal contracting officers and debarment officials already have broad discretion to deny contracts, and that those officials have used that discretion when necessary. In addition, the resolution deplores the Administration's attempt to politicize federal contracting and urges AGC to use any lawful means necessary to stop these regulations from becoming final (Attachment D).

AGC believes the following summarizes the most onerous provisions of this proposal.

- The proposal would corrupt the review standards long used to decide whether a contractor is "responsible." Far from clarifying those standards, the proposal would cause great uncertainty and insert political influence into the federal contracting process.
- The proposal would dispose of any requirement that there be a connection between legal violation and a firm's honesty, integrity or ability to perform federal work.
- The proposal would shift the responsibility for making complex, competing responsibility judgments from specialized agencies to contracting officers who lack training, experience, and resources to make those judgments. This proposal is equally unfair to contractors and contracting officers. It would put such officers in the untenable position

of trying to interpret and apply legal standards far outside the scope of their training and experience.

- The proposal would intrude on the primary jurisdiction of the National Labor Relations Board and other specialized agencies to which Congress has assigned primary responsibility enforcement.
- The proposal disregards not only the purpose of routinely determining whether contractors are “responsible,” but also the well-established and effective procedures for debarring ethical firms. It also treads on every contractor’s right to due process.
- The proposal also amends FAR Part 31 in a way that will disrupt the balance of labor and management required by federal law. Federal statutes determine which costs are allowable and unallowable, whether or not they are related to union organizing campaigns. The proposed regulations would clearly upset the “impartial” balance that has existed for years.

AGC thanks the House Small Business Committee for holding the hearing on this proposed regulation. Despite the Administration’s assertions, this is not a clarification. The blacklisting regulation undermines Congressional authority regarding the Fair Labor Standards Act and upsets the neutral stance toward labor-management relations. This regulation will not increase the quality of goods and services provided to the government. Sadly, it undermines recent efforts to streamline federal procurement.

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 9 and 31

[FAR Case 99-010]

RIN 9000-A140

**Federal Acquisition Regulation;
Contractor Responsibility, Labor
Relations Costs, and Costs Relating to
Legal and Other Proceedings**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to clarify coverage and give examples of suitable contractor responsibility considerations, as well as to make unallowable the costs of attempting to influence employee decisions regarding unionization, and make unallowable those legal expenses related to defense of judicial or administrative proceedings brought by the Federal Government when a contractor is found to have violated a law or regulation, or the proceeding is settled by consent or compromise, except to the extent specifically provided as part of the settlement agreement.

DATES: Comments should be submitted on or before November 8, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035 ATTN: Laurie Duarte, Washington, DC 20405.

Address e-mail comments submitted via the Internet to: farcase99-010@gsa.gov.

Please submit comments only and cite FAR case 99-010 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAR case 99-010.

SUPPLEMENTARY INFORMATION:

A. Background

1. FAR Responsibility Criteria

This proposed rule revises FAR 9.104-1(d) and (e) to clarify coverage concerning contractor responsibility considerations, by adding examples of what falls within the existing definition of "an unsatisfactory record of integrity and business ethics." The proposed amendment will provide contracting officers with guidance concerning general standards of contractor compliance with applicable laws when making pre-award responsibility determinations.

A prospective contractor's record of compliance with laws and regulations promulgated by the Federal Government is a relevant and important part of the overall responsibility determination. This proposed FAR amendment clarifies the existing rule by providing several examples of what constitutes an unsatisfactory record of compliance with laws and regulations. These examples are premised on the existing principle that the Federal Government should not enter into contracts with contractors who do not comply with the law. For example, the proposed rule clarifies that a prospective contractor's failure to comply with applicable tax laws may be considered by the contracting officer in making a responsibility determination. Similarly, the proposed rule attempts to clarify the fact that an established record of employment discrimination would be a relevant part of the contracting officer's responsibility determination because such a record or pattern is a strong indication of a contractor's overall willingness or capability to comply with applicable laws.

Normally, the contracting officer should base adverse responsibility determinations involving violations of law or regulation upon a final adjudication by a competent authority concerning the underlying charge. However, in some circumstances, it may be appropriate for the contracting officer to base an adverse responsibility determination upon persuasive evidence of substantial noncompliance with a law or regulation (i.e., not isolated or trivial, but repeated and substantial violations establishing a pattern or practice by a prospective contractor. The facts and circumstances in each such case will require close scrutiny and examination.).

An efficient, economical and well-functioning procurement system requires the award of contracts to organizations that meet high standards

of integrity and business ethics and have the necessary workplace practices to assure a skilled, stable and productive workforce. This proposal seeks to further the Government's use of best practices by ensuring the Government does business only with high-performing and successful companies that work to maintain a good record of compliance with applicable laws.

2. Cost Principle Changes

This proposed rule revises the cost principle at FAR 31.205-21 to make unallowable those costs relating to attempts to influence employee decisions regarding unionization. This cost principle change is in furtherance of the Government's long-standing policy to remain neutral with respect to employer-employee labor disputes (see FAR Part 22). Some contractors are claiming, as an allowable cost, those activities designed to influence employees with regard to unionization decisions. Inasmuch as a number of cost-based Federal programs have long made these types of costs unallowable as a matter of public policy (e.g., see 29 U.S.C. 1553(c)(1), 42 U.S.C. 1395x(v)(1)(N), 42 U.S.C. 9839(e), and 42 U.S.C. 12634(b)(1)), equity dictates that this same principle be extended to Government contracts as well.

The proposed rule also revises FAR 31.205-47 to make clear that costs relating to legal and other proceedings are unallowable where the outcome is a finding that a contractor has violated a law or regulation, or where the proceeding was settled by consent or compromise (except that such costs may be made allowable to the extent specifically provided as a part of a settlement agreement). At present, the relevant cost principle generally makes unallowable legal and other proceeding costs where, for example, in a criminal proceeding, there is a conviction; or where, for example, in a civil proceeding, there is a monetary penalty imposed. There are a number of civil proceedings brought by the Federal Government each year that do not result in imposition of a monetary penalty (e.g., NLRB or EEOC proceedings), but which do involve a finding or adjudication that a contractor has violated a law or regulation, and where appropriate remedies are then ordered.

Under the proposed rule, the allowability of legal and other proceedings costs would depend on whether or not a contractor is found to have violated a law or regulation rather than on the nature of the remedy imposed. Taxpayers should not have to pay the legal defense costs associated

with adverse decisions against contractors, especially where the proceeding is brought by an agency of the Federal Government.

3. Additional Considerations

In order to give greater effect to the FAR responsibility clarifications being proposed, please provide comments and suggestions concerning whether the provision appearing at FAR 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, should be amended to provide for enhanced responsibility disclosure relative to this proposal.

This is not a significant regulatory action and, therefore, was not subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities do not involve use of formal responsibility surveys. In addition, most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not require the submission of cost or pricing data, and thus do not require application of the FAR cost principles. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 99-010), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed FAR changes do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 9 and 31

Government procurement.

Dated: July 1, 1999.

Jeremy F. Olson,
Acting Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 9 and 31 be amended as set forth below:

1. The authority citation for 48 CFR parts 9 and 31 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

2. Amend section 9.104-1 to revise paragraphs (d) and (e) to read as follows:

9.104-1 General standards.

(d) Have a satisfactory record of integrity and business ethics (examples of an unsatisfactory record may include persuasive evidence of the prospective contractor's lack of compliance with tax laws, or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws or consumer protection laws);

(e) Have the necessary organizational, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104-3(a)) and the necessary workplace practices addressing matters such as training,

worker retention, and legal compliance to assure a skilled, stable and productive workforce;

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Revise section 31.205-21 to read as follows:

31.205-21 Labor relations costs.

(a) Costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.

(b) Costs incurred for activities related to influencing employees' decision regarding unionization are unallowable.

4. In section 31.205-47, redesignate paragraphs (b)(3) through (b)(5) as paragraphs (b)(4) through (b)(6) and add new paragraph (b)(3); and revise redesignated paragraphs (b)(5) and (b)(6) to read as follows:

31.205-47 Costs related to legal and other proceedings.

* * * * *

(b) * * *

(3) In a judicial or administrative proceeding brought by the Government, a finding that the contractor violated a law or regulation;

* * * * *

(5) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in paragraphs (b)(1) through (4) of this subsection (but see paragraphs (c) and (d) of this subsection); or

(6) Not covered by paragraphs (b)(1) through (5) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (5) of this subsection.

* * * * *

[FR Doc. 99-17298 Filed 7-8-99; 8:45 am]

BILLING CODE 8820-EP-P

CONTRACTOR RESPONSIBILITY AND COST PRINCIPLE CHANGES

Q: What does the proposed rule do?

A. The proposed rule will do three things:

First, the proposed rule will clarify the so-called "responsibility" criteria contained in the Federal Acquisition Regulation (FAR) - the rule that governs all government contracting procedures. The purpose of this proposed clarification is to specify that a firm's record of compliance with all Federal laws may be considered by the Contracting Officer in making a contract award determination. Under present law, Federal contract awards may only be made to firms that have a record of "integrity and business ethics." The proposed rule would add examples to the FAR to more clearly indicate what would constitute a record of "integrity and business ethics." For example, under the proposed rule, a prospective contractor's lack of compliance with tax laws, or substantial noncompliance with laws governing labor and employment, wages and hours, health and safety or equal employment opportunity, could be considered by the Contracting Officer in determining whether particular business firms is "responsible" for purposes of being awarded Federal contracts. b2-c

The proposed rule does not change existing government contract law, it only clarifies it.

Second, the proposed rule will change certain "cost principles" contained in the FAR to prohibit the reimbursement of contractors' legal expenses when they lose in a civil proceeding brought by the Federal Government. Under current rules, there are a number of civil proceedings where contractors may be reimbursed for their legal expenses even when they lose in a case brought by the Government. The Administration's proposal would stop this practice. Contractors would continue to be reimbursed for their legal costs when they prevail in civil suits brought by the Government, or in cases where payment of legal costs is expressly made a part of a settlement agreement.

Third, the proposed rule will stop reimbursement of contractors costs incurred for activities designed to influence employees with respect to unionization (either for or against unionization). Under current rules, the Federal Government reimburses contractors for their costs relating to anti-union activities, or other activities designed to influence employees concerning unionization. The proposed rule will further the Government's long-standing policy of remaining neutral with respect to employer-employee labor disputes.

- Q. How will Contracting Officers make this determination? What special qualifications do they possess? Isn't the job of the Contracting Officer to award and administer contracts, not to determine a firm's record of compliance with all sorts of Federal laws and regulations?
- A. In most cases, Contracting Officers will base adverse responsibility determinations involving violations of law or regulation upon a final adjudication by a competent authority concerning the underlying charge (i.e., a decision by an administrative entity or a Court with jurisdiction over the underlying matter). However, in some circumstances, it may be appropriate for the Contracting Officer to base an adverse responsibility determination upon persuasive evidence of substantial non-compliance with a law or regulation. Such evidence of substantial non-compliance may be based upon a charge that the Contracting Officer finds to have strong weight or merit associated with it. For example, although the filing of a complaint by a Government adjudicatory or enforcement agency, or its chief legal officer (e.g., the EEOC in a case involving alleged employment discrimination, the NLRB in a matter involving an alleged unfair labor practice, or the Department of Labor in a matter involving alleged violations of OSHA or the FLAA) while standing alone may not dictate the Contracting Officer's decision, the complaint may nonetheless, constitute evidence of substantial non-compliance, i.e., not isolated or trivial, but repeated and substantial violations establishing a pattern or practice by a prospective contractor. The facts and circumstances in each such case will require close scrutiny and examination.
- Q. Why the proposed changes to the cost principles?
- A. The proposed cost principle change is in furtherance of the government's long-standing policy to remain neutral with respect to employer-employee labor disputes. It has come to the FAR Council's attention that some contractors are claiming, as an allowable cost, those activities designed to influence employees with respect to unionization decisions. Inasmuch as a number of cost-based Federal funding programs have long made these types of costs unallowable as a matter of public policy (e.g., see 29 U.S.C. 1553(c)(1) - "The Job Training Partnership Act," 42 U.S.C. 1395x(v)(1)(N) - "Medicare," 42 U.S.C. 9839(e) - "Head Start," and 42 U.S.C. 12634(b)(1)) - "the National Service Act." equity dictates that this same principle be extended to Government contracts, as well.

Finally, the FAR Council is proposing to amend the cost principles to make clear that costs relating to legal and other proceedings are unallowable where the outcome is a finding that a contractor has violated a law or regulation, or where the proceeding was settled by consent or compromise (except that such costs may be made allowable to the extent specifically provided as a part of a settlement agreement). At present, the relevant cost principle generally make unallowable legal and other proceeding costs where, for example, in a criminal proceeding, there is a conviction; or where, for example, in a civil proceeding, there is a monetary penalty imposed. It has been brought to the FAR Council's attention that there are a number of civil proceedings brought by the Federal Government each year that do not result in imposition of a monetary penalty (e.g., NLRB

Q: What is the status of the rule? What are the procedures for issuance?

A. The status of the rule is that it is an initial proposal state only. The Administration will shortly forward the proposal to the members of the FAR Council (the group that issues Government procurement regulations). The FAR Council will review the proposal and have it published in the Federal Register for public comment. The public comment consideration and analysis period generally takes several months. Therefore, it is not likely that a final rule could be in effect before Fall 1999 (and possibly later).

Q: Why all the talk about "blacklisting"?

A. This is simply incorrect. No "blacklists" or other attempts to punish contractors are being attempted. The only purpose of the proposed rule is to protect the Government from having to do business with serious law breakers. Of course, some contractors that have a poor record of compliance with various Federal laws might find themselves ineligible for future contract awards.

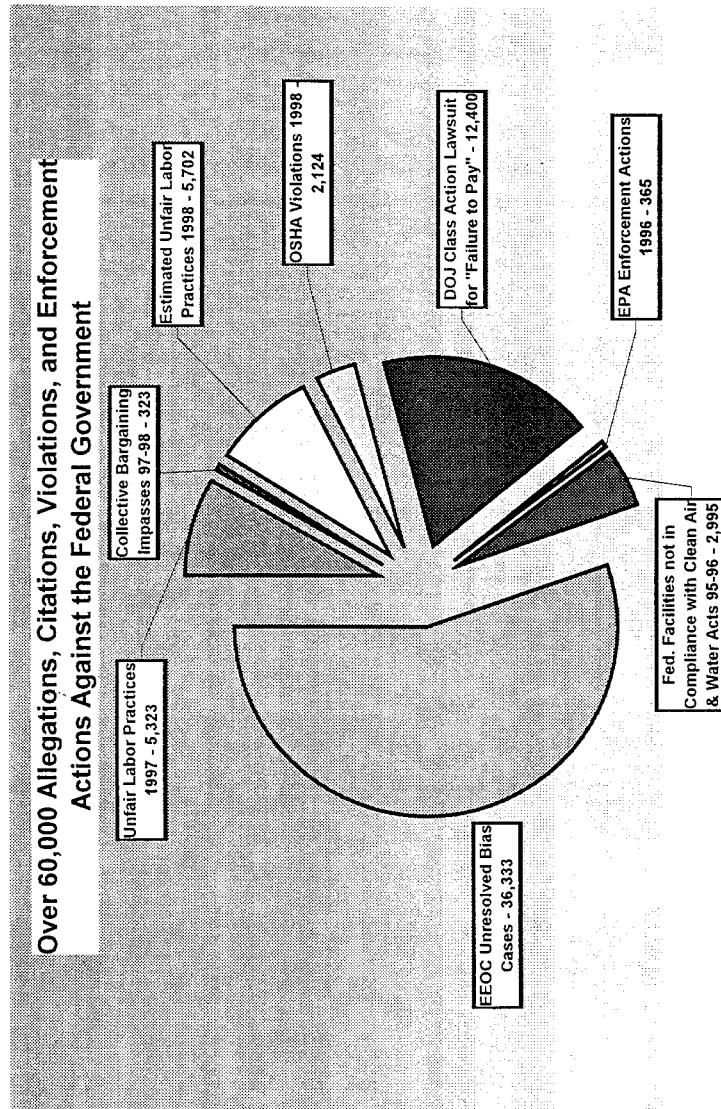
Q: Why is this rule even necessary?

A. A prospective contractor's record of compliance with laws and regulations promulgated by the Federal Government is a relevant and important part of the overall responsibility determination. This proposed FAR amendment clarifies the existing rule by providing several examples of what constitutes an unsatisfactory record of compliance with laws and regulations. These examples are premised on the existing principle that the Federal Government does not enter into contracts with law breakers.

For example, some Contracting Officers have inquired as to whether a prospective contractor's failure to comply with applicable tax laws may be considered in making a responsibility determination. The proposed rule clarifies that such a circumstance may be considered by the Contracting Officer. Similarly, inquiries have been made concerning contractors with a record of employment discrimination. Again, the proposed rule attempts to clarify the fact that an established record of employment discrimination would be a relevant part of the Contracting Officer's determination because such a record or pattern is a strong indication of a contractor's overall willingness or capability to comply with applicable laws.

or EEOC proceedings), but which do involve a finding or adjudication that a contractor has violated a law or regulation, and where appropriate remedies are then ordered.

Under the proposed rule, the allowability of legal and other proceedings costs would depend on whether or not a contractor is found to have violated a law or regulation rather than on the nature of the remedy imposed. Taxpayers should not have to pay the legal defense costs associated with adverse decision against contractors, especially where the proceeding is brought by an agency of the Federal Government.



**Graph Sources
Attachment C**

- According to the Federal Labor Relations Authority (FLRA), the federal government had 5,323 unfair labor practice charges filed in 1997.¹
- The federal government reached a collective bargaining impasse 148 times in 1997.²
- FLRA's preliminary estimates for unfair labor practices charges are 5,702 in 1998. There were 175 bargaining impasse cases filed in 1998.³
- For Fiscal Year 1998, the Occupational Safety and Health Administration issued the federal government 2,124 citations.⁴
- The Department of Justice is facing a class action lawsuit for failing to pay 12,400 department lawyers "millions of hours" in overtime. This violation of the Fair Labor Standards Act could result in a half billion-dollar settlement.⁵
- The Environmental Protection Agency took 365 enforcement actions against federal facilities in 1996.⁶
- Fully one-quarter of federal facilities are not in compliance with the Clean Water Act and the Clean Air Act.⁷
- Currently, the government has 36,333 unresolved bias cases being investigated by the Equal Employment Opportunity Commission.⁸

¹ 19th Annual Report, Federal Labor Relations Authority, Fiscal Year 1997.

² 19th Annual Report, Federal Labor Relations Authority, Fiscal Year 1997.

³ Initial findings of the Federal Labor Relations Authority.

⁴ OSHA website, Standards Cited, Division J, All sizes: Federal.

⁵ *The New York Times*, August 25, 1999, P. A-1.

⁶ State of Federal Facilities Report 1995-96, Environmental Protection Agency

⁷ State of Federal Facilities Report 1995-96, Environmental Protection Agency.

⁸ "Lubricating the Machinery," *The Washington Post*, August 27, 1999, p. A-27.

**AGC BOARD RESOLUTION
ON THE CLINTON ADMINISTRATION'S
PROPOSED REGULATIONS
ON FEDERAL CONTRACTING PROCEDURES**

WHEREAS, federal contracting officers and debarment officials have long had broad discretion to deny federal contracts to firms that are not presently responsible to perform such contracts;

WHEREAS, federal contracting officers and debarment officials have long exercised such discretion only where and when necessary to protect the federal government's legitimate business interests;

WHEREAS, the Administration has proposed new federal regulations that would have the purpose and effect of coercing such professionals to subordinate their professional judgment to the Administration's political agenda;

WHEREAS, such coercion is and shall be unacceptable to the Associated General Contractors of America,

NOW THEREFORE, it is RESOLVED that the Associated General Contractors of America does and shall continue to deplore the Administration's effort to politicize federal contracting procedures; and

It is FURTHER RESOLVED that the Associated General Contractors of America does and shall oppose the proposed regulations in the strongest possible terms and shall take all lawful steps necessary to prevent such regulations from taking effect.

Adopted September 30, 1999

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

October 21, 1999

The Honorable James Talent
Chairman
House Small Business Committee
United States House of Representatives
Washington, DC 20515

Dear Chairman Talent:

I want to thank you for holding an oversight hearing today on the Administration's proposed government procurement "blacklisting" regulation. The U.S. Chamber of Commerce, the world's largest business federation, representing more than three million businesses of every size, sector, and region, appreciates your concern for the impact this misguided proposal will have on all government contractors, including small employers.

The proposed regulation, issued on July 9 of this year, would effectively "blacklist" companies from eligibility to receive government contracts if they do not have a satisfactory record of compliance with employment, tax, anti-trust, environmental or consumer protection laws. (See 64 Fed. Reg. 37360). This issue is of great concern to the business community for many reasons, as discussed below, but particularly because its standards for compliance are so broad and vague as to be meaningless, effectively empowering government agents with unlimited discretion to deem which contractor will, or will not be, favored with a government contract. The regulation, not surprisingly given its political history, also has the potential for use as a weapon by unions against businesses that contract to provide services and products to the federal government. The proposed regulation threatens not only the loss of jobs, but also to upset the delicate balance of federal government neutrality in the labor/employer context.

Although the Chamber will be submitting formal comments for the rulemaking record, attached are some points that we urge you to consider as you examine this important issue.

In closing, I reiterate the Chamber's strong opposition to this proposed regulation. Your interest and concern for this important issue is greatly appreciated.

Sincerely,



R. Bruce Josten

Reasons Why the Clinton/Gore Administration's Proposed Federal Procurement "Blacklisting" Regulation is Bad for Small Business

➤ **The Impact of the Proposed Regulation is Not Limited to Large Businesses**

It should be emphasized that it is not only large businesses that will suffer the consequences of "blacklisting" under the proposed regulation. To the contrary, if implemented, the proposed regulation will have a large, profound effect on small business. For example, 20 percent – over \$41 billion in 1997 – of all government contracts are awarded to small businesses. Yet it is the small business that is least capable of implementing new government regulations – it costs small businesses twice as much as large businesses to do so. In addition, small businesses, more frequently than large, find themselves in inadvertent violation of various federal paperwork requirements. Such minor violations would end up on a firm's record of compliance for purposes of the proposed regulation and would inhibit their ability to qualify for federal contracts.

➤ **Contractors May be Presumed Guilty: Mere Allegations Enough**

Under the proposed regulations, government contracting officers would have the power to deny federal contracts to companies that are *merely accused* of violating employment and other laws. A charge need not even be finally adjudicated before being considered as part of an employer's record to be reviewed. For example, union complaints pending with the NLRB, OSHA charges, IRS and EPA allegations, as well as other allegations, can all be considered even before a final determination of guilt or innocence is made. Punishment before violations are even proven is hardly fair.

➤ **Regulation Language is Subjective and Vague**

The draft blacklisting regulation will permit federal agency contracting officers to determine, on a case-by-case basis, which contractors get contracts and which do not. These contracting officers, managed by political appointees, will be judge and jury in deciding who has a satisfactory record of compliance with federal laws. What constitutes satisfactory compliance with the law is unclear, and what "record" would be looked at is unclear, leaving open the door to subjective, conflicting, and unfair interpretation by political appointees and agency bureaucrats. Agency procurement officers are hardly equipped to make that determination.

➤ **Even the Best-intentioned Employer Can Get Caught in the Vast Maze of Confusing and Often Conflicting Agency Rules and Regulations**

The universe of law and regulation to which employers are subject is vast, covering almost every conceivable topic. For example, employers must comply with employment, tax, environmental, anti-trust, and many other areas of law and regulation in the course of running a business. The expanse of employment law and regulation alone is enormous – covering areas such as wage and hour, pension, affirmative action, immigration, safety and health, plant closing, labor relations, and discrimination, to name but a few. The *Code of Federal Regulations* relating *just to employment laws* covers over 4,000 pages of fine print. Even the federal government, with its legions of agencies and specialists with expertise in every nuance of the law, seems confused by what is or is not required by the workplace laws. A

1994 report by the General Accounting Office (GAO/HEHS-94-138) revealed that not only do agencies often not know the answer to employer inquiries, they often give conflicting responses as to what is required of employers. The GAO Report noted that "the magnitude, complexity, and dynamics of workplace regulation pose a challenge for employers of all sizes."

The difficulty of achieving total compliance with the impenetrable thicket of federal law and regulation is aptly illustrated by the Clinton/Gore Administration's own experience. For example, the federal agencies' record of compliance with employment laws is far from perfect. In fact, if the federal government were held accountable under the standards of the Clinton/Gore Administration's own proposed regulation (which, of course, it is not), it would likely be ineligible for government contracts in many instances. Note the following recent statistics on federal agency violations of federal law:

Equal Employment Opportunity Charges

The total number of EEO charge complaints filed against the federal government in FY98 was 28,147. However, the agency's inventory of complaints, representing previous years' cases and those filed in FY98 was much larger, at 36,333. Of the charges resolved in FY98, 7.2% were found to be meritorious.

NLRB Charges

The total number of unfair labor practice (ULP) charges filed against the federal government in FY98 was 5,702. At the end of the calendar year, 1998, 2,122 charges were pending against the federal government.

OSHA Complaints

There were 767 OSHA inspections of federal government agencies in FY98, which resulted in 2,274 cited violations.

Environmental Violations

In FY98 alone, EPA imposed 55 penalties for environmental violations against federal agencies ranging from the Department of Defense, the Department of Energy, the U.S. Postal Service, the Bureau of Indian Affairs, the General Services Administration, the U.S. Forest Service, the Corps of Engineers, the Department of Interior, the Federal Law Enforcement Training Center, the U.S. Department of Agriculture, and the Department of the Treasury. Federal agencies have violated hazardous waste laws at over 2,000 sites, including 150 of the worst hazardous waste cleanup sites in the nation.

➤ **23 Million American Workers' Jobs Could be at Risk**

GAO estimates that companies with federal contracts and subcontracts employ 23 million American workers. A federal contracting officer's decision to deny a company a federal contract based on subjective and unfair interpretations of the blacklisting regulation could put that company and its employees out of business.

➤ **Regulations Would Turn Back the Clock on Streamlining of Federal Procurement Process**

Congress since 1984 has enacted several measures designed to streamline and simplify the federal contracting process in order to increase efficiency and lower costs. These efforts will be significantly diminished if the Clinton/Gore Administration's blacklisting regulation is

permitted to become law. In addition to raising the costs of doing business with the federal government, the proposed blacklisting regulations will introduce an additional layer of bureaucracy and red tape into the contracting process.

Further, there has been no showing that the proposed regulation will lead to more efficient government contracting by the federal government. It is the taxpayer who will suffer as more red tape and consideration of vague subjective factors extraneous to determining the best possible product at the lowest cost to the government are introduced into the procurement process.

➤ **Would Deny Recovery of Attorney's Fees and Costs in Defending Against Government Lawsuits and Countering Union Propaganda**

Under existing law, government contractors are allowed to recover in their contracts with the government "costs incurred for activities related to influencing employees' decision regarding unionization." The proposed regulation would deny employers recovery of these costs.

Currently, employers are allowed to recover costs incurred in defending against government lawsuits or administrative proceedings in cases where the employer was "found" to have violated an employment law or regulation, but was not convicted of a crime, was not found liable for fraud, and no monetary penalty was imposed. The blacklisting regulations would change that to prohibit recovery of all costs incurred in connection with a judicial or administrative proceeding brought by the federal government in which there is a mere "finding" that the contractor violated a law or regulation, or in cases that are resolved by consent or compromise.

➤ **Back Door Attempt to Usurp Congress' Authority**

Only Congress possesses the authority to amend the employment and other laws of the land, and the Clinton/Gore Administration's proposed regulation is an attempt to circumvent the legislative process by adding, through regulation, a new draconian penalty – disqualification from government contracts – to those laws. Any changes to the laws should receive a full airing by the public and by Congress, rather than through the back door of the administrative agencies.

➤ **It's All About Politics and Not Substance**

Vice President Gore announced the Administration's intent to enact these regulations at a 1997 meeting of the AFL-CIO Executive Committee. The AFL-CIO quickly followed with a memorandum to its membership, searching for support for the announced initiative. The interest of organized labor in this proposal is not coincidental.

The blacklisting regulation would arm unions with another weapon with which to target and attack specific employers. For example, organized labor often files frivolous charges with government agencies during organizing drives against employers to put pressure on those employers to recognize, without an employee election, the union. The Clinton/Gore proposal will increase that pressure because pending allegations could now be used by government bureaucrats to disqualify employers from government contracts.

American Electronics Association

Representing the U.S. electronics, software and information technology industries

AEA

WWW Address: <http://www.aea.net.org>

5201 Great America Parkway, Suite 520, Santa Clara, CA 95054 Telephone: 408-987-4200 Fax: 408-970-8565

Mailing Address: P.O. Box 54990, Santa Clara, CA 95056-0990

601 Pennsylvania Ave., NW, North Building, Suite 600, Washington, DC 20004 Telephone: 202-682-9110 Fax: 202-682-9111

October 21, 1999

The Honorable James Talent
Chairman
House Small Business Committee
2361 Rayburn House Office
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the American Electronics Association, I would like to commend your committee for holding a hearing on the proposed regulations recommending changes to the Federal Acquisition Regulations (FAR) Parts 9 and 31-- contractor responsibility and unallowability of costs. I respectfully submit the attached AEA position paper be included in the hearing record.

It is the position of AEA that the proposed changes to contractor responsibility regulations will impede the ability of our members, large and small, to do fair business with the federal government. If finalized, the regulations will serve to prevent companies that are allegedly noncompliant with a law or regulation from obtaining federal contracts. Companies can be denied contract awards based on alleged or actual violations of labor, employment, environment, tax, or antitrust law. The contract officer must perceive these violations as 'substantial', but the term is undefined. These changes also add commitment to worker retention and training as contractor responsibility criteria. While companies strive to abide by all Federal regulations and to provide a positive work environment for their employees, deviations and alleged deviations from these practices should not deny award to a historically responsible contractor.

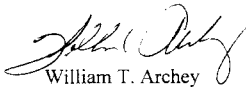
The proposed regulations also withhold due process by allowing denial of a contract on "persuasive evidence of substantial noncompliance with a law or regulation." Allegations need not be proven in court to be grounds for denial and many small businesses lack adequate resources for defense. Company size relative to number of complaints is not taken into account. This lack of threshold can be particularly damaging to small and medium-sized businesses. In addition, evidence can be interpreted at the discretion of a contracting officer without consistency and will encourage third party influence.

These draft regulations are unnecessary. Current law already protects the Federal government from companies with bad track records. These regulations will place all companies at risk of being unfairly excluded from providing innovative and valuable high-tech products and services to the government.

The American Electronics Association is the nation's largest high-tech trade group, representing almost 3,000 U.S.-based technology companies. Membership spans the industry product and service spectrum, from semiconductors and software to computers, Internet and telecommunications systems and services. For 56 years, AEA has been the accepted voice of the U.S. technology community.

AEA is looking forward to working with you to ensure that the interests of the small high-tech businesses are addressed.

Sincerely,



William T. Archey
President and CEO

AMERICAN ELECTRONICS ASSOCIATION
POSITION PAPER
SUBMITTED FOR THE RECORD TO THE
U.S. HOUSE SMALL BUSINESS COMMITTEE
HEARING ON THE PROPOSED CHANGES TO PART 9 OF THE
FEDERAL ACQUISITION REGULATIONS
RELATING TO CONTRACTOR RESPONSIBILITY

Federal Contracting & The Proposed Contractor Responsibility Regulation:
Threatening the Government Procurement Process and Acquisition Reform

We must clear the thicket of regulations by undertaking a thorough review of the regulations already in place and redesigning the regulatory processes to end the proliferation of unnecessary and unproductive rules.

-Vice-President Al Gore

From Red Tape To Results: Creating a Government That Works Better
and Costs Less; Report of the National Performance Review

INTRODUCTION

Imagine that you are the president of a medium-sized, high technology company that manufactures and sells computer printers and monitors. Your company previously did not conduct business with the Federal Government. However, due to recent statutory changes that have made commercial contracting with the Government much easier, your company has entered the federal marketplace and performed successfully under a number of government contracts.

Two months ago, your company engaged in a particularly fierce competition to sell computer equipment and devices to a particular federal agency with which your company has previously done business successfully. You are confident about your chances for the contract award considering your firm's track record, but your Federal Government sales representative suddenly informs you that your company has been precluded from further competition on this contract. According to your sales rep, the agency contract officer (CO) determined that your company failed to comply with the Federal tax code and therefore did not maintain the standards of integrity and business ethics required of "responsible" federal contractors. Upon further investigation, you find out that a competitor informed the agency's CO that your company was recently the subject of an Internal Revenue Service audit of your Last-In/First-Out (LIFO) dollar-method inventory accounting practices at three of your manufacturing plants. Although your company was audited, your firm was never assessed a tax deficiency and never charged with any tax code violations.

As president of a company that works hard to comply with all laws and regulations governing your firm's activities, you are obviously enraged and disillusioned. You never were given an opportunity to respond to the audit "issue" before being barred from the competition,

and you thought that many of the cumbersome government regulations that prevented your company from previously doing business with the Federal Government were removed. Do you protest the CO's decision, remain complacent about the "black mark" that has just been leveled at your company, or do you consider leaving the federal marketplace because of arbitrary decisions that impact not only your ability to win federal contract awards, but also your business reputation?

I. THE ISSUE

If the scenario presented seems implausible, it is not. On July 9, 1999, the Clinton Administration published draft changes to the Federal Acquisition Regulation (FAR) that seriously threaten to impede the recent efforts to reform the Federal Government's acquisition process. The proposed regulation¹ would allow an agency's contracting officer (CO) to bar a company from consideration for a federal contract award if the CO determines that there is "persuasive evidence of the prospective contractor's lack of compliance with tax laws, or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws or consumer protection laws." The proposed regulation would also allow a CO to bar a company from competition for award if the CO determines that the prospective contractor does not have "the necessary workplace practices addressing matters such as training, worker retention, and legal compliance to assure a skilled, stable and productive workforce."

This proposed regulation threatens to replace the barriers to the commercial marketplace that Congress has previously removed from the Government procurement process. The proposed regulation does not set forth any adequate standards for the COs who will be evaluating prospective contractors and making such important contractor "responsibility" determinations. The proposed regulation does not provide any mechanism for training COs to recognize and understand the often intricate and complex statutes and regulations involved with labor and employment, environmental, antitrust, and consumer protection laws—nor should any CO be expected to be experts in such a wide body of knowledge. The proposed regulation also does not provide prospective contractors with an opportunity to respond to such adverse CO responsibility determinations. Furthermore, the proposed regulation attempts to supercede an existing body of procurement law geared to protect the Federal Government from unscrupulous and unethical contractors. Although the Government is entitled to, and should, do business with ethical and law-abiding companies, a proposed regulation which threatens to punish those companies that endeavor to comply with the law should not be promulgated. As the proposed contractor responsibility regulation currently stands, however, its arbitrary, vague, and unnecessary standards risk losing the benefits and rewards that recent acquisition reform has brought to the Federal Government and its contractors.

II. BACKGROUND

A. Defining "Contractor Responsibility"

When acquiring products and services, the Government generally conducts a “background check” of its prospective contractors to determine if the contractors will be able to satisfy the Government’s particular contract requirements. This “background check” is officially known as a “contractor responsibility” determination. The government representative in charge of making the responsibility determination is the agency CO handling the particular procurement. The Federal Acquisition Regulations (FAR), which sets forth the general rules governing most agencies’ procurement processes and practices, states that when making a responsibility determination, a CO should review a prospective contractor’s financial resources, delivery capabilities, contract performance history, business functions and skill, and facilities to determine if the contractor has the “potential” to perform under a contract.² The FAR also states that a prospective contractor “must have a satisfactory record of integrity and business ethics” in order to be considered “responsible.”³ The FAR currently does not define the phrase “a satisfactory record of integrity and business ethics;” however, this phrase is generally interpreted to mean that a prospective contractor has not been indicted or convicted for a crime involving the contractor’s business conduct.⁴ As is evident, the contractor responsibility determination is a subjective analysis geared towards assessing a prospective contractor’s business capability. This analysis helps minimize the risk that a prospective contractor will not be able to perform a contract once it is awarded.

The responsibility determination process vests considerable discretion in the CO for deciding which prospective contractors will be able to compete for contract award. A CO may only buy products or services from prospective contractors that are *affirmatively* determined to be “responsible.”⁵ Therefore, a “nonresponsible” determination prevents prospective contractors from further consideration for contract award. A prospective contractor can protest a CO’s finding that the contractor is “nonresponsible.”⁶ However, because the CO’s responsibility determination is inherently a *subjective* evaluation of a prospective contractor’s capabilities, the tribunal hearing such a protest will not conduct a brand new responsibility evaluation. Instead, the tribunal will review a CO’s responsibility determination only for “unreasonableness,” “arbitrariness,” or an “abuse of discretion.”⁷

B. The Suspension & Debarment Process

In addition to the CO’s role in determining whether a prospective contractor possesses the capability to perform a particular government contract, an agency may determine that certain contractor actions threaten the integrity of the Government procurement process such that the contractor should not be able to do business with the Government. The FAR sets forth two specific procedures, “suspension” and “debarment,” which enable an agency to exclude companies engaged in certain fraudulent and unlawful activities from generally doing business with the Government.⁸ The suspension regulations allow an agency to restrict temporarily a contractor from consideration for contract awards. Suspensions are generally imposed upon the indictment of, the initiation of legal proceedings against, or the investigation of a company for fraudulent or illegal activity. Debarment prevents a contractor from receiving contract awards for a period of up to three years. Debarments are usually imposed upon the conviction of, or a

civil judgment against, a company for violations of procurement-related statutes (i.e., the False Claims Act, the False Statements Statute). Notably, both the suspension and the debarment regulations permit contractor exclusion from the government contracting process for the “commission of any . . . offense indicating a lack of business integrity or business honesty that *seriously and directly affects* the present responsibility of a Government contractor or subcontractor.”⁹

Because of the serious impact that a suspension or debarment has on a federal contractor’s business, the decision to suspend or debar a prospective contractor is handled by a designated agency suspension or debarment official. The FAR’s suspension and debarment provisions also allow a contractor to submit for agency consideration “information and argument in opposition” to a suspension or proposed debarment.¹⁰ In addition, the FAR rules provide for certain fact-finding hearings in both suspension and debarment contexts.¹¹ The FAR furthermore specifically guides agency suspension and debarment officials to consider a number of mitigating factors before rendering any suspension or debarment decision. For example, suspension and debarments officials should consider a contractor’s: (1) standards of conduct and internal control systems, (2) voluntary disclosure of the activity forming the basis of the pending suspension or debarment decision, (3) cooperation with government investigators, (4) payment or agreement to pay all civil or criminal fines, (5) disciplinary actions against the individuals responsible for the unlawful activity, (6) implementation or remedial measures, (7) recognition of the seriousness of any illegal actions.¹²

C. Acquisition Reform & Its Relation to Government Contracting Regulations

Until recently, many commercial companies avoided doing business with the Federal Government. Their apprehension of the federal marketplace stemmed from a cumbersome acquisition process that relied on rigid regulations and procedures, inordinate paperwork, detailed specifications, and constant government oversight through numerous audits and inspections during contract performance. For those companies that did contract with the Government, the extensive rules and processes governing federal procurement resulted in the fulfillment of government program needs over the course of years instead of months. These complex rules also led contractors to charge higher prices to the Government due to the required compliance with government-unique requirements and the increased risk of severe penalties for any noncompliance with these requirements. For many commercial companies and particularly small businesses, however, the complexity and cost of doing business with the Government simply prevented entrance into the federal marketplace.

Recognizing the procurement process limited government access to many state-of-the-art products and services available in the commercial marketplace, Congress and the President initiated a number of efforts to “streamline” the procurement system and “reform” the acquisition process to make it simpler and easier for commercial companies to do business with the Government. Among the most significant streamlining efforts on the executive front, President

Clinton created the National Performance Review (NPR) in 1993, a task force led by Vice President Gore with the goal of “creating a government that works better and costs less.” The report of the NPR recommended that the Administration “simplify the procurement process by rewriting federal regulations—shifting from rigid rules to guiding principles.”¹³ More specifically, the report of the NPR stated that the FAR “contains too many rules” that “are changed too often.” The report directed the Administration to rewrite the FAR and the agency FAR supplements to (among other principles):

- end unnecessary regulatory requirements;
- foster competitiveness and commercial practices, and;
- recommend acquisition methods that reflect information technology’s short life cycle.¹⁴

On the legislative front, Congress passed the Federal Acquisition Streamlining Act (FASA) in 1994¹⁵ and the Clinger-Cohen Act in 1996¹⁶ with the goal of realizing the efficiencies and lower costs of the commercial marketplace by allowing the government procurement system to emulate the commercial marketplace to the maximum extent possible. For example, FASA and the Clinger-Cohen Act expressed a clear preference for government acquisition of commercial items, discouraged contracting activities from establishing government-unique design requirements, limited the cost disclosures required by the Truth in Negotiations Act for contractors supplying commercial items, removed the applicability of certain statutory requirements to commercial item subcontractors, created innovative procurement vehicles for acquiring commercial products (particular information technology), and permitted the use of simplified acquisition procedures for certain commercial item contracts.

The on-going procurement reform effort, boosted by such initiatives as the NPR, FASA, and the Clinger-Cohen Act, has dramatically affected the government acquisition process. Many more commercial companies, particular information technology firms, are conducting business with the Federal Government due to the removal of restrictive and unnecessary rules formerly associated with the federal procurement system. The Government is acquiring commercial products and services with drastically reduced acquisition lead times. Perhaps most importantly, the Government has realized significant savings in the cost of its products and services through increased competition among commercial firms seeking to fulfill government requirements.

D. The Issuance of the July 9, 1999, Proposed Rule on Contractor Responsibility

Despite this acquisition streamlining effort, the Clinton Administration on July 9, 1999, published draft changes to the FAR that dramatically alter the considerations COs may entertain when making contractor responsibility determinations. The rule was originally intended to prohibit companies with an “unsatisfactory record” of labor law practices from receiving federal

contract awards. However, the proposed rule goes much further than merely preventing companies with unsatisfactory labor records from doing business with the Federal Government.

Specifically, the proposed rule would amend the FAR's contractor responsibility criteria to permit COs to find that a prospective contractor does not have a "satisfactory record of integrity and business ethics" (and therefore is "nonresponsible" and illegible for contract award) when there is "persuasive evidence of the prospective contractor's lack of compliance with tax laws or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws or consumer protection laws."¹⁷ The proposed rule does not incorporate a definition of the phrase "persuasive evidence of substantial noncompliance" into the FAR. However, supplementary information to the proposed rule provides the following:

Normally, the contracting officer should base adverse responsibility determinations involving violations of law or regulation upon a final adjudication by a competent authority concerning the underlying charge. However, in *some circumstances*, it may be appropriate for the contracting officer to base an adverse responsibility determination upon *persuasive evidence* of substantial noncompliance with a law or regulation (i.e., not isolated or trivial, but repeated and *substantial* violations establishing a *pattern or practice* by a prospective contractor. The facts and circumstances in each such case will require *close scrutiny and examination*.

(emphasis added). Significantly, the proposed FAR change and the supplementary information to the proposed rule do not define (as emphasized above): (1) the appropriate "circumstances" in which a CO should consider the "persuasive evidence of substantial noncompliance" test; (2) the types of evidence that a CO should consider as "persuasive evidence;" (3) the difference between an isolated or trivial violation and a substantial violation of a law or regulation; (4) the meaning of the phrase "pattern or practice;" and (5) the method of scrutiny or examination by which a CO reviews the evidence of an alleged statutory or regulatory violation.

The proposed rule would also change the FAR's responsibility criteria to require that prospective contractors maintain "the necessary workplace practices addressing matters such as training, worker retention, and legal compliance to assure a skilled, stable, and productive workforce."¹⁸ The proposed rule and the accompanying supplementary information, however, do not define the practices that are "necessary" to assure a skilled, stable, and productive workforce.¹⁹

III. THE PROPOSED RULE REPRESENTS A DIRECT THREAT TO FEDERAL PROCUREMENT REFORM AND ACQUISITION STREAMLINING

AEA believes the Government should do business with ethical and law-abiding companies. However, the proposed contractor responsibility regulation, as written, threatens to replace the barriers to the commercial marketplace that Congress has previously removed from

the Government procurement process. In general, the proposed regulation will greatly complicate and potentially handicap the current federal procurement process. The following summary presents a number of the streamlining goals of the NPR, FASA, and the Clinger-Cohen Act which are directly contradicted by the proposed contractor responsibility rule:

- ***Contrary to the Procurement Reform Initiative to Eliminate Unnecessary Regulatory Requirements, the Proposed Rule Attempts to Replace an Already Existing Body of Law that Protects the Government from Contracting with Unethical Companies***

Every federal agency has in place a system that allows for consistent denial of contract award to unscrupulous contractors—the suspension and debarment system. The suspension and debarment process is an established system governed by elaborate rules and staffed with designated agency officials who are experienced in determining whether a particular company has engaged in conduct unbecoming of a federal contractor. Unlike the suspension and debarment process, a CO's responsibility determination is geared towards deciding whether a prospective contractor will be able to fulfill the Government's needs timely and efficiently. The FAR also states that a prospective contractor "must have a satisfactory record of integrity and business ethics" in order to be considered "responsible."²⁰ This phrase has been interpreted, as stated previously, to mean that a prospective contractor has not been indicted or convicted of a crime that directly impacts on the contractor's business conduct and ability to perform the contract requirements.

The proposed rule seriously confuses the roles of the suspension and debarment system and the CO responsibility determination in the federal procurement process. It attempts to place specialized authority that has already been granted to designated agency suspension and debarment officials into the hands of agency COs. If the Administration seeks to reinforce the policy that the Government will conduct its business only with ethical contractors, the suspension and debarment regulations are the appropriate place to reinforce this policy. However, the suspension and debarment provisions already provide the Government with adequate safeguards against those firms that continually fail to comply with federal statutes and regulations.

- ***Contrary to the Procurement Reform Initiative to Eliminate Vague and Overly Complex Rules and Regulations, the Proposed Rule Is Riddled with Uncertainties That Would Prevent Companies From Getting Involved in the Federal Marketplace***

The proposed regulation also adds substantial uncertainty to the contractor responsibility determination process and the acquisition process in general. As a result, many commercial firms will avoid (or perhaps be forced to avoid) the federal marketplace. A "nonresponsible" determination may impact a contractor's other federal business and may jeopardize a contractor's commercial business. Because of the relative importance of the responsibility determination, no company wants to be determined nonresponsible based upon arbitrary or vague regulatory requirements. However, the proposed rule completely fails to articulate any reasonable standards

for COs when evaluating whether a prospective contractor “has a satisfactory record of integrity and business ethics” or has “necessary workplace practices” regarding its workforce.

As the supplementary information to the proposed rule recognizes, an unsatisfactory record of integrity or business ethics has generally meant that a prospective contractor was adjudicated by a competent authority of violating laws or regulations relating to its business conduct. The proposed rule seeks to amend the common interpretation of “unsatisfactory record of integrity or business ethics” to mean “persuasive evidence” of noncompliance with tax, labor, employment, antitrust, environmental, and consumer protection law. For companies seeking to do business with the Government, the proposed rule raises a number of uncertainties that will remain within the discretion of the CO (and therefore will be difficult to protest), but nevertheless complicate the acquisition process:

1. *The Proposed Rule Is Not Necessarily Tied to the Contractor’s Ability To Perform*

Under the proposed rule, a CO could determine that a contractor is “nonresponsible” for *alleged* violations of laws or regulations that have nothing to do with the contractor’s ability to fulfill the contract requirements. For example, a contractor *alleged* to have maintained insufficient pollution control devices in violation of the Environmental Protection Agency’s requirements may be deemed “nonresponsible” under the proposed regulation even though the solicitation at issue concerned the furnishing of laptops, which was not impacted by the alleged EPA violation.

2. *The Proposed Rule Does Not Accord Contractors with Any Due Process*

The proposed rule fails to define the types of “evidence” that a CO must consider before rendering a nonresponsible determination for failure to maintain a satisfactory record of integrity or business ethics. Under the proposed regulation, allegations need not be proven in court before a CO issues a nonresponsible determination. In addition, the regulation does not require that allegations of noncompliance come from a particular source or tribunal. Instead, the regulation permits COs to consider allegations from competitors, disgruntled employees, or other third parties. While the CO is responsible for closely scrutinizing any allegations, the standard of review of contractor protests of CO responsibility determinations insulates CO determinations that are not the product of full and complete investigations. The proposed rule also does not provide prospective contractors with an opportunity to submit information in response to an allegation of statutory or regulatory noncompliance. Therefore, a CO may base his or her nonresponsibility determination on evidence that may be controverted by the prospective contractor. Furthermore, the proposed rule does not require that a CO consider certain mitigating factors before issuing a nonresponsible determination. In other words, a prospective contractor may be labeled “nonresponsible” due to alleged regulatory violations, even though the prospective contractor maintained a rigorous compliance program, or voluntarily disclosed the facts relating to the potential violation. The proposed regulation, therefore, threatens to punish companies that affirmatively attempt to comply with the law.

3. *The Proposed Rule Does Not Set Forth Any Clear Parameters for COs.*

If the proposed rule enables COs to make nonresponsibility determinations because of evidence of “substantial” noncompliance with labor, employment, tax, environmental, antitrust, and consumer protection laws, COs need to understand when a violation of these laws is “substantial.” However, the proposed regulation does not provide a definition of “substantial” in the context of these laws. Furthermore, such a definition would be quite difficult to articulate, considering that the areas of law identified in the proposed rule as requiring compliance are complicated, complex, and occupy numerous volumes of statutes and regulations. The proposed rule nevertheless leaves the difficult decision of what constitutes a “substantial” violation of these laws in the hands of the CO, who is unlikely to be fully educated on the intricacies of all labor, employment, tax, environmental, antitrust, and consumer protection laws. As is evident, the proposed rule accords so much discretion to the CO that commercial companies will become wary of a federal marketplace that seemingly could label them “nonresponsible” on the basis of mere allegations concerning potentially insignificant statutory or regulatory noncompliance.

- ***Contrary to the Procurement Reform Initiative To Create an Acquisition Process Which Mimics the Commercial Marketplace, the Proposed Rule Adds New Government-Unique Contracting Requirements***

The proposed rule also provides that in order to be considered responsible, a prospective contractor must maintain “the necessary workplace practices addressing matters such as training, worker retention, and legal compliance to assure a skilled, stable, and productive workforce.” The proposed regulation fails not only to define the workplace practices that are “necessary” for a favorable responsibility determination, but also to consider that many commercial firms may not have implemented the unexplained “necessary workplace practices” that the Administration seeks. A major goal of the acquisition streamlining effort was to reduce government-unique requirements that are not a part of the commercial marketplace. By requiring that a responsible contractor must have certain “workplace practices” “to assure a skilled, stable, and productive workforce,” the proposed rule seeks to add an affirmative requirement to the contracting process that will limit the base of commercial companies with which the Government can contract.

- ***Contrary to the Procurement Reform Initiative to Reduce Acquisition Lead Times, the Proposed Rule Threatens to Stall the Acquisition Process***

One of the main benefits of procurement reform is the reduction of time between the original contract solicitation and the final contract award. The use of commercial practices and procedures has enabled the Government to acquire its goods and services faster than ever before. The proposed rule, however, risks the addition of unnecessary delays to the acquisition cycle. As third parties seek to present COs with evidence of a prospective contractor’s noncompliance with law or regulation, the COs will use up scarce resources and time to conduct investigations or examinations of the allegations. Furthermore, to the extent that a CO determines that a

prospective contractor is nonresponsible due to such third party evidence, commercial companies are likely to attempt to protest the CO's decision. These protests, if timely filed, will further delay the government's acquisition process.

- ***Contrary to the Procurement Reform Initiative To Reduce the Administrative Burdens on Government Contractors, the Proposed Rule Will Likely Lead to Increased Contractor Costs that Will Either Be Passed on to the Government, Or Will Prevent Companies from Contracting With the Federal Government***

If prospective contractors risk nonresponsibility determinations as a result of mere evidence of noncompliance with certain laws or regulations, and not final adjudication of guilt or liability, contractors that seek to do business with the Government will incur legal costs to defend most asserted violations of federal law, instead of settling various suits or complaints by the Government or other third parties. To the extent that these legal costs could be passed onto the Government,²¹ the Government will obviously pay more for items and services that would cost less if this proposed regulation is not adopted. However, the administrative burden of litigating each lawsuit (or attempting to sway a CO that evidence in his or her possession is not adequate to support a "nonresponsible" determination), especially to the extent that these costs will not be reimbursed by the Government, may lead many commercial and small business contractors away from the federal marketplace.

CONCLUSION

The implementation of a vague and arbitrary rule, which contradicts many federal procurement reform initiatives and threatens government access to the commercial marketplace, should not be allowed. As explained above, the proposed contractor responsibility rule will have a significant, deleterious impact on the Government's access to commercial products and services and risk undoing many of the gains accomplished by procurement reform. The AEA certainly supports the Administration's desire to contract with ethical businesses. However, the proposed contractor responsibility regulation is clearly not the appropriate method for carrying out this desire.

FOR MORE INFORMATION, PLEASE CONTACT NANCY SAUCIER AT 202/682-4457

ENDNOTES

1. 64 Fed. Reg. 37359 (1999).

2. 48 C.F.R. § 9.104-1. The regulations contained in Volume 48 of the Code of Federal Regulations (CFR) comprise the Federal Acquisition Regulation (FAR) and individual agency supplements of the FAR. CFR Volume 48, sections 1-53, represents the FAR. The rest of CFR Volume 48 includes the agency FAR supplements, which have more specific rules governing the individual agencies' particular contracting practices.

3. FAR 9.104-1(d).

4. Donald P. Arnavas & William J. Ruberry, *Government Contract Guidebook* 3-30 (2d ed. 1994 and Supp. 1998).

5. FAR 9.103(a), (b). An "affirmative" determination of responsibility means that the CO possesses information clearly indicating that a prospective contractor has the ability to perform the contract.

6. The "protest" process enables prospective contractors to challenge an agency's procurement practices or decisions for a particular acquisition as contrary to established law or regulation. A contractor can generally initiate a protest in the General Accounting Office (GAO), Court of Federal Claims, federal district court, or the contracting agency—although the precise rules and procedures for bringing a protest vary among the different protest fora.

7. See John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 442-44 (3d ed. 1998) (citing a variety of GAO bid protest decisions and district and appellate court decisions from the Federal Circuit).

8. FAR subpart 9.4 ("Debarment, Suspension, and Ineligibility").

9. FAR 9.406-2(a)(5), 9.407-2(a)(7) (emphasis added).

10. FAR 9.406-3(b)(1), 9.407-3(b)(1).

11. FAR 9.406-3(b)(2), 9.407-3(b)(2).

12. FAR 9.406-1(a), 9.407-1(b)(2).

13. Vice President Gore, *From Red Tape To Results: Creating a Government That Works Better and Costs Less*; Report of the National Performance Review, p. 28 (Sept. 7, 1993).

14. *Id.* at 28-29.

15. Pub. L. No. 103-355, 108 Stat. 3243.

16. Pub. L. No. 104-106, 110 Stat. 642.

17. 64 Fed. Reg. 37359 (proposed FAR 9.104-1(d)).

18. Id. (proposed FAR 9.104-1(e)).

19. The proposed rule also revises the FAR to make unallowable contractor costs relating to “attempts to influence employee decisions regarding unionization,” and contractor costs relating legal or other proceedings “where the outcome is a finding that a contractor has violated a law or regulation, or where the proceeding was settled by consent or compromise [that could have led to a finding of a contractor violation].” These proposed revisions are generally beyond the scope of the discussion in this Paper.

20. FAR 9.104-1(d).

21. See note 18 supra.

167

STATEMENT SUBMITTED FOR THE RECORD

OF

LPA, INC.

HEARING ON THE PROPOSED CHANGES TO PART 9 OF THE FEDERAL
ACQUISITION REGULATION RELATING TO CONTRACTOR
RESPONSIBILITY

BEFORE THE

HOUSE COMMITTEE ON SMALL BUSINESS

OCTOBER 21, 1999
(99-210)



1015 FIFTEENTH STREET | SUITE 1200
WASHINGTON DC 20005
202.789.8670 | FAX 202.789.0064 | WWW.LPA.ORG

MR. CHAIRMAN AND MEMBERS OF THE SMALL BUSINESS COMMITTEE:

Thank you for allowing us to present our views to your committee regarding the Clinton Administration's proposed regulations that change qualifications for federal contractors, known in shorthand as the "blacklisting" regulations. LPA, Inc., formerly the Labor Policy Association, is a public policy advocacy organization representing senior human resource executives of more than 250 of the largest corporations doing business in the United States. LPA's purpose is to ensure that U.S. employment policy supports the competitive goals of its member companies and their employees. LPA member companies employ more than 12 million employees, or 12 percent of the private sector workforce, and in 1997, comprised 36 of the top 100 federal contractors measured by dollar volume. The proposed blacklisting regulations would have a profound impact on our members.

In addition to the dramatic changes in federal contract law these regulations would create, LPA is especially concerned with how organized labor would use the proposed changes to Part 9 of the Federal Acquisition Regulation (FAR) to assist its strategy of using so-called "corporate campaigns" against targeted employers during organizing drives and contract negotiations. The changes to Part 9 would require contracting officers to review a company's history of compliance with labor and employment laws, antitrust laws, environmental consumer protection laws and tax laws. The added requirement would give unions greater incentive to file charges with or request inspections by federal agencies. This is particularly the case during organizing drives, where the unions often seek recognition as the employees' collective bargaining representative without a secret ballot election. This testimony aims to educate the committee further about union corporate campaigns and how the proposed regulations would substantially assist unions in achieving their goals.

Meanwhile, to put the regulations in context, it is necessary to understand that they are the substitute for the Clinton Administration's attempted 1995 executive order to ban federal contractors from using permanent striker replacements. Several times Congress had considered and rejected amendments to change federal law in this manner, a top labor priority. In 1995, President Clinton issued an executive order barring federal contractors from current and future contracts if they used permanent replacements in economic strikes. LPA and several other plaintiffs immediately sued, successfully arguing before the District of Columbia Circuit Court of Appeals in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), that the executive order exceeded the President's authority under the Constitution. The lawsuit forced the Administration to find a way to help organized labor using the power of federal contracts without violating the Constitution, so the Administration turned to federal procurement rules.

Regulations Intended To Assist Union Organizing

From the time the regulations were first announced, it was clear that they were intended to boost union organizing. Vice President Al Gore announced the regulations at a February 1997 AFL-CIO Executive Committee meeting. In his address to the committee, the Vice President made clear what the Administration's intentions were:

This White House will take action to give the right to organize new teeth. If you want to do business with the Federal government, you had better maintain a safe workplace and respect civil, human and, yes, union rights.¹

At an AFL-CIO organizing conference in September 1997, Gore again stated that the regulations were intended to pressure federal contractors into unionizing:

[C]ompanies that bust unions don't get or keep Federal contracts. That ought to be taken into account when they apply for Federal contracts.²

Union leaders viewed the denial of large federal contracts as a potent threat in their renewed focus on organizing. The federal procurement process could be used as a hammer in corporate campaigns to "encourage" federal contractors with non-union operations to accept a union, similar to the way that the Office of Federal Contract Compliance Programs "encourages" federal contractors to diversify their work forces.

The Use of Regulatory Pressure in Corporate Campaigns

In its effort to reverse the drop in private sector union membership, which fell to 9.6 percent in 1998,³ organized labor is increasingly turning to corporate campaign tactics to put pressure on employers to recognize unions even where their employees would not choose those unions in a secret ballot election. As one union organizer put it: "Organize employers, not employees."⁴

The D.C. Circuit Court of Appeals has defined a "corporate campaign" as:

a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, *requests that regulatory agencies investigate and pursue employer violations of state or Federal law*, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors or the general public.⁵

In corporate campaigns, unions attempt to find any pressure point against a company that will encourage the company to agree to the union's demands. As the definition points out, regulatory attacks are used frequently because they divert management's attention to regulatory compliance, paint the company as a bad actor in the media, and if the tactic is particularly successful, cost the employer a significant amount of money.

In order to promote corporate campaign tactics, several union groups, individual unions and the AFL-CIO have published manuals to guide local unions in organizing through corporate campaigns. These guides explain the rationale behind corporate campaigns and provide tactical suggestions and organizational templates. It is clear from the manuals that unions view Federal law as a means to harass employers:

Both public institutions and private companies are subject to all sorts of laws and regulations, from the Securities and Exchange Commission to the Occupational Safety and Health Act, from the Civil Rights Act to the local fire codes. *Every law or regulation is a potential net in which management can be snared and entangled.*⁶

Unions ensnare management by diverting its attention with lengthy regulatory investigations. A manual from the Industrial Unions Department of the AFL-CIO phrased it this way:

Businesses are regulated by a virtual alphabet soup of federal, state and local agencies, which monitor nearly every aspect of corporate behavior. Although these watchdog agencies employ inspectors to monitor compliance by companies, most also rely on employees and other individuals to file complaints about violations. Once the regulators are alerted to violations by a company, they sometimes assume an adversarial relationship toward the offender.⁷

Union-generated regulatory harassment has many advantages in a corporate campaign. Above all, it carries with it the imprimatur of the federal government. As demonstrated below, it can result in substantial alleged violations and proposed fines, creating greater scrutiny of the purported offender by other agencies. It is also cost effective for the union. Once a complaint is made or a charge is filed, the government often takes responsibility for investigating and prosecuting the allegation.

According to union strategist Ray Rogers, the creator of modern corporate campaigns, a successful corporate campaign strategy “has a beginning point A and an end point Z. Point Z is total defeat or annihilation of your adversary.” To be successful, Rogers emphasizes, “there has to be an escalation of the fight.”⁸

These sentiments are echoed throughout union literature:

Organizing is war. The objective is to convince employers to do something that they do not want to do. That means a fight. If you don't have a war mentality, your chances of success are limited.⁹

Within the regulatory sphere, escalation may involve allegations of more serious and costly violations. As a corporate campaign manual from the Service Employees International Union describes:

It often takes a combination of tactics to win. . . . More often, you have to put pressure in many ways so that the total cost of you campaign to the employer begins to outweigh the benefits of rejecting your proposals.¹⁰

By linking Federal contracts and regulatory compliance, the proposed regulations make it easier for unions to escalate their harassment during corporate campaigns.

Corporate campaign manuals recommend that organizers threaten federal funds or contracts when pressuring companies that are union organizing targets because these threats are effective. The more reliance a company places on federal contracts, the more successful these strategies will be:

An employer may depend on lenders, investors, customers, clients, tenants, patients, or *government agencies* to provide funds. The most effective outside pressure tactics are often those which could put that flow of funds in jeopardy.¹¹

To be effective the threats must appear to be real, even if they are not carried out:

The threat of action often has more psychological effect on management officials than the action itself because they don't know exactly what the impact may be. A consideration in [deciding on a pressure strategy] is that power is not only what the union has, but what the company thinks it has. Sometimes the threat exerts more pressure than the action itself.¹²

A report by the George Meany Center for Labor Studies notes that threatening government funds has been particularly successful in achieving union recognition without going through a traditional NLRB-supervised election. This process is known as card check recognition. The report states that the "most effective type of leverage [in gaining card check recognition] appears to be the employer's need for public dollars or regulatory assistance and the union's ability to thwart that need."¹³

Unions have regularly used corporate reliance on public funds to wrestle card check agreements from employers. For example, as stated in the Meany Center report regarding the Hotel Employees and Restaurant Employees Union (HERE):

HERE has used the investment of public dollars in hotel development projects to leverage neutrality and card check agreements in several cities across the U.S.¹⁴

Clearly, the proposed regulations would prove an effective union tool in forcing companies to agree to card check recognition if implemented.

Unions Will Use Proposed Regulations as Organizing Tactic in Corporate Campaigns

As noted above, the proposed changes to Part 9 of the FAR would do much more than clarify existing regulations. They would allow unions engaged in corporate campaigns to fire two shots at once toward a targeted employer: the regulatory charges that would normally be filed to harass an employer and the potential that any violations could lead to rejection of a federal contract.

Under current federal procurement regulations, before a contracting officer may award a contract, he or she must determine that the contractor is "responsible" as that term is defined in the regulations. A responsible contractor is one that can demonstrate that it has the financial and physical capacity to perform the contract. In addition, the contractor must demonstrate a

“satisfactory record of integrity and business ethics” and the necessary organization, experience, and accounting and other technical controls to perform the contract.

A contractor demonstrates that it has a “satisfactory record of integrity and business ethics” if it has followed applicable federal contracting laws and has not engaged in egregious or unethical behavior on prior federal contracts. Only on rare occasions has a contractor been disqualified from federal contracts as a result of labor law violations, and even then, the statutes in question, such as the Service Contract Act provided for debarment as a sanction. Debarment is a formal process of disqualifying an existing federal contractor for up to three years.

The proposed regulations would expand the concept of “integrity and business ethics” by adding the following parenthetical illustrations:

[E]xamples of an unsatisfactory record may include persuasive evidence of the prospective contractor’s lack of compliance with tax laws or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws.¹⁵

The clear intent of the regulations is to require contracting officers to closely review a contractor’s labor relations history, whether or not the violations are related to the contract in question. Unions trying to pressure the employer could cause labor charges to be filed against the company, causing greater scrutiny, if not disqualification.

The vague language of the regulations makes it difficult to determine exactly when a contracting officer will be considered to have “persuasive evidence of substantial noncompliance with labor laws.” The preamble to the regulations states that substantial noncompliance includes not only “final adjudication by a competent authority,” such as a decision by a federal court of appeals in an unfair labor practice charge case, but also “repeated and substantial violations establishing a pattern or practice by a prospective contractor.” Repeated and substantial violations could include less than final resolution of an alleged violation. According to an explanation provided by the Clinton Administration:

Such evidence of substantial noncompliance may be based upon a charge that the Contracting Officer finds to have strong weight or merit associated with it. For example, although the filing of a complaint by a Government adjudicatory or enforcement agency, or its chief legal officer (*e.g.*, the EEOC in a case involving alleged employment discrimination, the NLRB in a matter involving an alleged unfair labor practice, or the Department of Labor involving alleged violations of OSHA or the FLSA) while standing alone may not dictate the Contracting Officer’s decision, the complaint may constitute evidence of substantial noncompliance.¹⁶

In other words, contracting officers could disqualify a potential contractor on the basis of a *single allegation* of a labor law violation as long as the contracting officer believed it was significant in light of a past violation. Several examples of regulatory harassment illustrate this point.

National Labor Relations Board In July 1999, the Fifth Circuit Court of Appeals overturned a 1993 NLRB election at Avondale Industries because the Board used improper voter identification procedures that could have led to significant election fraud.¹⁷ Under NLRB rules, the only way the company could challenge the election procedures was to refuse to bargain with the union, committing a technical unfair labor practice. When the NLRB considered the case, however, it upheld the election and summarily affirmed that the employer had committed a refusal to bargain unfair labor practice. This finding would very likely have met the standard of “evidence of substantial noncompliance” established in the regulations.

Yet, six years after the election, reviewing the circumstances of the case, the court of appeals concluded that the NLRB erred in conducting the election:

The crux of the inadequate identification procedure is this: no one knows exactly who voted in the Avondale election. . . . The ultimate basis for approving the outcome of this election is the NLRB's hope that most employees voted truthfully. Such a hope does not fulfill the standard of “extreme care” that the NLRB itself sets for the conduct of representation elections. The NLRB's reliance on mere hope, unsupported by objectively verifiable voter information, raises a reasonable doubt as to the fairness and validity of the election.¹⁸

The organizing drive and election that resulted from it was part of an ongoing corporate campaign by the Metal Trades Council of New Orleans and the AFL-CIO to pressure the company to bargain with the union, even though the company believed the election was flawed.¹⁹ Had a contracting officer determined the company was not “responsible” based on the company's decision to seek review of the election by committing a technical unfair labor practice or the Board's interim decision in the union's favor, he or she may have incorrectly decided not to award the contract.

Another example of abuse of the NLRB is provided in the six-year corporate campaign waged against Caterpillar, Inc. by the United Autoworkers. Prior to the 1991 UAW strike, which was the start of the corporate campaign, the company had received only three NLRB complaints, all of which were settled amicably. But starting with the strike, the union filed over 800 unfair labor practice charges against the company, and of those, NLRB General Counsel Fred Feinstein issued over 370 complaints.

Most of the unfair labor practice complaints filed against the company clearly fell within the “nuisance” category, such as charging the company with discrimination in favor of picket-line crossovers by giving them free pizza while working under strike conditions. In April 1997, Administrative Law Judge James L. Rose, who at that time had tried ten of these cases, wearily observed that, after more than 20,000 pages of testimony and hundreds of documents “none of the cases tried before me seems to have advanced resolution of the real dispute between the parties, namely, their failure to reach a mutually acceptable collective bargaining agreement to replace the one which expired five and one-half years ago.”²⁰

If a federal contracting officer reviewed the outstanding complaints against Caterpillar while the dispute was ongoing, he or she may have drawn the conclusion that the company was a

recidivist labor law violator. However, upon closer look, the real story was that the union filed as many charges as possible to put the company in a bad light, and to force it to expend resources litigating the complaints. Meanwhile, these cases were never fully adjudicated because they were dropped as part of the settlement of the underlying dispute between Caterpillar and the United Autoworkers.

Occupational Safety and Health Administration The health and safety field has also proven to be fertile ground for corporate campaign harassment techniques. A corporate campaign waged by the United Brotherhood of Carpenters against BE&K Construction, a nationwide nonunion construction firm, continued for over ten years. In December 1993, the union encouraged OSHA to inspect the maintenance work that BE&K was performing for an International Paper plant in Maine. OSHA accused the company of intentionally disregarding OSHA rules and assessed a maximum \$70,000 penalty for failing to record 19 injuries in its OSHA log.²¹ The penalty exceeded typical OSHA citations, given that only one of the injuries resulted in more than one lost workday, and most were not serious, such as a bruised knee.

Reinforcing the union's belief that the agency would be willing to take an adversarial role toward the employer, the Carpenters pressed on. The union urged OSHA to inspect all BE&K worksites nationwide, alleging a pattern and practice of suspected recordkeeping violations based on the Maine inspection. OSHA inspected four BE&K worksites, all but one of which had been closed for two years. The agency assessed eight willful citations for recordkeeping violations and proposed a record \$560,000 in penalties for such violations.

However, OSHA could not prove that the company operated with indifference to OSHA rules. Over a year later, following a full review of the proposed penalties, OSHA Assistant Secretary Joe Dear was forced to reduce the violations from a willful to an administrative fine and reduce the penalties from \$560,000 to \$10,000,²² or \$2,500 per inspection. To put this in perspective, this is \$1,000 per inspection less than OSHA's average penalty per inspection of \$3,500.²³

Department of Labor Wage and Hour Division The United Food and Commercial Workers' (UFCW) wide-ranging corporate campaign against grocery store chain Food Lion demonstrates how federal wage-hour laws can be used to pressure a company to accede to union demands. The company was expanding into areas traditionally dominated by grocery stores whose workers were represented by the UFCW, prompting several union responses, including a staged undercover investigation by a major television network. Starting in 1988, the union solicited legal action against Food Lion by running newspaper advertisements and sending letters to more than 55,000 former and current employees, alleging that the chain had failed to pay hourly employees for legitimate work time.

In 1991, under the UFCW's direction, 183 former and current employees filed a complaint with the Labor Department, alleging overtime violations of \$64.7 million.²⁴ The Wage and Hour Division expanded the investigation and the plaintiff class ultimately topped 1,000 individuals. The company agreed to settle the suit without admitting it violated the law for \$16.2 million.²⁵ Without full knowledge of the circumstances, a contracting officer could be

persuaded that similar violations by a federal contractor would merit disqualification from the contracting process.

The above examples involve mostly large companies that have the resources to fight union harassment through regulatory agencies. Small businesses, which comprise nearly one-third of all federal contractors, often do not possess the financial ability to endure the litigation necessary to prove that the regulatory charges are often without merit.

Requirements to Assure "Stable and Productive Workforce" Impeded by Outdated Labor Laws

The Part 9 amendments would also require employers to have "the necessary workplace practices addressing matters such as training, worker retention, and legal compliance to assure a skilled, stable and productive workforce." Thus, contracting officers would have to delve deeply into the employment practices of the contractor to ensure that these highly subjective standards were upheld. More importantly, many workplace policies that encourage worker retention and a productive workforce are currently impeded by outdated labor laws and regulations that are consistently opposed by organized labor. These include:

- the ability of employers and employees to work together in teams in nonunion facilities, which is prohibited by the NLRA;
- providing bonuses to hourly workers without engaging in administratively burdensome calculations required by the Fair Labor Standards Act;
- providing genuinely flexible schedules and compensatory time off for hourly employees;
- facilitating the use of part-time and other flexible work arrangements for employees that choose not to work a traditional full-time job.

Mr. Chairman, we would just add that you and a number of the other members of this committee have joined in cosponsoring legislation designed to address these deficiencies in the law. Unfortunately, the Administration and organized labor have blocked those efforts, thus inhibiting employers' efforts to maintain a "skilled, stable and productive workforce."

Conclusion

In sum, LPA believes that the proposed blacklisting regulations are nothing more than a politically-motivated attempt to provide yet another weapon to organized labor in its corporate campaign arsenal. In addition to putting a stop to these regulations, Congress should be looking for ways to limit the waste of government resources caused by labor's tactics. We strongly encourage your committee to ensure that those resources stay free of the guerilla warfare being waged by unions against employers and instead remain devoted to their intended purposes.

Endnotes

-
- ¹ Dan Balz and Frank Swoboda, *Gore, Gephardt Court Organized Labor in Precursor of 2000 Campaign*, Wash. Post, Feb. 19, 1997, at A14.
- ² Vice President Gore Address to AFL-CIO Organizing Convention, Sept. 20, 1997 *quoted in Union-Busting Firms To Be Denied Business*, Wash. Times, Sept. 21, 1997.
- ³ *Daily Lab. Rep.* (BNA) Jan. 25, 1999, at AA-1.
- ⁴ Joe Crump, *The Pressure Is On: Organizing Without the NLRB*, Lab. Research Rev., Fall/Winter 1992, at 35-36.
- ⁵ *Food Lion v. United Food and Commercial Workers*, 100 F.3d 1007, 1014 (D.C. Cir. 1997) (opinion by Judge Patricia Wald) (emphasis added).
- ⁶ Dan La Botz, *A Troublemaker's Handbook*, 127 (1991) (emphasis in original).
- ⁷ Industrial Unions Department, AFL-CIO, *Developing New Tactics: Winning with Coordinated Corporate Campaigns* (1985), at 6 [hereinafter *Winning with Coordinated Corporate Campaigns*].
- ⁸ *Id.* at 128.
- ⁹ Joe Crump, *The Pressure Is On: Organizing Without the NLRB*, Lab. Research Rev., Fall/Winter 1992, at 35.
- ¹⁰ Service Employees International Union and American Labor Education Center, *SEIU Contract Campaign Manual* 3-3 (1988) (chapter entitled "Pressuring the Employer").
- ¹¹ Service Employees International Union and American Labor Education Center, *SEIU Contract Campaign Manual* 3-18 (1988) (emphasis added).
- ¹² *Winning With Coordinated Campaigns*, *supra* note 7 at 3.
- ¹³ Adrienne E. Eaton and Jill Kriesky, *Organizing Experiences Under Union-Management Neutrality and Card Check Agreements*, George Meany Center for Labor Studies, Feb. 1999, at 24.
- ¹⁴ *Id.* at 7.
- ¹⁵ 64 Fed. Reg. 36,361 (1999).
- ¹⁶ "Contractor Responsibility and Cost Principle Changes," White House White Paper, May 1999.
- ¹⁷ *Avondale Industries Inc. v. NLRB*, 180 F.3d 633 (5th Cir. 1999).
- ¹⁸ *Id.* at 640.
- ¹⁹ See, e.g., <http://www.justiceatavondale.org>.
- ²⁰ *Caterpillar, Inc.*, JD-65-97 (April 14, 1997).
- ²¹ *OSHA Cites, Proposes \$70,000 Penalty Against BE&K for Recordkeeping Violations*, Construction Lab. Rept. (BNA) Dec. 15, 1993, at 1049.
- ²² *Record OSHA Penalties Against Company Slashed; Violations Found Not Willful*, Daily Lab. Rept. (BNA) Feb. 24, 1995, at A9.
- ²³ Based on FY1998 data. U.S. Occupational Safety and Health Administration, "Frequently Cited OSHA Standards," available at <http://www.osha.gov/oshstats/std1.html>.
- ²⁴ *Food Lion Charged with FLSA Violations for Encouraging "Off-the-Clock" Work*, Daily Lab. Rept. (BNA) Sept. 12, 1991, at A-15.
- ²⁵ Daniel Southerland and Martha M. Hamilton, *Food Lion to Settle Claims It Violated U.S. Labor Laws*, Wash. Post, Aug. 4, 1993, at A1.



October 20, 1999

Capitol Hill Office
 305 4th Street, NE
 Washington, DC 20002
 Phone: (202) 547-8202
 Fax: (202) 547-8810

The Honorable James Talent
 U.S. House of Representatives
 1022 Longworth House Office Building
 Washington, DC 20515

Dear Representative Talent:

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), is supported by more than 4,500 construction firms engaged in industrial, commercial, residential, architectural and specialty sheet metal and air conditioning construction throughout the United States. On behalf of SMACNA, I want to express our support for the Administration's effort to raise the quality, performance and legal standards for federal contractors by issuing clarifications to the Federal Acquisition Regulations (FAR). SMACNA urges Congress to support an aggressive federal procurement policy that ensures federal contractors meet higher standards of integrity, business ethics, quality and performance.

While many organizations and procurement officials have long argued for greater clarity, scrutiny and enforcement of higher quality procurement standards, a number of groups and their supporters in Congress have reacted to the tougher selection scrutiny included in the FAR proposal with protests. This is surprising since for the most part, the proposed changes merely reflect current law. The general definition of contractor responsibility found in current contracting rules has been broad enough for many years to encompass most of proposed clarifications.

Unfortunately most of those protesting the proposed regulations do not offer constructive suggestions on how the federal government can raise the quality bar to exclude the worst offenders from the bidding pool for federal projects. Evidently they want to continue to allow the worst offenders to continue to compete for federal work. Supporting a less vigorous scrutiny of contract bidders than that used by many major private corporations does not well serve the federal owner or the industry's image.

Virtually 100 percent of union contractors are financially committed to safety and provide health and welfare benefits as well as training for their workers. Proper training is clearly the cornerstone to creating a safe working environment. So, while the 12,500 contractor members of Mechanical Electrical Sheet Metal Alliance spend over \$175 million each year on training, nonunion contractors have only recently started contributing a small fraction of that amount toward training programs. The large amount of money spent on training is just one example of how union contractors do not cut corners to make more profit.

SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, INC.
 HEADQUARTERS: 4201 LAFAYETTE CENTER DRIVE • CHANTILLY, VIRGINIA 22021-1209
 MAILING ADDRESS: P.O. BOX 221230 • CHANTILLY, VIRGINIA 22022-1230
 PHONE (703) 803-2980 • FAX (703) 803-3732

Representative Talent
Page 2

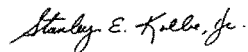
The union contractor's profit in the private sector comes from providing a quality product on time with a highly skilled and stable workforce--not from taking shortcuts. Factoring in quality and integrity for federal construction contracts will not harm the scrupulous contractor nor his competitive position in the federal bidding process.

General Accounting Office (GAO) studies have documented billions of dollars in federal contracts going to contractors with lengthy legal records, to firms with substandard workplace practices and to firms with federal convictions for various legal violations. These include documented, egregious violations of the nation's tax, labor, environmental and employment discrimination laws, as well as safety regulations and fair employment and contract fraud statutes. Recent evidence of disgraceful construction quality and corrupt contractor practices in New York and Los Angeles has prompted their procurement officials to enact similar contractor selection reforms to those currently under review by the Administration.

Although generally supportive of the Administration's efforts to raise contract bidding standards across the board, SMACNA and the Mechanical Electrical Sheet Metal Alliance continues to offer constructive suggestions on ways to include only the most relevant legal, performance and quality factors into the contractor selection process.

The end result of the effort to improve federal contracting policy should be a more selective construction bidding process where the government gets the quality it deserves from the most ethical and qualified firms the industry has to offer. Stricter procurement standards really do make a difference for the owner, facility users and the taxpayer. Good faith efforts by the Administration to implement higher contractor selection standards deserve the support of Congress and those in the private sector seeking to bid on federal contracts.

Sincerely,



Stanley E. Kolbe, Jr.
Director, Legislative Affairs



**MECHANICAL • ELECTRICAL • SHEET METAL
ALLIANCE**

Release: Thursday, July 8, 1999

Contact: John McNerney, MCAA

Rockville, Maryland

Tel.: 301-869-5800

Construction Industry Mechanical/Electrical/Sheet Metal Alliance

Supports Administration Effort to Strengthen Contractor Qualification

Procurement Procedures

The MCAA/NECA/SMACNA Construction Industry Alliance supports the Administration's initiative in drafting proposed changes to the Federal Acquisition Regulations (FAR) to more fully and objectively assess prospective prime and subcontractor project and contract past performance to qualify for federal contracts.

With this qualified support for a narrowly drawn change to the FAR, the Alliance also recognizes that any proposed regulations must have effective provisions that guard against too much rating discretion by purchasing officers. Negative evaluations based on factors that are unsubstantiated, adequately addressed by existing sanctions, or otherwise not material to contract performance must be prohibited.

Mechanical Contractors
Association of America, Inc.
1385 Piccard Drive
Rockville, MD 20850
Phone (301) 869-5800
FAX (301) 869-0600

National Electrical Contractors
Association
3 Bethesda Metro Center, Suite 1100
Bethesda, MD 20814-5372
Phone (301) 657-3110
FAX (301) 715-1500

Sheet Metal and Air Conditioning
Contractors National Association, Inc.
P.O. Box 221230
Chantilly, VA 22022-1230
Phone (703) 805-2980
FAX (703) 805-2727

The Alliance is made up of the over 12,000 member construction companies represented by the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA). Alliance member firms represent the high-skill sector of the specialty construction industry, and execute sophisticated construction project contracts as both prime and subcontractors on public and private projects nationwide. In virtually all cases, Alliance members execute the production craft work under local collective bargaining agreements or project labor agreements with skilled building construction trades labor organizations.

The Alliance position supporting better performance-based qualification criteria is based on member contractors' experience in both public and private markets nationwide. Experienced purchasers of construction services increasingly are selecting contractors using performance criteria. Sophisticated purchasers are using past contract and performance criteria including safety, workers compensation, bona fide training, and other workforce quality contract specifications to assess performance and successful contract compliance.

The Alliance anticipates the release of a regulatory proposal soon, and plans to submit comments aimed at narrowing the final regulations to advance the proprietary interests of both the government and the industry in spurring quality improvements by assessing a broader scope of performance criteria.

#



**Mechanical - Electrical - Sheet Metal Alliance
Supports Administration Effort to Strengthen Performance-Based
Procurement Procedures**

The Mechanical – Electrical – Sheet Metal Alliance supports the Administration's initiative in drafting proposed changes to the federal Acquisition regulations (FAR) to more fully and objectively assess prospective prime and subcontractor project and contract past performance to qualify for federal contracts.

The Alliance is made up of the over 12,000 member construction companies represented by the Mechanical Contractors Association of America, the National Electrical Contractors, and the Sheet Metal Contractors' National Association. Alliance member firms represent the high-skill sector of the specialty construction industry, and execute sophisticated construction project contracts as both prime and subcontractors on public and private projects nationwide. In virtually all cases, Alliance members execute the production craft work under local collective bargaining agreements or project labor agreements with skilled building construction trades labor organizations.

The Alliance position supporting better performance-based qualification criteria is based on member contractors' experience in both public and private markets nationwide. Experienced purchasers of construction services increasingly are selecting contractors using performance criteria. Sophisticated purchasers are using past contract and performance criteria including safety, workers compensation, bona fide training and other workforce quality contract specifications, to assess performance and successful contract compliance.

The federal government should adhere to these same, stringent private industry guidelines when assessing contractor qualifications. An economical and well functioning procurement system can only be based upon contracts with law-abiding citizens.

With this qualified support for a narrowly drawn change to the FAR, the Alliance also recognizes that any proposed regulations must have effective provisions that guard against too much rating discretion by purchasing officers. Negative evaluations based on factors that are unsubstantiated, adequately addressed by existing sanctions or otherwise not material to contract performance must be prohibited.



THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.

MEMORANDUM IN SUPPORT

OFFICERS
PRESIDENT:
 Thomas King
 SCHAWONE CONSTRUCTION CO. INC.
FIRST VICE PRESIDENT:
 Peter Tully
 TULLY CONSTRUCTION CO., INC.
SECOND VICE PRESIDENT:
 John Pegno
 A. J. PEGNO CONSTRUCTION CORP.
TREASURER:
 Louis D'Amico
 MODERN CONTINENTAL CO.
SECRETARY-MANAGING DIRECTOR
 Francis X. McArdle
 THE GENERAL CONTRACTORS ASSOCIATION
 OF NEW YORK, INC.
EMERITUS MEMBERS:
 Daniel Lazar
 John D. Saunders
 Gerard Tully

EXECUTIVE COMMITTEE:
 A.F.C. ENTERPRISES, INC.
 Andrew Gorman
 BLAUER CONCRETE CONSTRUCTION
 GATEWAY INDUSTRIES, L.P.
 Anthony Adrecco
 JOHN GUETTA & SONS, INC.
 Theodore Civetta
 E. E. CRUZ & CO., INC.
 Edward Cruz
 KENNETH J. DELANEY CONSTRUCTION CO.
 Kenneth J. Delaney
 FALCO CONSTRUCTION CORP.
 Joseph Falco
 FELIX INDUSTRIES INC.
 Felix J. Pardo, Jr.
 FRONTIER-KEMPER CONSTRUCTORS
 Richard Raab
 GRACE INDUSTRIES INC.
 Richard Grace
 GROW TUNNELING CORP.
 George A. Fox
 Peter Schmiedeknecht
 Leonard Epstein
 HMM ASSOCIATES INC.
 Harvey Blatt
 JANA GROUP
 Dennis F. Adgen
 J.M.A. CONCRETE CONSTRUCTION CO.
 Joseph Augotta
 JUDLAU CONTRACTING INC.
 Thomas Iovino
 KOCH SKANSKA, INC.
 Ken Daly
 LAND-SITE CONTRACTING CORP.
 Adriano Lot
 MODERN CONTINENTAL CO.
 Louis D'Amico
 T. MURPHY & SON, INC.
 James P. Murphy
 NAB CONSTRUCTION CORP.
 Edward Simpson
 A. J. PEGNO CONSTRUCTION CORP.
 John Pegno
 PERINI CORPORATION
 Zohrab Marandian
 PETRACCA & SONS, INC.
 Eugene Petroski, Jr.
 John P. Piccone, INC.
 John P. Piccone
 P. Richard Tashley
 SCHAWONE CONSTRUCTION CO., INC.
 Thomas King
 SILVERSTEIN CONSTRUCTION CO., INC.
 Angelo Silver
 SLATTERY SKANSKA, INC.
 Stuart Graham
 S&I Mancini
 SPEARIN, PRESTON & BURROWS, INC.
 Gerald A. Newman, Jr.
 TULLY CONSTRUCTION CO., INC.
 Kenneth Tully
 Peter Tully
 URSAN FOUNDATION/ENGINEERING LLC
 Leon Levy
 Ben DiGiorgio
 YONKERS CONTRACTING CO., INC.
 Carl Perito
 John Chesneglies

FROM: Francis X. McArdle, Managing Director *FAM*

DATE: August 16, 1999

RE: FAR Case 99-010

The General Contractors Association of New York, representing the heavy construction industry active in New York City, writes in support of the proposed revisions of the Federal Acquisition Regulation regarding contractor responsibility, labor relations costs, and costs related to legal and other proceedings.

Current federal law already mandates the use of "responsible contractors". Contractors must show that they have business integrity, financial solvency, technical expertise, and appropriate experience. However, the proposed amendment clarifies that, as a condition of their business integrity determination, bidding contractors must be in substantial compliance with labor laws, employee relations requirements, and environmental regulations if they want to be considered for federal contracts.

We believe that this clarification is important. It sends a simple message - companies that want to do business with the federal government must have a record of compliance with the law. It is critical that the federal government thoroughly screen their contractors in order to ensure that they have a real commitment to business integrity, worker rights, employee training and worker safety, as well as environmental excellence. Contractors/employers who are unwilling or unable to provide a workplace that is safe and respectful of civil rights and the right to union representation should not be rewarded with government contracts.

Some business groups are concerned that otherwise responsible companies could be "blacklisted" for relatively minor violations of the law or allegations from competitors if these regulations go into effect. However, we are satisfied that the language in this amendment will protect contractors from being unjustly penalized as a consequence of isolated incidents - only companies with a pattern of substantial and/or repeated violations should be ruled non-responsible under the provisions of this rule.

NDIA

National Defense Industrial Association

October 21, 1999

The Honorable James Talent
Chairman, House Small Business Committee
2361 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the members of the National Defense Industrial Association, I would like to express our appreciation for affording us the opportunity to submit a statement for the House Small Business Committee's hearing on the Effect of Compliance Regulations on Small Business. We are grateful for the efforts of both yourself and the Subcommittee to review the Administration's proposed changes in the Federal Acquisition Regulations (FAR) covering responsible contractor determination and cost allowability and their implications for small business.

As the premier defense-related association—comprising some 24,000 individual members and nearly 900 companies—we are committed to representing the interests and views of the defense technology and industrial base. The issue at hand poses serious concerns for small business, which is sensitive to changes in procurement laws and regulations that reduce business opportunities.

NDIA believes that the Administration's proposed changes to FAR Part 9 (responsible contract determination) and FAR Part 31 (cost allowability) are ill conceived and would likely reverse the critical progress that has been made to open the vendor base to high technology commercial firms (including small business). Access to advanced commercial technology is important to the Department of Defense's strategy of securing information dominance in the battlespace. Consequently, in NDIA's judgement the proposed regulations will turn back the clock; therefore NDIA strongly opposes the proposed regulations and recommends that they be withdrawn.

Once again, thank you for granting NDIA the opportunity to submit a statement for the record. We look forward to working with you in the future.

Sincerely,

Lawrence F. Skibbie
President



National Defense Industrial Association

Statement of the National Defense Industrial Association

For the House Committee on Small Business Hearing

On proposed Federal Acquisition Regulations Concerning Responsible Contractor

Determinations and Cost Allowability

October 21, 1999

Mr. Chairman, distinguished members of the House Committee on Small Business, I am Larry Skibbie, President of the National Defense Industrial Association (NDIA). We appreciate the opportunity to submit this statement concerning the Administration's proposed Federal Acquisition Regulations (FAR) covering responsible contractor determinations and cost allowability and their implications for small business.

These are important issues for NDIA. A majority of our 24,000 individual members and some 900 corporate members that employ the preponderance of the two million men and women in the defense industry are small business firms. Sixty-three percent of our member firms generate annual revenue of five million dollars or less from the Department of Defense. Therefore, our membership is very sensitive to any changes in procurement law or regulations that reduce business opportunities for small business.

There is no question that the proposed regulations have significant implications for small business. At a time, when small business bears the brunt of the 7100 Federal debarments that were imposed in Fiscal Year 1998 and, according to the latest Small Business Administration data, has experienced a declining share of Department of Defense contract dollars because of contract bundling, the proposed regulations represent serious disincentives.

The fact that the proposed FAR Part 9 regulation (responsible contractor determinations) allows third party allegations to destroy a firm's opportunity to compete for a Federal

contract award is very troubling. This double jeopardy approach places a small business, which has limited resources to counter or mitigate such allegations, at a decided disadvantage. For a small business firm that is subject to such allegation, the likelihood of the firm receiving or retaining its required certificate of competency is greatly diminished. Without the certificate, future opportunities for Federal contract opportunities are severely constrained.

Further, the proposed regulation withholds due process. There is no adjudication of the allegation. It need not be proven in court to be the grounds for denial of a responsible contractor determination. The potential for such arbitrary action further undermines confidence and fairness in the Federal procurement system, particularly for small business.

It is ironic that such actions are contemplated at the same time we observe the fifth anniversary of the signing into law of the 1994 Federal Acquisition Streamlining Act (FASA), which ushered in an era of streamlining and simplifying the Federal procurement system. In doing so, efforts have been made to achieve greater transparency and predictability with the system so that the potential for defensive bid protests and contract disputes are lessened. Regrettably, the proposed regulations represent steps in the opposite direction.

Moreover, the proposed regulations conflict with the vision of the Administration's 1993 National Performance Review (NPR) task force to "simplify the procurement process by rewriting federal regulations-shifting from rigid rules to guiding principles." The NPR vision along with the work of the congressionally mandated Advisory Panel on Streamlining and Codifying Acquisition Law provided much of the basis for FASA.

The fact that both the proposed FAR Part 9 and Part 31 regulations amend public law through the administrative rulemaking process, without benefit of legislative action, represents dubious delegation of congressional authority. The Congress has carefully prescribed the basis for disqualification of contractors for violations of certain labor laws and environmental laws as well as remedial actions for violations that do not result in disqualification. While the Administration claims that the proposed regulations merely clarify existing policy, their practical effects are to expand the basis for disqualification.

With respect to the proposed changes to FAR Part 31 (cost allowability), the revised regulation would violate the Major Fraud Act of 1988, which reflects Congress's judgment as to what litigation costs are properly recoverable under government contracts. The Administration's proposal seeks by regulation to render unallowable litigation costs that are currently allowable under statute. Specifically, costs of civil or administrative litigation in which a contractor is found to have violated a law but which does not result in the imposition of a monetary penalty, or perhaps even in damages, would now be unallowable. If the Administration wishes to make such changes, it is the prerogative of the Congress to address the issue by appropriate legislation.

Mr. Chairman, and members of the Committee, NDIA believes that the proposed regulations are ill conceived and found wanting. They are antithetical to the progress that has been made to open the vendor base to high technology commercial firms (including small business) which are critically important to the Department of Defense's strategy of securing information dominance of the battle space.

This is not the time to turn back the clock. If there are to be changes along the lines recommended by the Administration, the Congress should be involved. Executive fiat is not an adequate or proper substitute for legislation. Therefore, NDIA strongly opposes the proposed regulations and recommends that they be withdrawn.

**Testimony of
Gary D. Engebretson, President
Contract Services Association of America
Submitted for the Record to the
House Small Business Committee
Hearing on Contractor Responsibility
October 21, 1999**

Mr. Chairman and members of the subcommittee. My name is Gary Engebretson and I am the President of the Contract Services Association of America (CSA), the nation's oldest and largest association of government service contractors. Now in its 34th year, CSA represents more than 300 companies that provide a wide array of services to the Federal government, as well as numerous state and local governments; small businesses represent a large portion of our membership. I appreciate this opportunity to provide written comments to you on the proposed revisions to regulations relating to contractor responsibility (FAR Part 9) and unallowability of costs for certain union-related activities (FAR Part 31).

Certainly, I agree that the Federal government should not do business with lawbreakers. Current law and regulation, however, has well established procedures that fully protect the Government's interests and effectively address the issues of irresponsible or unethical business practices. Debarment is based on due process and adequate review of potential contractor's past performance records.

I would like to cover several issues outlined in the "notice of proposed rulemaking" that was published to explain the rationale behind the proposed regulations. Specifically, my testimony will address:

- Contractor Responsibility
- Impact on Small Business
- Service Contract Act (as an example of labor laws with which service contractors must comply)
- Commercial Practices
- Allowability of Costs

Contractor Responsibility

According to the rulemaking notice, the changes to FAR Part 9 relating to contractor responsibility are necessary because *“a prospective contractor’s record of compliance with laws and regulations promulgated by the federal government are a relevant and important part of the overall responsibility determination. This proposed FAR amendment clarifies the existing rule by providing several examples of what constitutes an unsatisfactory record of compliance with laws and regulations.”*

The proposed rule clarifies nothing. Current law already requires that the Federal government only do business with responsible contractors. In the case of a small business that is considered not to be responsible, the contracting officer must refer the matter to the Small Business Administration, which makes the final determination of responsibility for small businesses. The current regulatory responsibility review, however, focuses on the prospective contractor’s present ability and capacity to perform on a specific contract. In other words, responsibility determinations cannot be used to address future contracts. If a contracting officer believes a prospective contractor should not be eligible for any future awards, then he/she should initiate the suspension and debarment procedures as called for in the Federal Regulations. However, the proposed regulations look beyond a prospective contractor’s capability on the current contract and affects the ability of contractors to receive future contracts. In other words, a responsibility determination is replacing the debarment procedure. Thus, based on alleged or even actual past violations, a contractor could be de facto debarred from government contracting. What is more troubling is that under the proposed regulations, allegations not need to be proven in court (or any tribunal) before a non-responsible determination is issued. Moreover, prospective contractors have no opportunity to submit information in response to allegations. Not only does this subvert the concept of due process, it undermines the entire “certificate of competency” procedures that Congress put into place specifically to protect small businesses from being unfairly shut out of the Federal government marketplace (see further comments below under Impact on Small Business).

The proposed regulations invite unnecessary and unproductive third-party interference in responsibility determinations. That is, the proposed regulations could be used to unfairly target responsible contractors and subcontractors with loss of Federal contracts by business competitors, plaintiff’s attorneys, disgruntled employees and others. Allegations could be filed and a prospective contractor could be removed from consideration without knowledge of what occurred nor any ability to defend itself against such allegations. As already noted, there is no due process procedure available to address a non-responsibility determination as there exists for a formal suspension/debarment process. Nor can a bid protest be filed since GAO has determined that contractor responsibility is outside the scope of their bid protest jurisdiction.

More significantly, the proposed rule would greatly expand the scope of obligations imposed on agency contracting officers when making responsibility determinations. The

contracting officer, however, does not have the necessary training, experience or resources to conduct a review of a prospective contractor's history of compliance with numerous, complex Federal, state, and local tax laws and regulations, environmental laws and regulations, consumer protection laws and regulations, antitrust laws and regulations, employment laws and regulations, and labor statutes and regulations. Obviously, it would take a tremendous amount of time, effort and resources to educate them in these additional areas to the degree necessary to properly and conscientiously evaluate alleged violations of any of the multitude of laws and regulations. These areas are currently outside their expertise and purview because the Congress already has concluded that compliance by either a company or an individual should be determined by the enforcing agencies, such as the Department of Labor, EPA or even the IRS – not the contracting officer. (Compliance with the Service Contract Act, which is enforced by the Department of Labor, is outlined later in this testimony.) I also emphasize that the Congress has directed the agencies to pare down their workforce, which include acquisition personnel, in order to meet their budget and management goals. Requiring fewer people to perform more work that they have not been trained to do will not lead to achieving either goal. By the way, does anyone here know what the contracting officer's think? Has anyone in the Administration consulted with the people who will be charged with the responsibility of learning an entire panoply of unrelated laws and regulations in order to evaluate whether a prospective offeror or bidder meets all of those laws and regulations? To our knowledge, the answer is a resounding "no."

An unfortunate end result of the proposed contractor responsibility regulatory changes could easily be that contracting officers will award contracts to those companies with which they are familiar, thus taking a lot of businesses, especially small businesses, out of the Government contracting loop.

Impact on Small Business

Under current law, contractor responsibility must be affirmatively determined before the award of every Government contract. In other words, the agency contracting officer must determine that the prospective awardee has the present ability and capacity to perform the particular contract in question, including (1) a satisfactory record of integrity and business ethics, and (2) the necessary management, experience and skills to perform. If a small business is considered otherwise by a contracting officer, then the matter must be referred to the Small Business Administration (SBA) for a final decision (15 U.S.C. 637(b)(7)). The SBA Certificate of Competency procedure is outlined as follows:

To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal

property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for final disposition to the Administration.

Generally, the Certificate of Competency (CoC) process, as outlined above, kicks in when a small business would have been the awardee, except that the contracting officer believes the small firm is not responsible. How the proposed regulations relate to the CoC process is somewhat unclear. It appears that a prospective contractor could be removed from consideration for award solely on the basis of mere allegations regarding his/her record of “compliance” even before the final award decision is made – which is only when the CoC process kicks in. Hence, a small business concern may not even reach the stage where it would have been the awardee, except for the non-responsibility determination related to compliance (and not capability), and thus, no CoC referral would ever be sent to the SBA. CSA cannot support a proposal which (intentionally or otherwise), harms our small business members and your small business constituents.

Taking this a step further, if every single small business prospective contractor must now be referred to the SBA for a responsibility determination (or Certificate of Competency) in order to preserve its ability to bid on Government contracts, that would clearly overwhelm the Small Business Administration which lacks the resources to handle such an increase in workload. Moreover, the SBA personnel would necessarily need to receive the same education that a contracting officer would need if such personnel are going to be qualified to render CoCs on such issues as tax, antitrust, labor, and environmental laws and regulations. Of course, if the contracting officer is wrong, and the SBA is wrong, then the courts will decide if the small business was in “compliance.” An excellent example of such potential confusion comes from the Federal Labor Standards Act and its implementing regulations. Under the present legal scheme, if a company violates the FLSA by classifying an employee as a salaried employee instead of an hourly employee (and thus the employee is not eligible for overtime pay), then the company is permitted a “window of correction” to change the status of the affected employee. See 29 C.F.R. § 541.118(a)(6). Under this circumstance, the company is not in “compliance” but it has the ability to self-correct the FLSA violation. By contrast, if the company cannot get a contract award, it may have to terminate the employee under a downsizing plan.

Another very important aspect to consider is that the proposed regulations shift the burden of proof in tax and other investigations from the government to the taxpayer/contractor who would be presumed guilty of alleged violations for purposes of determining Federal contract eligibility – with no recourse to explain the alleged violation. This is particularly troublesome for small businesses that often face violations of certain laws because of their inexperience – and pay the resulting fines rather than contest the allegation because they lack the resources and the ability to spend the time/money on such legal fights. Any small business that has ever found itself in that situation would be immediately removed from consideration for a Government contract (possibly forever) should these regulations be enacted in any form.

Clearly, small businesses would be more severely injured by the proposed revisions in the contractor responsibility regulations because, unlike major corporations, they often depend entirely on the revenues from current and future Government contracts for continued growth. Indeed, future Government contracts and growth is the foundation of the 8(a) program, the small, disadvantaged business program, and the women-owned small business program. The proposal would keep many small business owners from competing for these contracts – either as a function of increased overhead from management and legal expenses or as a function of eligibility.

Service Contract Act

There are rules on the books to protect employees from unfair wage rates and to ensure adequate benefits – and one of those is the Service Contract Act. Indeed, in all of the debate surrounding the proposed revisions to the contractor responsibility regulations, little focus has been paid to the specific rules and regulations that service contractors already have to follow. In 1965, Congress enacted the McNamara-O'Hara Service Contract Act (SCA) which stipulates certain requirements in terms of wages, health and welfare benefits, enforcement policies, and suspension and debarment procedures. The SCA governs all service contracts over \$2500. Under the SCA, service contractors are required to:

- Pay the minimum monetary wage listed in the applicable wage determinations.
- Pay a bona fide fringe benefit or equivalent at the hourly cost listed in the wage determination.
- Prohibit services from being performed under conditions controlled by a prime contractor or a subcontractor which are unsanitary or hazardous or dangerous to the health or safety of the service employees.
- Keep detailed records for all employees who perform services under the prime contract for a period of three years from the date of completion of work on the prime contract.
- Include the standard subcontract clauses in all subcontracts that describe the requirements of the SCA; the prime contractor is required to review subcontractor pay practices to ensure compliance with SCA (and the prime can be debarred on the basis of non-compliance by a subcontractor).
- Give notice to all service employees, either directly or by posting the wage determination in a prominent location, of the applicable minimum monetary wage applied to their occupational classification and the fringe benefits requirements.
- Respect collective bargaining agreements in place (on successor contracts).

By statute, the Service Contract Act is enforced solely by the Department of Labor (DOL). The law and implementing DOL regulations, provide procedures for contract default terminations as well as suspension and debarment of those service contractors found to be in violation of the law. Even so, there are inconsistencies on how the law is interpreted and enforced by the Department of Labor. For example, one company in one

part of the country may reach a settlement agreement (and not be fined or debarred) for a minor offense while another company located elsewhere in the country who has committed exactly the same minor offense may be fined or debarred for three years.

The labor advisors within the Government agencies provide advice to the contracting officers regarding compliance with the SCA. There is real concern that the proposed contractor responsibility changes improperly enlarges the authority of the agency contracting officer to make determinations because the scope of the obligations have been improperly increased to encompass areas in which they are not well versed, such as SCA or tax and environmental laws. Agency labor advisors, also lacking in resources, may be overwhelmed with compliance questions, which could lead to a slowdown of the acquisition process as award decisions are delayed pending “determinations” from third parties – due to allegations from other third parties.

The Service Contract Act and its relationship with other laws such as the National Labor Relations Act (and collective bargaining agreements) and the Davis Bacon Act is often confusing, even to the most sophisticated employers and their counsel. That is why CSA, in conjunction with the Department of Labor, holds special training courses for services contractors to ensure compliance with the SCA. But even the best get caught off-guard. Now, as a double threat, companies – particularly small businesses – that have inadvertently violated the SCA (for example, the complex fringe benefit calculations) may also find themselves determined to be non-responsible under the proposed regulations and in jeopardy of never receiving another Government contract.

CSA has long supported the Service Contract Act. The existence of a mandated wage floor prevents unscrupulous contractors from taking over contracts by bidding minimal wages that undercut incumbents or other responsible contractors in the local area, particularly in sealed bid situations. Such unscrupulous, low ball bids would result in the wholesale termination of employees or require veteran employees to accept often substantial pay and benefit cuts to retain their jobs.

Furthermore, we have consistently argued against any actions to repeal that Act. Should the SCA be repealed, the competitiveness of some of America’s most experienced and quality driven Government service contracting companies will be severely compromised. Indeed, the best companies are those that seek to build a loyal and productive workforce. Yet they would face the choice of continually turning-over their workforce (in order to be able to pay the lowest possible wages) or getting out of the Government marketplace. In the end, the best business decision for many of the best companies would be to forego Government contract business, leaving the Government with a contractor pool that is not of the quality and experience level that the Government presently demands under the performance based contracting requirements of the Federal Acquisition Streamlining Act. So our argument is NOT with the Service Contract Act – but rather the empowerment of agency contracting officers, not trained in the complexities of the labor-related elements of

the SCA, to arbitrarily withhold contracts from companies based on alleged or even real violations of the Act, without any ability for those companies to defend themselves. To give you an idea of the complexity of the acquisition process for service contracts, let me focus on the wage determination process. Once the Department of Labor issues a wage determination for a particular job classification (based on an occupational survey for the local area where the contract may be performed), it can be challenged by any interested party (including the contracting agency, contractors or prospective contractors, employees or their representatives, etc). Upon reconsideration, the DOL reviews, among other things, the accuracy of the statistical surveys and any additional data. DOL then may issue a new wage determination, revise the published wage determination or affirm the wage determination. Further administrative review of the wage determination is by the Administrative Review Board. The losing party before the Board may appeal to the Federal district court pursuant to the Administrative Procedure Act. Would a pending challenge to a wage determination by a contractor be enough to question their responsibility? What if the challenge is because the contractor thinks the DOL wage determination rates are too low and should be raised? If successful, the increased rate will affect the contracting officer's budget. So why not just declare that contractor "non-responsible" and be rid of the nettlesome contractor and preserve the full budget? Or what if the challenger thinks the DOL wage determination is too high for the local area and should be lowered. This challenge preserves the contracting officer's budget (a plus) and better reflects the wage structure in the local area (the purpose of the Act and another plus). But this type of challenge may upset a local union, already disgruntled employees, or a competitor who had intended to bid the absolute minimum wage rate and still hope to perform. All of these elements can allege a failure to comply with the Service Contract Act. These proposed regulations do not (and cannot) comport with real life in the world of Government contracts.

We also have seen significant differences between the job classifications and job definitions in the Wage Determinations for the various locations where the work is to be performed. This disparity then conflicts with the contractor's job titles. The result is differences in relative wage rate levels for what should be the same job classification at different locations on the contract. As one can imagine, disparate job classifications have led to considerable employee consternation and unhappiness. Under the proposed regulations, a contractor is now subject to allegations of Service Contract Act violations because the employee does not know what the various Regional Offices of Department of Labor have done or why. The contractor has done nothing wrong and is rewarded with an unfounded allegation of non-responsibility.

The SCA calls for suspension/debarment of violators – although the standard is rather vague and inconsistently applied. All the labor and employment laws, except for the SCA and the Davis-Bacon Act, require that culpable conduct meriting debarment be willful. The SCA provides that any violation, whether or not willful, is to result in debarments unless the Secretary of Labor recommends otherwise because of "unusual circumstances" (which is determined on a case-by-case basis). Unfortunately, it is virtually impossible for

a Federal court to overturn an SCA debarment because to do so the court must find that the Secretary “arbitrarily and capriciously” abused her discretion in failing to find the existence of “unusual circumstances.” By the same token, Boards of Contract Appeals do not even take jurisdiction over such matters as they are considered to be solely within the jurisdiction of the Department of Labor. Here again, the proposed revisions to contractor responsibility could significantly curtail the ability of prospective contractors from receiving future contracts – even though they have already been adequately punished for their SCA violations and should be able to start over with a clean slate.

To summarize, the Department of Labor is exclusively responsible for enforcement of the SCA. It is authorized to conduct investigations, render findings relevant to alleged violations and impose penalties for such violations, including recovery of wage and fringe benefit underpayments through legal action or administratively by withholding of contract payments, contract default termination and debarment. Furthermore, the complexity of the SCA is obvious as seen in the above discussion. Yet such problems and discrepancies can lead to unintentional, but quickly remedied, violations of the SCA. However, under the proposed regulations, determinations of non-responsibility are authorized by contracting officers, or by SBA personnel, not trained in the complexities of the SCA.

Commercial Practices

According to the rulemaking notice, *“this proposal seeks to further the government’s use of best commercial practices by ensuring the government does business only with high-performing and successful companies that work to maintain a good record of compliance with applicable laws.”*

Contrary to that statement, I believe the proposed rule is totally incompatible with the concept of moving the Federal government toward greater commercial practices. It is certainly inconsistent with the Administration’s stated National Performance Review objectives of restructuring the management of Federal agencies to make them more businesslike and less encumbered by unnecessary burdensome requirements. Indeed, building on that, the Congress enacted the 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act – both measures were aimed at providing the authority needed for Federal agencies to act more like commercial buyers and to encourage more commercial companies to enter the Federal marketplace. The intent was to provide goods and services to the Federal government faster, better, cheaper.

These two important procurement reform laws eliminated many government-unique requirements, including contract certifications. The statutes also allowed the FAR council to determine under what circumstances certain contract laws could be waived. Together, these two measures, along with the extensive FAR Part 15 rewrite, have provided the basis for a positive change in how the Government does business. The Federal government is now able to acquire high quality goods and services from commercial companies with a much shorter (i.e., commercial-like) acquisition lead-time. The

proposed regulations constitute a major step backwards since they would re-impose a government-unique requirement centering around the already nebulous concept of “responsibility.”

Requiring contractors to (1) supply information relating to their compliance with the identified laws or their general legal compliance, or (2) as implicitly suggested by the notice issued with the proposed rules, requiring them to certify their general legal compliance, would violate procurement reform requirements to eliminate unnecessary certifications. Moreover, if contractors provide any information that is not accurate current and complete, they could unwittingly expose themselves to criminal liability for false statements or false claims. Many government contract prosecutions brought under the Civil False Claims Act involve extremely technical rules of contract and regulatory interpretation, e.g., compliance with a Cost Accounting Standard or interpretation of complex specifications and tradeoffs among conflicting requirements. These types of cases are really issues of contract interpretation of which honest men and women may legitimately differ – not an intent to defraud the government and not with the intent to encourage a determination of non-responsibility.

Enactment of the proposed contractor responsibility regulatory revisions would create yet another impediment to the participation of commercial companies in the Government contracts process – and harm other legitimate longstanding Government contractors as well.

Allowability of Costs

Finally, the rulemaking notice states, *“under the proposed rule, the allowability of legal and other proceedings costs would depend on whether or not a contractor is found to have violated a law or regulation rather than on the nature of the remedy imposed. Taxpayers should not have to pay the legal defense costs associated with adverse decisions against contractors, especially where the proceeding is brought by an agency of the federal government.”*

The proposed regulation would monumentally expand, rather than simply clarify, the existing procurement laws and regulations related to cost principles and what is allowable or unallowable on Government contracts. At the moment, legal costs expended in defense of basically criminal proceedings leading to a conviction or fine are unallowable. However, the laws involved with the proposed regulation deal with specific business areas where parties can rationally and honestly differ about a non-criminal event. If this proposed regulation takes effect, many legal expenses currently allowed as legitimate, normal business expenses become unallowable. For example, if a company has ample reasons to contest an environmental charge or a tax allegation (i.e., the complexity of the business facts, law and regulations lead honest parties to differ), should only one party be faced with a double whammy when there is no fraud involved – i.e., lose the argument and take the legal fees out of profit? (Remember, this is not the “English rule” where the losing party pays legal fees. Here the Federal government does not pay the company’s

legal costs when it loses the argument.) Furthermore, the Defense Contract Audit Agency (DCAA) has the sufficient training, expertise and experience to identify what legal fees are reasonable after they have been allocated in order to determine if those costs are allowable. If completely disallowed, the financial burden of engaging in any sort of legal action (whether it be negotiation, arbitration, or court litigation) regarding unwanted unionization (by employees or employer alike), environment-related charges, tax-related disputes, antitrust-related issues, employment-related allegations, etc. will again fall heaviest on small business contractors. And again, what can be done in the commercial contract arena (deduct legal costs as a legitimate business expense) will not be permissible in the Government contract arena. Such a rule is yet another reason to discourage many commercial contractors from entering the Federal government marketplace. Moreover, the breadth of this rule is an effective chilling of a company's or individual's prerogative to challenge the perceptions of the Federal government so that the parties can deal with each other from an agreed upon set of facts. After all, this is supposed to be Government of the people and by the people.

Conclusion

Mr. Chairman and members of the Committee, the Contract Services Association commends you for your interest in this important subject. The proposed revisions to regulations relating to contractor responsibility and unallowability of legal costs are ill-conceived, politically motivated, unnecessarily burdensome, and will clearly have a detrimental impact on the Government procurement process – particularly hindering the ability of small businesses to participate in the Federal marketplace. CSA believes the proposed revisions should be withdrawn. We look forward to working with you on this issue and stand ready to help in anyway possible.

JAMES M. TALENT, MISSOURI
CHAIRMAN

NYDIA M. VELÁZQUEZ, New York

Congress of the United States
House of Representatives
100th Congress
Committee on Small Business
2501 Rayburn House Office Building
Washington, DC 20515-6715

November 4, 1999

Ms. Laurie Duarte
General Services Administration
FAR Secretariat
1800 F Street, N.W., Room 4035
Washington, DC 20405

RE: FAR Case No. 99-010; Contractor Responsibility, Labor Relations
Costs, and Costs Relating to Other Legal Proceedings, 64 Fed. Reg.
37,360 (July 9, 1999)

Dear Ms. Duarte:

On July 9, 1999, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (collectively referred to as the "FAR Council") issued the above-captioned proposed amendment to the FAR. The Committee on Small Business of the House of Representatives (the "Committee") held a hearing on October 21, 1999 to examine the impact that the proposed modifications to the FAR would have on small businesses, both as prime and subcontractors. The hearing left members concerned that the proposed rule, as drafted, might have substantial adverse consequences that the FAR Council should address before issuing a final rule.

At the outset, it is important to note that the Committee supports the concept that federal agencies should only do business with responsible contractors and not do business with contractors that have committed serious civil or criminal breaches of federal law. The Committee, however, is troubled that the proposed rule, if implemented as currently drafted, will go far beyond that principle and could lead to the possible exclusion, through what is essentially a de facto debarment, numerous small businesses from government contracting for a series of minor violations that a contracting officer may determine to be substantial non-compliance even though they would not be considered serious breaches of federal law. This is particularly problematic for thousands of small businesses that often find out about a violation only when an inspector or Internal Revenue Service agent comes through the door.

The proposed rule leaves substantial discretion to contracting officers, discretion that contracting officers, as Eleanor Spector of the Defense Department noted in her testimony at the hearing, may not be equipped to handle because contracting officers are not attorneys knowledgeable in various aspects of federal law potentially covered by the proposed rule. As a result, contracting officers may require expert assistance from agencies with that knowledge. Without that assistance, contracting officers may have to determine for themselves, as best they can from diverse sources (and possibly contradictory sources, such as competitors) what constitutes substantial non-compliance. The Committee remains concerned that this could result in the elimination of small businesses from a contract award because the contracting officer was unable to accurately determine substantial compliance. That exclusion, if based on prior record of non-compliance, might lead other contracting officers to reach the same conclusion. While the Small Business Administration's ("SBA") Certificate of Competency program acts as a backstop against adverse contracting officer decisions, the SBA may find itself constrained to reach the same conclusion as the contracting officer with respect to a responsibility determination based on a prior record of minor technical violations to which the small business acceded and paid appropriate penalties.

The vagueness of the compliance standard is compounded by the proposed rule's unclear evidentiary standard. Contracting officers are supposed to base a responsibility determination for lack of integrity and business ethics on "persuasive evidence" of lack of compliance with the tax laws or substantial noncompliance with a host of other specified (or unspecified) laws should the proposed rule be adopted as drafted. The term "persuasive evidence" is not defined in the proposed rule or the accompanying preamble and has no correlation with existing standards of proof in criminal, civil, or administrative law. By creating a totally new standard that has no prior basis in the law, the proposed rule potentially increases discretion of the contracting officer to determine the quantum of evidence needed to make a responsibility determination. A prospective bidder on two contracts being reviewed by two different contracting officers potentially could have the odd result that one contracting officer determines that the violations amount to "persuasive evidence" of substantial noncompliance while simultaneously the other contracting officer makes the contrary determination. To the Committee, this does not seem to be rational decisionmaking as required by the Administrative Procedure Act or logical procurement policy.

The potential adverse consequences to small businesses seeking federal government contracts may be compounded by the absence of guidance for contracting officers in determining whether a prospective contractor has a "lack of compliance" or "substantial noncompliance" with various federal statutes. As with "persuasive evidence," two different contracting officers reviewing the same contractor could reach opposite results with respect to that contractor's responsibility. The ability of a small business to obtain a contract could then be left to the discretion of a contracting officer who lacks expertise in tax law, employment law, labor law, environmental law, antitrust law, or consumer protection law. Even if other agencies establish a point of contact for contracting officers, the decisions concerning what constitutes substantial noncompliance

may vary depending upon what official is assigned on any given day to answer questions from contracting officers. Small businesses may then be excluded from federal procurement or incur the cost of a Certificate of Competency appeal based on random ad hoc conclusions by federal agency employees.

The proposed rule also permits the contracting officer to base a non-responsibility determination on something other than a final adjudication by a competent authority. While there may be circumstances where that is appropriate, such as an indictment being issued for filing false statements with the government, allegations of violations can be sent to the contracting officers from any source, including competitors for the contract. Contracting officers then might rely on these unsubstantiated and unproved allegations to make their responsibility determinations. The Committee believes that this simply is an inappropriate mechanism upon which to base government procurement decisions and raises serious due process concerns.


Nor does it appear that the FAR Council, in preparing the rule, examined the adverse consequences that the proposed rule would have on subcontractors. One key component in achieving the goals of small business participation in federal government procurements is through subcontracting to larger prime contractors. However, the proposed rule, if implemented as drafted, could have a devastating adverse impact on the willingness of small businesses to participate as subcontractors in federal government procurements. Since subcontractors are required to meet the same responsibility standards as prime contractors, subcontractors who lack compliance with the tax laws or are in substantial noncompliance with the other laws cited in the proposed rule would be found to be non-responsible. Prime contractors are required to vouch for the responsibility of their subcontractors. Prime contractors are unlikely to rely simply on a certification from the subcontractor that they are in compliance with various federal statutory requirements. Rather, the prime contractors will perform some type of due diligence that requires examination of extremely sensitive proprietary information from the subcontractor. Of course, subcontractors will be rather leery about providing prime contractors items like tax records, etc. to businesses that may be their competitors in subsequent procurements. The Committee members are highly concerned that the proposed rule may lead many small businesses to shy away from becoming subcontractors which would make it even harder for the federal government to reach its small business utilization goals.

Many of these problems could have been avoided or, at least identified and alternatives developed for consideration by the contracting community, had the FAR Council fully utilized the Regulatory Flexibility Act ("RFA"), as strengthened by the Small Business Regulatory Enforcement Fairness Act. The RFA requires that federal agencies consider the impacts of a proposed rule on small business, and if they are significant, propose alternatives that will minimize the adverse consequences. Instead of performing this analysis, the FAR Council came to the conclusion, contradicted by almost all the witnesses at the hearing as well as by members of the Committee, that the proposed rule would not have a significant economic impact on a substantial number of small

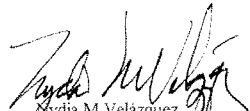
entities. The failure to perform a proper regulatory flexibility analysis raises some serious questions about the procedures and information utilized by the FAR Council in drafting the proposed rule. The FAR Council should make a concerted effort to properly assess the impact on small business, utilize the outreach mechanisms in the RFA to obtain small business input (and this goes beyond simply noticing a proposed rule in the Federal Register and expecting small businesses to respond with comments), and work with the Committee as well as the Office of Advocacy of the United States Small Business Administration in crafting a rule that minimizes the impact on small business while achieving ensuring that the government only does business with responsible contractors.

Again, the Committee concurs with the underlying premise of the proposed rule – proven violators of the law should not be awarded federal contracts. Where the Committee parts company with the FAR Council is the mechanism for achieving that objective. As the hearing record demonstrates (and the Committee expects to submit it for the FAR Council's consideration in developing a final rule), the proposed rule appears to create more questions than it clarifies and potentially could exclude numerous small businesses from obtaining federal government contracts in contravention of the policies embedded in the Small Business Act.

Sincerely,



James M. Talent
Chairman



Nydia M. Velázquez
Ranking Member

JAMES M. TALENT, Missouri
C-1000244

NYDIA M. VELÁZQUEZ, New York

Congress of the United States
House of Representatives
100th Congress
Committee on Small Business
2501 Rayburn House Office Building
Washington, DC 20515-6315

October 25, 1999

VIA TELEFACSIMILE AND FIRST CLASS MAIL

Honorable Deidre Lee
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Old Executive Office Building
Room 352
Washington, D.C. 20503

Dear Administrator Lee:

Thank you for your testimony on October 21, 1999 concerning the proposed changes to the contractor responsibility rules in the Federal Acquisition Regulations. The Committee wishes to build as complete a record as possible on the utilization of integrity and business ethics in responsibility determinations made by contracting officers.

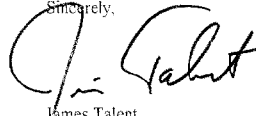
Please provide to the Committee within ten days, the following information and responses to questions:

- 1) All decisions issued by federal courts, Boards of Contract Appeals, or the Comptroller General which support the proposition that the proposed change represents a clarification of existing law rather than a new policy.
- 2) Please provide the number of decisions during the past four (4) fiscal years in which contracting officers have found a lack of responsibility for violations of the tax laws, labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws.
- 3) Did the agencies promulgating the rule examine the potential impact on subcontractors? If not, why not since subcontractors must be held to the same standards of responsibility as prime contractors? Finally, how do the members of the FAR Secretariat expect prime contractors to implement the revised rule in their dealings with subcontractors?

- 4) What coordination, if any, will your Office provide for contracting officers needing to assess compliance with tax, environmental, labor, consumer protection, antitrust, and employment laws so that contracting officers can make the responsibility determinations?
- 5) Please provide to the committee the job description and qualifications for contracting officers at GSA, the Department of Defense, and the National Aeronautics and Space Administration. In your response, please provide the typical grade levels of contracting officers and any educational requirements specifically noted in the job description.

Thank you for testifying and the Committee looks forward to working with you as the federal procurement agencies develop a final rule. If you have any questions, please contact Barry Pineles or Mike McLaughlin of the Committee staff at (202) 225-5821.

Sincerely,



James Talent
Chairman



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

OFFICE OF FEDERAL
PROCUREMENT POLICY

November 19, 1999

The Honorable James Talent
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515-6515

Dear Mr. Chairman:

This responds to your October 25, 1999, letter in which you request certain information regarding the proposed acquisition rule concerning the utilization of integrity and business ethics in responsibility determinations made by contracting officers. You have asked for the following:

1. *All decisions issued by Federal Courts, Boards of Contract Appeals, or the Comptroller General which support the proposition that the proposed change represents a clarification of existing law rather than a new policy.*

You have asked about the legal basis for our statement that the proposed change represents a clarification of existing law. To respond to your question, it is necessary to place the proposed change in the overall context of the pre-existing statutory and regulatory requirement for federal contractors to be "responsible sources."

By statute, contracting officers may award contracts only to "responsible sources." See 41 U.S.C. 253b(b), 10 U.S.C. 2305(b)(3). In the Office of Federal Procurement Policy Act, Congress has stated that, to qualify as a "responsible source," a contractor must have "a satisfactory record of integrity and business ethics." 41 U.S.C. 403(7)(D). This statutory requirement was incorporated verbatim in the Federal Acquisition Regulation. In accordance with the OFPP Act, the FAR provides that, to be a "responsible source," a contractor must "[h]ave a satisfactory record of integrity and business ethics." FAR 9.104-1(d).

The change that has been proposed to the FAR does not alter the statutory requirement that a contractor be a "responsible source" and therefore must have "a satisfactory record of integrity and business ethics." To the contrary, the proposed rule retains verbatim the existing regulatory language from FAR 9.104-1(d), thereby reaffirming that a contractor must have "a satisfactory record of integrity and business ethics" in order to qualify as a "responsible source." The fact that the general standard would remain exactly the same (i.e., does the firm have "a satisfactory record of integrity and business ethics?") confirms that the proposal would not establish a new policy.

Instead of establishing a new policy, the proposed rule would add illustrative examples that clarify what constitutes “a satisfactory record of integrity and business ethics.” Specifically, the proposed rule would add the following parenthetical sentence to FAR 9.104-1(d):

“(Examples of an unsatisfactory record may include persuasive evidence of the prospective contractor’s lack of compliance with tax laws, or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws or consumer protection laws.)”

These illustrative examples do not depart from the long-standing requirement that a contractor have “a satisfactory record of integrity and business ethics” in order to qualify as a “responsible source.” In evaluating a firm’s “record of integrity and business ethics,” it is entirely reasonable to review the firm’s history of compliance with applicable laws. If there exists “persuasive evidence” of a firm’s “lack of compliance” with the tax laws, or of the firm’s “substantial noncompliance” with the other referenced laws, we believe that this compliance history is relevant to an evaluation of the firm’s “record of integrity and business ethics” and that such evidence can form the basis for a determination that the firm has an “unsatisfactory record.”

When legislatures and agencies draft and amend statutes and regulations, it is a common and routine practice for them to state a general standard and then offer illustrative examples that clarify its meaning (“such as . . .,” “including . . .”). The practice of a legislature or agency providing (or adding) illustrative examples to clarify a general standard is so well-accepted by the courts that it is taken for granted that offering illustrative examples is a useful way to clarify the meaning of a general statement. In this case, by adding illustrative examples of what would not constitute “a satisfactory record of integrity and business ethics,” the proposed rule represents another instance of this practice of clarifying through examples.

2. Please provide the number of decisions during the past four (4) fiscal years in which contracting officers have found a lack of responsibility for violations of tax laws, labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws.

Section 19 of the Office of Federal Procurement Policy Act (codified at 41 U.S.C. 417), entitled “Record Requirements” delineates the procurement files every executive agency must establish and maintain. These unclassified files, which are computerized, record individual facts about each procurement greater than \$25,000. Procurement facts concerning contracts below \$25,000 are recorded in a summary fashion. These agency records are then entered into the Federal Procurement Data System (FPDS), as discussed in subpart 4.6 of the Federal Acquisition Regulation (FAR). The FPDS is the authoritative source of government-wide procurement information. Federal agencies do not keep in summary form, and hence the FPDS files do not reflect, data from which answers to your questions can be derived.

The files kept on individual contract actions (there are nearly 12 million actions each year) are also not helpful in answering your questions. As a general rule, we do not keep pre-award data except for the successful offeror. In any event, those files are not set up to reflect contractor failure to comply with the law. Rather, they reflect performance or nonperformance of the contract.

However, the Small Business Administration reported, through the certificate of competency process which is used for assessing the responsibility of small businesses, the following determinations of non-responsibility related to the "business ethics and integrity" standard: for FY 98, three determinations of non-responsibility; for FY 97, five determinations; and in FY 96, eight determinations.

3. Did the agencies promulgating the rule examine the potential impact on subcontractors? If not, why not since subcontractors must be held to the same standards of responsibility as prime contractors? Finally, how do the members of the FAR Secretariat expect prime contractors to implement the revised rule in their dealings with subcontractors?

The FAR places the responsibility for subcontractor determinations on the prime contractor. As a general proposition, the government does not interfere in the relationship between the prime and its subcontractors since we have no privity of contract. As you can see from the following provision of the FAR, the prime contractor's role is the same with regard to the standard of integrity and business ethics as it is for the other standards which form the basis for responsibility determinations.

FAR 9.104-4

Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors. Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility.

When it is in the Government's interest to do so (for example when prospective contract involves medical supplies, urgent requirements, or substantial subcontracting), the contracting officer may directly determine a prospective subcontractor's responsibility. In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility.

4. What coordination, if any, will your Office provide for contracting officers needing to assess compliance with tax, environmental, labor, consumer protection, antitrust, and employment laws so that contracting officers can make the responsibility determinations?

This office has authority under the OFPP Act to issue guidance, as necessary, in carrying out these policies. That assessment will be made after a review of the public comments. At that time we will review all these issues and issue guidance as appropriate.

5. Please provide to the committee the job description and qualifications for contracting officers at GSA, the Department of Defense, and the National Aeronautics and Space Administration. In your response, please provide the typical grade levels of contracting officers and any educational requirements specifically noted in the job description.

A “contracting officer” is an individual (typically a “contract specialist”) who has been issued a warrant authorizing him or her to enter into, administer, or terminate contracts on behalf of the U.S. Government. Because the business of the Government varies widely, not only between agencies but also within a single agency, agencies do not create a single job description for contracting officers. Rather, the requirements of different jobs are detailed in documents referred to as position descriptions. Reflective of the wide variety in responsibilities and demands among positions, you will not find a “typical” grade level for contracting officers. GSA, DOD, and NASA issue warrants to individuals ranging from grades GS-5 through GS-15, depending on complexity and dollar value of contracts worked. Unfortunately, we do not yet maintain a centralized system that identifies who has been issued warrants across the Federal Government, so OFPP is unable to identify warrants by grade. NASA, however, does capture this information for its workforce and provided the attached statistics. See Enclosure 1.

For your information, we are providing examples of position descriptions from GSA and DOD (Air Force). These are only examples and are not intended to represent some type of standard for each agency, which does not exist. However, the documents can give you insight into some of the duties that individuals serving in the specific positions covered by those position descriptions are asked to perform. See Enclosure 2.

On the issue of qualifications, more specifically, educational requirements, two sets of rules apply to the Federal workforce. Agencies identify these requirements in their vacancy announcements.

DOD positions are subject to the requirements specified in the Defense Acquisition Workforce Improvement Act (DAWIA). The Act requires that, in addition to training and experience requirements, contracting officers must have either received a bachelor’s degree, completed 24 semester hours of business-related course-work, or passed an exam demonstrating skills, knowledge, or abilities comparable to an individual who completed 24 semester hours of business-related course-work. For contracting officer positions at grades GS-13 and higher

that are designated as part of the "acquisition corps," an individual must possess a bachelor's degree and 24 semester hours of business-related course-work. A copy of the applicable DAWIA language is attached. See Enclosure 3.

Civilian positions are covered by an OPM qualification standard that reflects requirements prescribed by the OFPP Administrator pursuant to the Clinger-Cohen Act. The educational requirements are comparable to DAWIA requirements: through grade GS-12, individuals must have received a bachelor's degree, completed 24 semester hours of business-related course-work, or passed an exam demonstrating skills, knowledge, or abilities; for grades GS-13 and above, individuals must possess a bachelor's degree and 24 semester hours of business-related course-work. A copy of the GS-1102 qualification standard is attached. See Enclosure 4.

All contracting officers today do not possess the education specified by DAWIA and the 1102 standard, largely due to the overall educational status of the workforce at the times the standards became effective. Individuals were allowed to keep their current grade levels without meeting new requirements and, in civilian agencies, can be promoted through grade GS-12. For DOD positions, DAWIA also exempts from the educational requirements all persons having more than 10 years of acquisition experience as of October 1991, meaning those individuals can continue to advance in their careers. Again, since we lack a centralized system that identifies warrants across all agencies, we cannot readily identify the educational qualifications of current contracting officers. However, for the entire 1102 workforce, 1998 OPM data indicates that 62 percent possess college degrees.

In response to the concerns you raised at the hearing regarding the Regulatory Flexibility Act and the attendant statutorily provided judicial review, we will revisit this issue along with the others submitted during the public comment period. If at that time it is appropriate, we will prepare an initial regulatory flexibility analysis in accordance with the procedures outlined in the Act.

I hope that this information is helpful to you in understanding the Administration's proposal. I look forward to a continued dialogue with you on this proposal. Please call me at 202-395-5802 should you need more information.

Sincerely,



Deidre A. Lee
Administrator

Enclosures

WARRANTS BY GRADE LEVELS — NASA

	ARC	DFRC	GRC	GSFC	JSC	KSC	LARC	MSFC	NMO	SSC	TOTAL
1102-07				2				5			7
1102-09			1	10			2				13
1102-11	1	2	1	13		3	5	4			29
1102-12	6	2	23	12	7	8	11	15	2	1	87
1102-13	18	8	4	44	39	18	13	27	4	2	175
1102-14	3	4	2	12	13	6	5	6		2	53
1102-15	4	1	1	2	9	3	1	5	2	1	29
SES	1			1	2	1	1	1			7
TOTALS	31	17	32	96	70	39	38	63	8	6	400

POSITION DESCRIPTION (Please Read Instructions on the Back)										1. Agency Position No. M-79	
2. Reason for Submission <input type="checkbox"/> Reestablishment <input type="checkbox"/> New <input type="checkbox"/> Other		3. Service <input type="checkbox"/> Home <input type="checkbox"/> Field		4. Employing Office Location		5. Duty Station		6. OPM Certification No.			
7. Pay Labor Standards Act <input type="checkbox"/> Exempt <input type="checkbox"/> Nonexempt		8. Financial Statements Required <input type="checkbox"/> Employee Personnel <input type="checkbox"/> Employment and Financial Interests		9. Subject to IA Action <input type="checkbox"/> Yes <input type="checkbox"/> No		10. Position Status <input type="checkbox"/> Competitive <input type="checkbox"/> Excepted (Specify in Remarks)		11. Position is: <input type="checkbox"/> Supervisory <input type="checkbox"/> 1-Non Sensitive <input type="checkbox"/> 2-Critical Sensitive		12. Agency Use	
13. Classified/Graded by a. U.S. Office of Personnel Management		Official Title of Position		Pay Plan		Occupational Code		Grade		Inroads	
b. Department, Agency or Establishment		CONTRACT SPECIALIST		GS		1102		12			
c. Second Level Review											
d. First Level Review											
e. Recommended by Supervisor or Training Office											
15. Organizational Title of Position (if different from official title)				17. Name of Employee (if vacant, specify)							
18. Department, Agency or Establishment				c. Third Subdivision							
a. First Subdivision				d. Fourth Subdivision							
b. Second Subdivision				e. Fifth Subdivision							
Employee Review—This is an accurate description of the major duties and responsibilities of my position.				Signature of Employee (optional)							
20. Supervisory Certification. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.				b. Typed Name and Title of Higher-Level Supervisor or Manager (optional) WILLIAM N. GORMLEY, CPPO Asst Comm, Office of Acquisition							
a. Typed Name and Title of Immediate Supervisor				Signature				Date			
21. Classification/Job Grading Certification. I certify that this position has been classified/graded as required by Title 5, U.S. Code, in conformance with standards published by the U.S. Office of Personnel Management or, if no published standards apply directly, consistently with the most applicable published standards.				22. Position Classification Standards Used in Classifying/Grading Position				Information for Employees. The standards, and information on their application, are available in the personnel office. The classification of the position may be reviewed and corrected by the agency or the U.S. Office of Personnel Management. Information on classification/job grading appeals, and complaints on exemption from PLSA, is available from the personnel office or the U.S. Office of Personnel Management.			
Typed Name and Title of Official Taking Action Gail T. Lovelace Director of Personnel				Signature				Date			
23. Position Review				Initials				Date			
a. Employee (optional)											
b. Supervisor											
c. Classifier											
YES											
OPTIONAL FORM 90 (7-90)											
FAX TRANSMITTAL											
a of pages = 14											
TONY BAUMAN TERESA ELBIN											
Duty Agency DFPP Phone 501-4765											
Fax # 395-5105 Fax # 501-3341											
NSN 7540 01-317-1258 5089-101 GENERAL SERVICES ADMINISTRATION											
25. Description of Major Duties and Responsibilities (See Attached)											

GENERAL SERVICES ADMINISTRATION FEDERAL SUPPLY SERVICE CONTRACT SPECIALIST: GS-1102-12
--

DUTIES

Serves as a contract specialist in an FSS Commodity Center responsible for large-scale, national in scope, centralized acquisition of services, or supplies under the Stock, Special Order, or Multiple Award Schedule (MAS) programs. Resultant contracts are designed to meet the consolidated requirements of Federal agencies, nonprofit agencies operating under the Javits-Wagner-O'Day Act (NIB/NISH), and other entities authorized to use the Federal Supply Service (FSS) as a source of supply.

Is responsible for all acquisition preaward and postaward functions which include, but are not limited to the following duties:

- ***Performs Industry Analysis.*** Determines current and future industry capability to meet the consolidated requirements for the assigned product line (s) or services. Identifies quantitative and product service needs for current and future requirements. Reviews and considers industry capabilities, corporate acquisitions or bankruptcies, and changes in product technology and performance.
- ***Performs Market Research.*** In accordance with Public Law 103-355, determines whether commercial items are available to meet customer requirements and to determine if clauses, terms, and provisions, to be utilized in commercial item acquisitions are consistent with commercial practice. Determines need for new or additional products/services to meet customer requirements.
- ***Develops Acquisition Plans.*** Conducts acquisition planning based on analysis of results of industry analysis, market research and other considerations. Also analyzes conditions peculiar to past procurements, establishes minimum/maximum order limitations, sample requirements, reviews socio-economic factors, etc. Determines cost and performance objectives for the acquisition and develops the applicable milestone plan(s).
- ***Implements Electronic Commerce.*** Participates in electronic commerce initiatives set forth in the Federal Acquisition Streamlining Act of 1994 and GSA's on-line shopping service, *GSA Advantage!* (<http://www.gsa.gov>).
- ***Develops Source Selection Plan.*** Provides guidance and assistance to the cognizant program office in developing evaluation criteria and establishes and source selection board/authority.

- **Maximizes Competition or Product Availability.** Stimulates interest in bidding or locating new sources of supply. Maintains contact with manufacturers to persuade them to convert portions of production capacity to Government requirements or to produce for the Government during slack seasons at reduced costs. Identifies and works with current and potential commercial contractors and customers to develop specification or work statements. Attends conferences and exhibits or initiates meetings with industry, Small Business Administration, and others for the purpose of expanding competition. Explains Federal contracting procedures to potential suppliers, and determines the most advantageous time to solicit bids for expanded competition.
- **Develops the Solicitation.** Determines quantities or extent of services to be procured, identifies exceptions or changes needed in contract provisions, determines appropriate contract type, coordinates socio-economic factors with appropriate activities and makes determinations concerning minimum or maximum order limitations, method of award, origin/destination pricing, guarantees, preaward samples, transportation and delivery considerations and other special provisions unique to the Government's requirements.
- **Conducts Pre and Post-Award Conferences.** Holds conferences with industry and customers to provide information on the development or implementation of acquisition programs covering supplies or services.
- **Obtains Pre-Award Audits and Achieves Resolution (Negotiated).** Determines need for pre-award audits by Office of Inspector General (OIG) based on contract dollar amount and other factors. Evaluates and analyzes completed audit findings, and concurs/non-concurs with findings. Achieves resolution with the OIG.
- **Determines Responsiveness and Responsibility.** For sealed bids, determines compliance of bids to all material respects of the solicitation; rejects bids that fail to conform to the essential requirements of the solicitation. Evaluates bids for mistakes and processes mistakes in bids in accordance with applicable regulations.

For both sealed bids and negotiated solicitations, determines need for pre-award surveys. Reviews and considers results of Financial Reports and Plant Evaluation and Facilities Report, and other indicators of capability to perform (e.g., past performance information). Requests Certificate of Competency (COC) from the Small Business Administration as necessary; challenges COC if necessary.

- **Responds to Protests.** Establishes and prepares the Government's position with respect to protests to the Contracting Officer or to the General Accounting Office. Supports and defends the position via preparation of protest documentation and files in accordance with applicable regulations.
- **Evaluates and Analyzes Requests for Proposals.** Evaluates proposals for completeness and acceptability of all information provided by the offeror (administrative, technical and/or

pricing). Obtains clarifications and other additional technical and pricing information from the offeror if necessary. Must determine if pricing information is available from Government, in-house, or other public sources before obtaining additional proprietary pricing and sales information from the offeror. When obtained, conducts analysis of offeror's pricing and sales information; establishes competitive range and develops prerenegotiation memorandum (including findings of any pre-award audit), documenting negotiation strategy and objectives.

- ***Performs Price and/or Cost Analysis.*** Analyzes industry and supplier pricing practices applicable to the product line or service and the latest economic developments pertaining to increased material, labor, or transportation costs as reflected in the latest price indices or cost data. Analyzes contractual arrangements and other agreements relative to national accounts, state and local governments, original equipment manufacturers, other classes of customers and related audit reports and determines the relationship to contract offers. For cost analysis, analyzes cost and pricing data submitted by offerors and related audit reports to substantiate direct and indirect costs and profit. Determines reasonableness of prices offered. Identifies areas subject to negotiation. These include some or all of the following: cost elements and/or price; quantity and/or payment discounts; transportation, delivery and/or performance; specification and/or work statement reconfiguration; and as necessary, evaluates product offers with respect to warranties, replacement, service or technical assistance.
- ***Negotiates Contracts.*** Conducts written or oral negotiations with offeror's authorized contract negotiator. Conducts negotiations or serves as lead negotiator of Government negotiating team. Documents negotiations in negotiation memorandum, explaining objectives or concessions achieved/not achieved. Requests "Best and Final" offer, documenting offeror's concessions.
- ***Negotiates Subcontracting Plans.*** Evaluates bidder's/offeror's subcontracting plan goals and negotiates new goals if necessary as required by Public Law 95-507. Coordinates plan with Small Business Technical Advisor and Small Business Administration.
- ***Recommends and Makes Award.*** Completes all award documents required to make award, and signs as Contracting Officer, if Warranted. Conducts debriefings when requested by unsuccessful offerors.
- ***Performs Contract Administration.*** When contract administration is not delegated, performs the full range of contract administration responsibilities including negotiation of contract modifications, performance of termination/cancellation actions, and/or negotiation of Government claims for defective cost or pricing data. Resolves disputes between ordering activities and contractors.
- ***Requests and Analyzes Post Award Audits.*** Determines need for post award audit and analyzes completed Audit Report. Achieves audit resolution with the Office of Inspector

General after considering comments/input from contractor involved. Conducts negotiations with contractor to achieve audit settlement.

- *Serves as Technical Expert and Advisor.* Provides technical direction and guidance to management, customers, and contractors in assignment area relative to the market, the industry, specifications, socio-economic concerns, and similar matters or unusual problems.

Factor 1. Knowledge Required by the Position

Knowledge of Federal and GSA contracting principles and procedures, contracts and provisions, and methods of contracting applicable to the centralized acquisition of product line and/or service requirements.

Knowledge of assigned product lines or services and the industry sufficient to identify sources of supply, recent developments and trends, economic factors affecting procurements, and anticipated requirements of Federal agencies both annually and seasonally.

Knowledge of cost and price techniques sufficient to perform a variety of computations relative to item costs, packing, packaging, specification requirements, and delivery points sufficient to determine the best buy for the Government.

Knowledge of negotiation techniques sufficient to negotiate prices, terms and conditions, contract modifications, and settlements.

Factor 2. Supervisory Controls

Assignments are made by the supervisor with general guidance on the objectives and timing of operations, and new or revised policies, programs, and procedures. The contract specialist is responsible for developing the annual strategy and acquisition plan for assigned product line(s) or services. The contract specialist carries out assignments independently, referring to the supervisor only unusual problems encountered, policy matters, or situations which may lead to precedent-setting decisions. Completed work is reviewed primarily for conformance with policy, overall progress, and results achieved.

Factor 3. Guidelines

Guidelines include statutes, Federal and GSA policies and procedures, Controller General decisions, precedents, commercial catalogs, and price indices. Guidelines applicable to industry studies are general of limited use, or not available. The contract specialist uses initiative and resourcefulness in developing new information such as locating new sources or stimulating small and disadvantaged business participation, researching trends and patterns within the specific industry such as costs and changes in products, and analyzing effects of changing costs and changes in products, and analyzing effects of changing industrial conditions (e.g., strikes,

shortages, surpluses, seasonal demands) on the procurements. As necessary, the contract specialist develops clauses or provisions consistent with customary commercial practice.

Factor 4. Complexity

The contract specialist is responsible for the acquisition of product lines or services to meet the consolidated requirements of Federal agencies. Complexities typically encountered include some or all of the following:

- Technical changes;
- Electronic Commerce;
- Urgent Government needs that override normal production;
- Conflicting program requirements that jeopardize continuity of contract coverage.
- Concurrent procurements at various stages of completion;
- Great volume of production;
- Technical complexity of commodities or equipment;
- Commodity shortages;
- Lack of competition among vendors;
- In-depth price or cost analysis;

Service contracts are characterized by complex statements of work, time and material requirements, repair and maintenance of major proprietary items, multiplicity of awards, multi-year contract life, and extensive administrative problems. Work involves managing the acquisition of services with a high degree of uncertainty during performance, complicated work breakdown, schedules with significant interdependence of work elements creating considerable possibilities for schedule slippage, and high (multi-million dollar) systems life costs.

Decisions are based on extensive analysis of the industry to balance the award and impact of high dollar Government contracts on suppliers, on the availability of items or services to other consumers, on the productive capacity of firms, on small and disadvantaged businesses, and the timely meeting of agency needs. The work requires innovative solicitation development, determining consolidated needs, and developing new sources.

Factor 5. Scope and Effect

The purpose of the work is to plan and conduct centralized procurements for large-scale or heavy volume buying for supplies, equipment, or services to meet the consolidated requirements of one or more Federal agencies. The volume or urgency of need has a significant impact upon the industry in capacity, financial commitment, availability of potential suppliers, effect on the market, effect on supply and demand, impact on increasing or decreasing overall competition, and/or on local labor markets. Timely or continued availability of contractual sources impacts on one or more agencies for products or all agencies in a region for services in terms of their ability to perform their missions. Contractual activity frequently generates interest by elected officials.

industry officials, labor organizations, and/or special interest groups because of the impact on income, employment, and industry affecting a segment of a local economy.

Factor 6. Personal Contacts

Contacts include contractors and representatives of industry, labor organizations, special interest groups, local officials, management representatives within the agency and from other agencies, and/or legal counsel and other specialists within the agency.

Factor 7. Purpose of Contacts

Contacts are to conduct negotiations for procurements and/or to persuade suppliers to convert portions of their production capacity to the Government's requirement which involves convincing supplier or developing compromise resolution or suitable alternatives. The contract specialist represents the agency at industrial and trade association conferences to obtain information concerning new and improved products, new manufacturing techniques, or marketing practices; and to furnish information or discuss improvements in contracting methods. The contract specialist provides consultation and guidance to lower grade specialists, management officials within the agency, other client agencies, and manufactures and prospective suppliers.

Factor 8. Physical Demands

The work is sedentary in nature.

Factor 9. Work Environment

The work is Performed in an office setting.

CONTRACT SPECIALIST, GS-1102-12

MAJOR DUTIES

Incumbent serves as a contract specialist satisfying customer needs through the professional placement of Government contracts. He/she is responsible for the full range of preaward and postaward functions, e.g., price/cost analysis, negotiation, administration and termination in a regional Public Buildings Service organization. Incumbent procures a wide range of real property related services such as new construction; building design; major repair and alteration projects; professional and/or specialized services such as architect-engineering, construction management or commercial facilities management firms; telecommunications, information technology, hardware, software and technical services; operation, maintenance and/or replacement of complex mechanical systems and equipment, janitorial and guard services, real estate brokerage and appraisal, space planning, public utilities, asbestos abatement and other health and safety related services. Procurement actions involve contracts up to and exceeding \$10 million dollars and oftentimes generate intense Congressional interest.

Customer Relations: Incumbent consults with and supports internal and external customers, providing technical expertise and advice on contracting matters. He/she maintains open communication channels with customers, providing professional, courteous and timely feedback through regular phone calls or site visits. Keeps customers apprised of project status and procurement issues of mutual concern, striving to maintain agreed upon schedules and promptly advising customers when schedules or estimated delivery dates change.

Preaward: Incumbent reviews and analyzes requests for procurements, revising the scope of work or specifications as necessary. Determines the method of procurement and the contract type and develops an acquisition plan to assure project completion in a timely and efficient manner. Researches market conditions to assess adequacy of competition. Develops justifications for other than full and open competition; determines statutory authority and other required clearances; and prepares needed documentation.

Incumbent prepares solicitation documents, incorporating specialized provisions, such as cost accounting standards, requirements for technical proposals with appropriate weighting factors, cost escalation factors, socioeconomic programs, etc. Analyzes specifications to ensure their adequacy and recommends revisions, identifying exceptions or changes needed in standard contract provisions to accommodate unique circumstances. Develops special clauses and provisions for unique procurements for which there is no precedent.

Solicits proposals from prospective contractors. Determines procurements to be awarded under the Small Business Administration's (SBA) Section 8(a) program and other socioeconomic programs. Prepares contract documents, awards and administers contracts with the SBA. Assists SBA in awarding subcontracts to socially and economically disadvantaged firms or individuals. Initiates meetings and attends conferences with industry, SBA personnel and/or others to expand competition.

Solicits proposals from non-profit agencies working under the Javits Wagner O'Day Act. Maintains liaison with the regional office of the National Industries for the Severely

Handicapped (NISH). Negotiates, awards and administers contracts. Participates in partnering sessions with workshops, regional NISH and as appropriate, representatives from the Committee for Purchase from People Who are Blind and Severely Disabled.

Evaluates technical submissions, bids or offers for responsiveness to the solicitation. Performs cost and/or price proposal analyses; reviews cost breakdowns, direct and indirect costs; identifies costs which are allowable and allocable to determine reasonableness; determines the necessity for, requests and evaluates preaward financial or physical plant surveys to establish contractor responsibility; and obtains audits, estimates and pricing reports. Establishes competitive range for negotiations.

In advance of negotiations, he/she analyzes overhead costs and determines reasonable profit as measured by the degree of risk assumed by the contractor, contractor investment and the expected proficiency of the contractor and utilizes audit information of Government findings on contractor and subcontractor proposals in negotiating final contract price.

Coordinates the establishment of a technical evaluation committee or source selection evaluation board to determine acceptability of technical proposals; prepares source selection plans; develops selection criteria; and may serve as the Source Selection Authority/chair and as such makes cost/technical trade-offs. Oversees the evaluation process to ensure that the board members consider offers in accordance with the source selection plan. Reconciles inconsistencies in evaluations. Resolves differences between board members and prepares or oversees the preparation of the board's evaluation reports.

Develops pre-negotiation position or advises other agency personnel involved in negotiations on the development of a pre-negotiation position. Develops negotiation plans; holds conferences; and conducts discussions and negotiations with contractors.

Obtains required preaward approvals. If warranted, makes final determination on awards within delegated contracting officer authority. Otherwise, recommends awards on contracts to higher level contracting authorities.

Postaward: Conducts initial conferences with the contractor to provide information, to clarify standard and special provisions of the contract and to maintain liaison with the contractor to interpret contractual obligations and resolve problems; analyzes proposed modifications, supplemental agreements and change orders; and reviews contractor proposals when precedents are of limited relevance.

Negotiates modifications, determining contract cost changes, price adjustments, progress, partial and final payments. After verifying evidence of contractor's progress, makes progress payments until final delivery and payments are completed and the contract is closed. Negotiates delivery and progress schedule changes; determines whether the contractor has fulfilled all contract requirements, any corrective actions needed and/or monetary adjustments for deficiencies, investigating and resolving differences of fact. Determines the allocability, allowability and reasonableness of costs claimed under cost reimbursement contracts and reviews and approves subcontracts under cost type contracts.

Monitors contractor's performance through phone conversations, correspondence, reports, vouchers and visits, maintaining contractor's compliance with contract, regulatory and statutory provisions. Determines status of contract performance scheduling and problems that have arisen and proposes solutions. Interprets provisions for contractors and for officials of customer agencies and provides advice and guidance. Identifies areas requiring further negotiation and establishes the agency position. Takes action to ensure contract compliance.

Monitors contract files to ensure timely completion of required contractual actions, such as the exercise of contract options.

Negotiates changes and other modifications to contracts directly with contractor personnel on material and labor costs, overhead, profit or fees, resolving disagreements between auditor and contractor involving audit determined cost or pricing. Executes modifications and supplemental agreements. Prepares memoranda to explain rationale and methods used in arriving at final price.

Determines agency position on protests from unsuccessful bidders/offerors. Prepares initial agency position on GAO and interagency protests from unsuccessful bidders; renders final decisions on claims and appeals arising under the contract; prepares statement of the Government's position and appeal file for claims brought to the Board of Contract Appeals and the U.S. Court of Federal Claims; and appears as a witness or consultant in contract appeals and other litigated matters.

Closes out contracts; issues termination notices; reviews settlement proposals; and develops the Government's position with respect to contractor claims.

Termination: Based on customer feedback, incumbent determines whether and when to terminate contracts for the convenience of the Government or due to contractor default. Takes administrative actions, calculating Government liability, determining settlement costs and negotiating settlement agreements. Reviews termination notices for extent of action (partial or complete) and for special conditions or instructions.

Incumbent negotiates partial settlement for those elements on which there is an agreement, reserving the rights of parties on excluded or unsettled elements for later resolution or issuing a unilateral determination on elements for which an agreement cannot be reached; equitable adjustments in the continued portion of a partially terminated contract; contractor's claims or settlement proposals, including unsettled contract changes, profit or loss considering such elements as the difficulty of work, efficiency and risks; no cost settlements when the contractor does not owe the Government and when the contractor either has incurred no costs or waives such costs; and reductions in fees for contracts with fee provisions.

Issues determinations of costs disapproved due to unallocability, unallowability or unreasonableness. Executes modifications in settling terminations or claims and obtains contractor's release of claims. After settling a claim or proposal, prepares a memorandum for file setting forth the principal elements of the settlement.

When directed to do so by a higher authority, incumbent may act for the supervisor or branch chief.

Based on organizational operating requirements, the incumbent may also serve as a warranted contracting officer, with the dollar amount of individual warrant delegations left to the discretion of management.

Knowledge Required by the Position

Knowledge of Federal and agency contracting laws, policies, regulations and procedures to acquire and administer contracts for a wide range of extensive or unique services, supplies and equipment using cost and fixed-price type contracting, multiple awards and other special provisions; proprietary rights, warranties, bonds and insurance liability or similar considerations involving the use of Alternate Dispute Resolution procedures.

Knowledge of various types of contracts, methods of contracting and selection factors to satisfy complex requirements and to conduct negotiations in the preaward and postaward phases of contracting.

Knowledge of cost and price analysis and cost accounting standards sufficient to perform the full range of strategic, analytical and technical procurement assignments, including the acquisition of complex design, construction, alterations and/or building services.

Knowledge of business practices sufficient to identify sources, recent developments and trends, economic factors affecting procurements and anticipated requirements of Federal agencies; to analyze cost and pricing data and contract proposals; and to evaluate the offers for responsibility.

Knowledge of the full range of Federal socioeconomic and labor policies and regulations, including those related to small business, small disadvantaged business, women-owned business, the Javits-Wagner-O'Day Act, the Service Contract Act and the Davis-Bacon Act.

Skill in the use of negotiation techniques sufficient to negotiate prices, terms and conditions, contract modifications and settlements and the ability to communicate effectively orally and in writing with individuals both within and outside of GSA.

Supervisory Controls

The supervisor makes work assignments in terms of objectives and resources available. The employee, in consultation with the supervisor and customers, develops priorities and critical project deadlines. The employee independently plans the procurement approach, initiates and manages ongoing actions, coordinates with other offices such as technical or legal personnel and resolves most problems which arise. He/she apprises the supervisor of potentially controversial matters, e.g., contracts which may lead to precedent setting or otherwise sensitive decisions, providing comprehensive synopsis and recommendations. Completed work is reviewed for effectiveness in meeting contractual requirements, customer needs and conformance with policies and procedures.

Guidelines

Guidelines include Federal Acquisition Regulations, General Services Acquisition Regulations, Comptroller General and Board of Contract Appeals decisions, other legal precedents, statutes affecting procurement requirements and practices, executive orders, technical documents such as procedural manuals, audit and technical reports, economic indices and labor wage rate documents. These guidelines normally cannot be applied directly and require significant interpretation. The employee exercises experienced judgment, initiative and resourcefulness to interpret, apply and extend broadly stated regulations to the particular procurement; to devise new contractual provisions or innovative financial arrangements and incentives; and to develop justifications to offset contractor claims against the Government and ground rules for monitoring or evaluating contractor performance.

Complexity

Assignments cover the full range of procurement functions associated with negotiated and sole source actions and are characterized by such complexities as developing and implementing contract plans, performing diverse procurement functions, applying termination and claim settlement techniques including special pricing provisions; performing difficult cost and/or price analyses on initial pricing or price adjustments; reviewing and analyzing audit/technical reports; reviewing the market to locate potential contractors; limited competition; requirements involving extensive professional services and/or complex construction projects where there is a lack of previous experience or competition, extensive subcontracting or similar problems; sensitive negotiations; and changes in the technical requirements and design concepts during the course of the contract.

The work requires making final decisions on a variety of issues such as cost and price allowability, contract settlements and legal and technical problems, considering diverse factors such as extent of prime contractor's cooperation, dollar amount of claim and/or proposal, involvement of subcontract claims and/or proposals, promptness and approval of interim financing, unusual contractual provisions, extent of contract completion, partial versus total termination, unsettled claims and consideration to the extent of contractor's financial and management controls. The employee extends contractual techniques, modifies approaches and develops new terms, conditions or other innovations necessary to satisfy unique contracting requirements while balancing program, project and technical needs, contractor interests, statutory and regulatory requirements and the prevailing socioeconomic climate to make decisions that are in the best interest of the Government.

Decisions are based on analysis of alternatives, adaptation or modification of procedures, resolution of incomplete or conflicting technical or contractor data. Preaward analyses include evaluating data received from numerous firms to determine applicability, develop the Government's pricing position and consider the responsibility of the contractor to perform. Postaward requirements include economic price adjustment determinations, price reduction considerations, exercise of options, determination on claims and/or termination, resolution of disputes, waiver request determinations and close-out of contracts.

Scope and Effect

The purpose of the work is to satisfy customer needs for real property related services, supplies and equipment through the expert use of the Government contracts. This is carried out by serving as a lead negotiator and/or warranted contracting officer responsible for planning and negotiating procurements for specialized and complex services for building operations and construction, supplies and equipment essential to the mission of the Government. The employee performs the full range of procurement functions, providing expertise in all phases of design and construction contracting by furnishing advisory, planning or reviewing services on specific problems, projects or programs in addition to obtaining extensive technical services and construction.

The work product affects the accomplishment of agency procurement goals, client agencies' mission requirements and overall contractors' operations within the region.

Personal Contacts

External contacts are with officials, managers and representatives of public and private organizations, such as commercial concerns and professional services firms, personnel of various state, Federal or municipal entities and customer agencies. Internal contacts include agency technical experts, supervisors, managers, contract review staff, small and disadvantaged business representatives, legal counsel and program personnel. Contacts occur in a moderately unstructured situation with the roles and authorities of the parties varying and the purpose and extent of each contact defined at the time.

Purpose of Contacts

External contacts are to conduct prenegotiation conferences; to negotiate contracts and contract modifications; and to defend procurement actions where conflict exists between the objectives of industry and GSA or in the litigation of claims and appeals. Internal contacts are to exchange information, justify or defend proper contractual approaches to customers, technical experts and managers, e.g., to persuade customers and other personnel of the proper approaches from a procurement viewpoint.

Physical Demands

The work is mostly sedentary in nature.

Work Environment

Work is performed primarily in an office setting, with occasional visits to construction sites. Travel to contractor's facilities and work performance sites may require special safety precautions or severe weather protection, such as protective clothing or gear such as masks, coveralls, coats, boots, hard-hats, goggles, gloves or shields.

CL NUMBER: [REDACTED]

Page 1

AIR FORCE CORE PERSONNEL DOCUMENT

ORGANIZATION: [REDACTED]	CPD NUMBER: [REDACTED]
SUPV LEV CODE: 8	COMP LEV CODE: 0347
TARGET GRADE: GS-12	FLSA: Exempt
JOB SHARE: N	CAREER PROG ID: Q
SENSITIVITY: Noncritical-Sensitive	BUS: 1765
EMERGENCY ESS: N	DRUG TEST: N
KEY POSITION: N	POSITION HIST: Conv to CD

CLASSIFICATION: Contract Negotiator, GS-1102-12
 DUTY TITLE:

ORG & FUNC CODE: PB2	Procurement/Systems Management
1ST SKILL CODE: 604 CMJDALALN	Cont Ngtr, Aero Sys/Subsys, Production
2ND SKILL CODE: 204 CMRALN	Cont Price/Cost Anlys, Production
3RD SKILL CODE: 204 DNADAS	Procurement Anlys, Cont Review

CLASSIFIED BY: [REDACTED]

CLASSIFIER SIGNATURE [REDACTED]

DATE [REDACTED]

SUPERVISORS CERTIFICATION:

I certify that this Core Personnel Document is an accurate statement of the major duties, knowledges, skills, and abilities, responsibilities, physical and performance requirements of this position and its organizational relationships. The position is necessary to carry out government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

SUPERVISOR: [REDACTED]

SUPERVISOR SIGNATURE [REDACTED]

DATE [REDACTED]

CERTIFICATION:

Rater/Supv.	[REDACTED]		
Date	[REDACTED]		
Reviewer	[REDACTED]		
Date	[REDACTED]		
Employee *	[REDACTED]		
Date	[REDACTED]		

*Signature acknowledges receipt. It does not indicate agreement/disagreement.
 AF Form 1003 APR 90 (COMPUTER GENERATED)

NUMBER: [REDACTED]

Page 2

CORE PERSONNEL DOCUMENT

Position Number: [REDACTED]

Organization: [REDACTED]

PURPOSE OF POSITION AND ORGANIZATIONAL LOCATION:

The primary purpose of this position is: to plan for and negotiate contracts for the acquisition of complex equipment, systems, subsystems, services, and/or related research, development, test and evaluation (RDTE). The organizational location of this position is: in the Contracting & Support Division, Contracting Directorate. This position may be collocated to user organization.

ORGANIZATIONAL GOALS OR OBJECTIVES:

The organizational goals or objectives of this position are: to plan for, and negotiate contracts for, the acquisition of complex equipment, systems, subsystems, services, and/or related research, development, test and evaluation.

DUTY 1: Performs work associated with a wide range of contract types and contracting methods. Critical.

STANDARDS:

- A. Displays and applies knowledge of a wide range of contracting methods and contract types to effectively plan and carry out required contracting actions.
- B. Thoroughly analyzes difficult contracting issues and identifies appropriate alternative courses of action.
- C. Modifies standard procedures and terms as necessary to satisfy specialized requirements and effectively solve a variety of contracting problems. Significantly departs from previous approaches as required to develop sound resolution or approach that complies with regulatory/procedural requirements and that will meet the government's needs.
- D. Ensures contracts include and adequately define special provisions and incentives such as price redetermination, cost and performance incentive provisions, or proprietary rights provisions.

KSA: 1, 2, 3, 4

DUTY 2: Performs work associated with preaward and postaward phases of long-term (multiple year) contracts for assigned systems or programs encompassing complex equipment, systems, subsystems, services and/or RDTE programs. Critical.

STANDARDS:

D NUMBER:

Page 3

- A. Accomplishes thorough review, research, and analysis in support of preaward and postaward phases of long-term (multiple year) contracts for assigned programs.
- B. Makes sound recommendation to organizational management for approval of procurements ensuring issues, uncertainties, interests, and all aspects of the program/system have been considered.

KSA: 1, 3, 5, 6

DUTY 3: Reviews and evaluates requisitions and purchase requests, develops plans and determines acquisition strategy, or recommends method of procurement. Critical.

STANDARDS:

- A. Reviews previous history, market conditions, and specifications or technical data packages and develops a well-organized, realistic, and sound contracting plan to meet the government's needs.
- B. Independently plans and manages procurements with technical, legal and contract pricing personnel ensuring necessary preaward actions are completed within regulatory and time requirements to meet objectives.
- C. Provides guidance in development of the statement of work and data requirements. Effectively resolves problems which limit competition and modifies contract language which discourage potential bidders.
- D. Works with program managers, contractors, and potential bidders to identify possibilities for converting production to government needs.

KSA: 1, 3, 7

DUTY 4: Performs work involved in contract negotiation. Critical.

STANDARDS:

- A. Plans and develops the government's negotiation position. Regularly meets with suppliers or their representatives to effectively negotiate prices, delivery dates, specifications, or similar matters.
- B. Thoroughly evaluates technical and cost proposals and establishes an appropriate competitive range for purpose of conducting negotiations.
- C. Effectively represents the government's position in contract negotiations on cost and technical issues. Negotiates fair and reasonable contract terms, conditions, and prices. Definitizes the contract, makes supplemental agreements or revisions and finalizes contract clauses ensuring objectives and requirements are met.

KSA: 1, 2, 3, 4, 7, 8, 9

DUTY 5: Reviews and evaluates contractor bids and proposals. Critical.

CD NUMBER:

Page 4

STANDARDS:

- A. Performs detailed analysis of bids or proposals received ensuring strict compliance with specifications and determining bid responsiveness.

KSA: 1, 2, 3, 4

DUTY 6: Prepares contractual documents. Critical.

STANDARDS:

- A. Compiles complete bidders' list from qualified applications, knowledge of suppliers, contacts with trade associations, Small Business Administration, or other sources.
- B. Drafts or prepares final contract ensuring inclusion of appropriate standard and special clauses such as packing and shipping requirements, inspection provisions, specifications, etc.
- C. Prepares complete contract file with appropriate support documentation including justification for award.

KSA: 1, 3, 7

DUTY 7: Analyzes, resolves and ensures disposition of audit reports. Critical.

STANDARDS:

- A. Reviews and takes appropriate action on audit reports within established timeframes. Evaluates audit reports by analyzing facts and performing necessary research. Presents appropriate recommendations on unresolved or questionable problems. Follows up on a regular basis to ensure complete resolution and disposition of audit reports.

KSA: 2, 4, 10

DUTY 8: Provides advice and assistance to others related to contracting work. Critical.

STANDARDS:

- A. Effectively represents the interests of the organization in a professional manner in meetings and in various contacts outside the organization on a variety of issues that often are not well-defined. Contributes to timely and viable resolution of issues and problems. Recommendations are complete, effective, coordinated and well researched.

CD NUMBER: [REDACTED]

Page 3

- B. Establishes effective working relationships and provides accurate advice and assistance to installation technical or program personnel, sales representatives and/or local suppliers whenever information is needed or issues need to be resolved so that contractual actions and products are complete, effective, coordinated, and well-researched.
- C. Establishes effective working relationships with co-workers and personnel in closely related units contributing to a cooperative working environment and timely accomplishment of work.
- D. Establishes and maintains contacts to provide advice and assistance, effectively plan, advise, and/or coordinate common contractual actions, or resolve related issues while endeavoring to maintain cooperative attitudes and mutual goals.
- E. Develops and effects persuasive strategies so as to convince those initially opposed to agree to contractual positions.

KSA: 1, 2, 3, 7, 11

DUTY 9: Communication (oral and written), working relationships, and quality are major components for fully successful performance of every duty (element) of this core document. Critical.

STANDARDS:

- A. Writes clear, concise, and technically accurate memoranda, letters, documents, or reports that support contractual actions or recommendations.
- B. Uses tact and diplomacy in orally communicating with others and presents a good image as a representative of the organization.
- C. Establishes effective professional working relationships with coworkers, contractors, using organizations, or contacts outside the agency contributing to a cooperative working environment and successful accomplishment of the mission.
- D. Accepts responsibility and accountability willingly, shows willingness to learn new work methods, and try new ideas. Readily adapts to new situations and changing work environments to include participation in the total quality management program.
- E. Reviews/evaluates work processes, methods, and products and seeks improvements. Actively expresses and contributes ideas/suggestions for analysis and implementation, if approved. Demonstrates sensitivity to ideas of fellow workers and supervisors.

KSA: 3, 11

DUTY 10: Safeguards sensitive and/or classified information. Critical.

STANDARDS:

NUMBER: [REDACTED]

Page 6

- A. In accordance with security regulations appropriately handles and safeguards sensitive and classified information and material to reduce potential compromise.

KSA: 7

DUTY 11: Performs special assignments and projects as required. Non-Critical.

STANDARDS:

- A. Recommends the need for and participates on special projects and in studies. Makes recommendations as to the resources needed and establishes milestones to achieve desired goals. Ensures final product meets stated objectives, addresses pertinent issues and reflects an understanding of the impact of the project and/or final product.

KSA: 3, 9, 12, 13

Other significant facts pertaining to this position are:

Incumbent must file an annual SF 450. This position may or may not require a contracting officer warrant. This position is designated as an acquisition position and is covered by APDP. Therefore, the incumbent must be able to meet APDP requirements (or be waived) as stipulated under the Defense Acquisition Workforce Improvement Act (DAWIA) of 1990, P.L. 101-510, Title XII.

RECRUITMENT KNOWLEDGES, SKILLS, AND ABILITIES

1. Knowledge of a wide range of contracting methods and contract types.
2. Knowledge of contracting principles, policies, procedures, and regulatory requirements.
3. Ability to communicate effectively both orally and in writing.
4. Knowledge of business practices and market conditions applicable to program and technical requirements.
5. Knowledge of procurement law, executive orders, and federal and agency regulations.
6. Ability to interpret, modify and extend guides, techniques and precedents to the resolution of complex contracting problems.
7. Knowledge of contracting principles, policies and procedures.
8. Knowledge of negotiation techniques and technical requirements.
9. Skill in contract negotiations.
10. Skill in applying contract price/cost analysis techniques to a variety of preaward and/or postaward procurement actions.

) NUMBER: [REDACTED]

Page 7

11. Ability to establish effective working relationships with others.
12. Knowledge of organizational policies and procedures which impact current responsibilities.
13. Ability to be an effective team member or leader.

Factor 1. Knowledge Required

Level 1-7 (1250 Points)

The position requires a knowledge of contracting principles, laws, statutes, Executive Orders, regulations and procedures applicable to preaward and/or postaward actions sufficient to procure and/or administer contracts for a variety of specialized equipment, services, and/or construction, or to conduct studies of problem areas and develop standard methods and operating procedures. Familiarity with business practices and market conditions applicable to program and technical requirements is required sufficient to evaluate such actions as bid responsiveness, contractor responsibility, and/or contractor performance.

Factor 2. Supervisory Controls

Level 2-4 (450 Points)

The supervisor sets the overall objectives of the work as well as the available resources. The employee, in consultation with the supervisor, develops specific objectives and priorities. The employee independently plans and carries out the work, selecting the approaches and techniques to be used and informs the supervisor of progress and significant problems. Work is evaluated by the degree to which program and regulatory requirements are met.

Factor 3. Guidelines

Level 3-4 (450 Points)

Policies and precedents are available but stated in general terms or are of limited use. Extensive searches of a wide range of regulations and policy circulars are frequently required. The employee uses experienced judgment and initiative in applying principles underlying guidelines, in deviating from traditional techniques, or in researching trends and patterns to develop new approaches, criteria, or proposed policies.

Factor 4. Complexity

Level 4-5 (325 Points)

The work is characterized by breadth of planning, review and coordination or depth of problem identification and analysis, stemming from the variety of the procurement functions or from the unknowns, changes or conflicts inherent in the issues. Decisions involve responsiveness to continuing changes in programs or technological developments. Procurements typically require new or modified contract terms and conditions, funding arrangements, or policy interpretation throughout the preaward or postaward phases.

Factor 5. Scope and Effect

Level 5-4 (225 Points)

The purpose of the work is to provide expertise as a specialist in a functional area of contracting by furnishing advisory, planning, or

CD NUMBER: [REDACTED]

Page 8

reviewing services on specific problems, projects, or programs. The work affects a wide range of procurement activities such as the operation of procurement programs in various offices or locations, the accomplishment of significant procurement or technical program goals, or the economic position of contractors of their respective geographic areas.

Factor 6. Personal Contacts

Level 6-3 (60 Points)

Personal contacts include a variety of specialists, managers, officials or groups from outside the employing agency in a moderately unstructured setting where the purpose and extent of each contact is usually different, and the role and authority of each party is identified and developed during the course of the contact.

Factor 7. Purpose of Contacts

Level 7-3 (120 Points)

Contacts are to obtain agreement on previously determined goals and objectives through negotiation, persuasion, and advocacy. The individuals or groups are frequently uncooperative, have different negotiation objectives, or represent divergent interests.

Factor 8. Physical Demands

Level 8-2 (20 Points)

The work requires some physical exertion such as walking over rough, uneven surfaces of the type found at construction sites or other outdoor facilities which the contract specialist must visit on a regular and recurring basis; or intensive negotiations for extended periods of time, i.e., 4 hours or longer.

Factor 9. Work Environment

Level 9-1 (5 Points)

The work is performed in an office setting.

CLASSIFICATION SUMMARY:

CLASSIFICATION STANDARD(S) USED:
Contracting Series, GS-1102, December 1983 (TS-7)

FES LEVELS 1-7 2-4 3-4 4-5 5-4 6-3 7-3 8-1 9-1 PTS: 2905

GRADE CONVERSION: GS-12

Position File Name: [REDACTED]
Generated by ProClass Plus V4.2
Revised on 24-Feb-94 - 1:41:28pm

May be required to travel by
commercial or military air in
the performance of TDY.

1723. General education, training and experience requirements.

(a) Qualification Requirements. -- The Secretary of Defense shall establish education, training, and experience requirements for each acquisition position, based on the level of complexity of duties carried out in the position. Unless otherwise provided in this chapter, such requirements shall take effect not later than October 1, 1993. In establishing such requirements for positions other than critical acquisition positions designated pursuant to section 1733 of this title, the Secretary may state the requirements by categories of positions.

(b) Limitation on Credit for Training or Education. -- Not more than one year of a period of time spent pursuing a program of academic training or education in acquisition may be counted toward fulfilling any requirement established under this chapter for a certain period of experience.

(Added P.L. 101-510, 1202(a), Nov. 5, 1990, 104 Stat. 1642.)

1724 Contracting positions: qualification requirements.

(a) Contracting Officers. -- The Secretary of Defense shall require that, beginning on October 1, 1993, in order to qualify to serve in an acquisition position as a contracting officer with authority to award or administer contracts for amounts above the small purchase threshold referred to in section 2304(g) of this title, a person must (except as provided in subsections (c) and (d)) --

(1) have completed all mandatory contracting courses required for a contracting officer at the grade level, or in the position within the grade of the General Schedule (in the case of an employee), that the person is serving in;

(2) have at least two years of experience in a contracting position;

→ (3)

(A) have received a baccalaureate degree from an accredited educational institution authorized to grant baccalaureate degrees,

(B) have completed at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education in any of the following disciplines: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management, or

(C) have passed an examination considered by the Secretary of Defense to demonstrate skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education in any of the disciplines listed in subparagraph (B); and

(4) meet such additional requirements, based on the dollar value and complexity of the contracts awarded or administered in the position, as may be established by the Secretary of Defense for the position.

(b) GS-1102 Series. -- The Secretary of Defense shall require that, beginning on October 1, 1993, a person may not be employed by the Department of Defense in the GS-1102 occupational series unless the person (except as provided in subsections (c) and (d)) meets the requirements set forth in subsection (a)(3).

(c) Exceptions. --

(1) The requirements set forth in subsections (a)(3) and (b) shall not apply to any employee who

on October 1, 1991, has at least 10 years of experience in acquisition positions, in comparable positions in other government agencies or the private sector, or in similar positions in which an individual obtains experience directly relevant to the field of contracting.

(2) The requirements of subsections (a) and (b) shall not apply to any employee for purposes of qualifying to serve in the position in which the employee is serving on October 1, 1993, or any other position in the same grade and involving the same level of responsibilities as the position in which the employee is serving on such date.

(d) Waiver. -- The acquisition career program board of a military department may waive any or all of the requirements of subsections (a) and (b) with respect to an employee of that military department if the board certifies that the employee possesses significant potential for advancement to levels of greater responsibility and authority, based on demonstrated job performance and qualifying experience. With respect to each waiver granted under this subsection, the board shall set forth in a written document the rationale for its decision to waive such requirements. The document shall be submitted to and retained by the Director of Acquisition Education, Training, and Career Development.

(Added P.L. 101-510, 1202(a), Nov. 5, 1990, 104 Stat. 1642.)

1725. Office of Personnel Management approval.

(a) Qualification Requirements. -- The Secretary of Defense shall submit any requirement with respect to civilian employees that is established under section 1723 or under section 1724(a)(4) of this title to the Director of the Office of Personnel Management for approval. If the Director does not disapprove the requirement within 30 days after the date on which the Director receives the requirement, the requirement is deemed to be approved by the Director.

(b) Examinations. -- The Secretary of Defense shall submit examinations to be given to civilian employees under subsection (a)(3) or (b) of section 1724 of this title to the Director of the Office of Personnel Management for approval. If the Director does not disapprove an examination within 30 days after the date on which the Director receives the examination, the examination is deemed to be approved by the Director.

(Added P.L. 101-510, 1202(a), Nov. 5, 1990, 104 Stat. 1643.)

DAWIA Table of Contents



SUBCHAPTER III -- ACQUISITION CORPS

Sections:

- 1731. Acquisition Corps: in general
- 1732. Selection criteria and procedures
- 1733. Critical acquisition positions
- 1734. Career development
- 1735. Education, training and experience requirements for critical acquisition positions
- 1736. Applicability
- 1737. Definitions and general provisions

1731. Acquisition Corps: in general.

(a) Acquisition Corps. -- The Secretary of Defense shall ensure that an Acquisition Corps is established for each of the military departments and one or more Corps, as he considers appropriate, for the other components of the Department of Defense. A separate Acquisition Corps may be established for each of the Navy and the Marine Corps.

(b) Promotion Rate for Officers in Acquisition Corps. -- The Secretary of Defense shall ensure that the qualifications of commissioned officers selected for an Acquisition Corps are such that those officers are expected, as a group, to be promoted at a rate not less than the rate for all line (or the equivalent) officers of the same armed force (both in the zone and below the zone) in the same grade.

(c) OPM Approval. -- The Secretary of Defense shall submit any requirement with respect to civilian employees established under section 1732 of this title to the Director of the Office of Personnel Management for approval. If the Director does not disapprove the requirement within 30 days after the date on which the Director receives the requirement, the requirement is deemed to be approved by the Director.

(Added P.L. 101- 510, 1202(a), Nov. 5, 1990, 104 Stat. 1644.)

1732. Selection criteria and procedures.

(a) Selection Criteria and Procedures. -- Selection for membership in an Acquisition Corps shall be made in accordance with criteria and procedures established by the Secretary of Defense. Such criteria and procedures shall be in effect on and after October 1, 1993.

→ (b) Eligibility Criteria. -- Except as provided in subsections (c) and (d), only persons who meet all of the following requirements may be considered for service in the Corps:

(1)

(A) In the case of an employee, the person must be currently serving in a position within grade GS-13 or above of the General Schedule (including any employee covered by chapter 54 of title 5).

(B) In the case of a member of the armed forces, the person must be currently serving in the grade of major or, in the case of the Navy, lieutenant commander, or a higher grade.

(C) In the case of an applicant for employment, the person must have experience in government or industry equivalent to the experience of a person in a position described in subparagraph (A) or (B), as validated by the appropriate career program management board.

- (2) The person must meet the educational requirements prescribed by the Secretary of Defense. Such requirements, at a minimum, shall include both of the following:
- (A) A requirement that the person --
- (i) has received a baccalaureate degree at an accredited educational institution authorized to grant baccalaureate degrees, or
- (ii) has been certified by the acquisition career program board of the employing military department as possessing significant potential for advancement to levels of greater responsibility and authority, based on demonstrated analytical and decision making capabilities, job performance, and qualifying experience.
- (B) A requirement that the person has completed--
- (i) at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education from among the following disciplines: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management; or
- (ii) at least 24 semester credit hours (or the equivalent) from an accredited institution of higher education in the person's career field and 12 semester credit hours (or the equivalent) from such an institution from among the disciplines listed in clause (i) or equivalent training as prescribed by the Secretary to ensure proficiency in the disciplines listed in clause (i).
- (3) The person must meet experience requirements prescribed by the Secretary of Defense. Such requirements shall, at a minimum, include a requirement for at least four years of experience in an acquisition position in the Department of Defense or in a comparable position in industry or government.
- (4) The person must meet such other requirements as the Secretary of Defense or the Secretary of the military department concerned prescribes by regulation.
- (c) Exceptions. --
- (1) The requirements of subsections (b)(2)(A) and (b)(2)(B) shall not apply to any employee who, on October 1, 1991, has at least 10 years of experience in acquisition positions or in comparable positions in other government agencies or the private sector.
- (2) The requirements of subsections (b)(2)(A) and (b)(2)(B) shall not apply to any employee who is serving in an acquisition position on October 1, 1991, and who does not have 10 years of experience as described in paragraph (1) if the employee passes an examination considered by the Secretary of Defense to demonstrate skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education from among the following disciplines: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management. The Secretary of Defense shall submit examinations to be given to civilian employees under this paragraph to the Director of the Office of Personnel Management for approval. If the Director does not disapprove an examination within 30 days after the date on which the Director receives the examination, the examination is deemed to be approved by the Director.
- (d) Waiver. --
- (1) Except as provided in paragraph (2), the acquisition career program board of a military department may waive any or all of the requirements of subsection (b) with respect to an

employee of that military department if the board certifies that the employee possesses significant potential for advancement to levels of greater responsibility and authority, based on demonstrated analytical and decision making capabilities, job performance, and qualifying experience. With respect to each waiver granted under this subsection, the board shall set forth in a written document the rationale for its decision to waive such requirements. The document shall be submitted to and retained by the Director of Acquisition Education, Training, and Career Development.

(2) The acquisition career program board of a military department may not waive the requirements of subsection (b)(2)(A)(ii).

(e) Mobility Statements. --

(1) The Secretary of Defense is authorized to require civilians in an Acquisition Corps to sign mobility statements.

(2) The Secretary of Defense shall identify which categories of civilians in an Acquisition Corps, as a condition of serving in the Corps, shall be required to sign mobility statements. The Secretary shall make available published information on such identification of categories.

(Added P.L. 101-510, 1202(a), Nov. 5, 1990, 104 Stat. 1644, and amended P.L. 102-484, 812(e)(1), Oct. 23, 1992, 106 Stat. 2451.)

1733. Critical acquisition positions.

(a) Requirement for Corps Member. -- On and after October 1, 1993, a critical acquisition position may be filled only by a member of an Acquisition Corps.

(b) Designation of Critical Acquisition Positions. --

(1) The Secretary of Defense shall designate the acquisition positions in the Department of Defense that are critical acquisition positions. Such positions shall include the following:

(A) Any acquisition position which --

(i) in the case of employees, is required to be filled by an employee in a position within grade GS-14 or above of the General Schedule (including an employee covered by chapter 54 of title 5), or in the Senior Executive Service; or

(ii) in the case of members of the armed forces, is required to be filled by a commissioned officer of the Army, Navy, Air Force, or Marine Corps who is serving in the grade of lieutenant colonel, or, in the case of the Navy, commander, or a higher grade.

(B) Other selected acquisition positions not covered by subparagraph (A), including the following:

(i) Program executive officer.

(ii) Program manager of a major defense acquisition program (as defined in section 2430 of this title) or of a significant nonmajor defense acquisition program (as defined in section 1736(a)(3) of this title).

(iii) Deputy program manager of a major defense acquisition program.

(C) Any other acquisition position of significant responsibility in which the primary duties are supervisory or management duties.

United States Office of Personnel Management

Operating Manual



Qualification Standards for General Schedule Positions

Individual Occupational Requirements for

GS-1102: Contract Specialist

The text below is extracted verbatim from Section IV-B of the Operating Manual for Qualification Standards for General Schedule Positions (p.IV-B-166), but contains minor edits to conform to web-page requirements.

This is an individual qualification standard that does not apply to Department of Defense positions.

Basic Requirements for GS-5 through GS-12

- A. A 4-year course of study leading to a bachelor's degree with a major in any field.

OR

- B. At least 24 semester hours in any combination of the following fields: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management, or a passing score on an examination or examinations considered by the Director, Office of Personnel Management to demonstrate skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester hours (or the equivalent) of study in any of these academic disciplines, plus appropriate experience or additional education.

Applicants who meet the criteria for Superior Academic Achievement qualify for positions at the GS-7 level.

The following table shows the amounts of education and/or experience required to qualify for positions GS-7 through GS-12 covered by this standard.

GRADE	EDUCATION	OR	SPECIALIZED EXPERIENCE
GS-7	1 full academic year of graduate education or law school <i>or</i> superior academic achievement		1 year equivalent to at least GS-5
GS-9	2 full academic years of progressively higher level graduate education <i>or</i> master's or equivalent graduate degree or LL.B. or J.D.		1 year equivalent to at least GS-7
GS-11	3 full academic years of progressively higher level graduate education <i>or</i> Ph.D. or equivalent doctoral degree		1 year equivalent to at least GS-9
GS-12 and above	None		1 year equivalent to at least next lower grade level
Equivalent combinations of education and experience are qualifying for all grade levels for which both education and experience are acceptable.			

Graduate Education. To qualify for GS-1102 positions on the basis of graduate education, graduate education in one or a combination of the following fields is required: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management.

NOTE - For positions at GS-7 through GS-12, applicants who are qualifying based on experience must possess at least one year of specialized experience at or equivalent to work at the next lower level, that provided the knowledge, skills, and abilities to perform successfully the work of the position, in addition to meeting the basic requirements in paragraph A or B, above.

Basic Requirements for GS-13 and Above

- A. Completion of all mandatory training prescribed by the head of the agency for progression to GS-13 or higher level contracting positions, including at least 4-years experience in contracting or related positions. At least 1 year of that experience must have been specialized experience at or equivalent to work at the next lower level of the position, and must have provided the knowledge, skills, and abilities to perform successfully the work of the position.

AND

- B. A 4-year course of study leading to a bachelor's degree, that included or was supplemented by at least 24 semester hours in any combination of the following fields: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management; **OR** certification by the senior procurement executive of the agency that the applicant possesses

significant potential for advancement to levels of greater responsibility and authority, based on demonstrated analytical and decision making capabilities, job performance, and qualifying experience (Any applicant certified under this provision must meet the requirements of either Paragraph A or B for GS-5 through 12 positions); or a passing score on an examination or examinations considered by the Director, Office of Personnel Management to demonstrate skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester hours (or the equivalent) of study in any of the academic disciplines listed above.

SPECIAL INSERVICE PLACEMENT PROVISION

Current employees in GS-1102 positions, and persons hired into GS-1102 positions by January 1, 1998, will be considered to have met minimum qualification requirements for other GS-1102 positions until January 1, 2000. That is, those GS-1102 employees will not have to meet the new educational requirements in this standard and can continue to qualify for other GS-1102 positions, including positions at a higher grade and in another agency, by meeting specialized experience requirements. This 2 year special inservice placement provision provides a reasonable opportunity for current GS-1102 employees to acquire the educational background specified in the new standard.

Beginning January 1, 2000, all GS-1102 employees who have continuously incumbere GS-1102 positions since January 1, 1998 or earlier, will be considered to have met the "new" standard for positions they occupy on January 1, 2000. Employees who occupy GS-1102 positions at grades 5 through 12 will be considered to meet the new basic requirements for other GS-1102 positions up to and including those classified at GS-12. This includes positions at other agencies and promotions up through grade 12. Employees who occupy GS-1102 positions at grades 13, 14, and 15 will also be considered to meet the new standard for other GS-1102 positions at their same grade, including positions at other agencies. However, they will have to meet the new basic requirements in order to qualify for promotion to a higher grade, beginning January 1, 2000. In addition, all employees must meet specialized experience requirements when seeking another position.

- [To Top of This Page](#)
- [To Qualifications Standards Front Page](#)
- [To OPM Web Site Index](#)
- [To OPM Home Page](#)

Updated 08 March 1999

JAMES M. TALENT, MISSOURI
CHAIRMAN

NYDIA M. VELÁZQUEZ, NEW YORK

Congress of the United States
House of Representatives
100th Congress
Committee on Small Business
2501 Rayburn House Office Building
Washington, DC 20515-6515

October 25, 1999

VIA TELEFACSIMILE AND FIRST CLASS MAIL

James Ballentine
Acting Associate Deputy Administrator
for Government Contracting and Minority
Enterprise Development
Small Business Administration
409 Third Street, S.W.
Washington, D.C. 20416

Dear Mr. Ballentine:

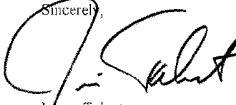
On October 21, 1999, you testified before the Committee on Small Business concerning the Certificate of Competency program. The Committee wishes to build as complete a record as possible on the utilization of integrity and business ethics in responsibility determinations made by contracting officers.

Please provide to the Committee within ten days, the following information:

- 1) The issues involved in the sixteen Certificate of Competency appeals involving integrity and business ethics during the past three fiscal years. In your response, please include the size of the business, the contracting officer's rationale for making the non-responsibility determination, the findings of the SBA either overturning or supporting the contracting officer's original decision, and whether the contracting officer or the small business appealed the decision of the Area Director to SBA Headquarters or to federal court or both.
- 2) Please identify any other appeal during the past three fiscal years involving an inability to meet the regulatory requirements of another agency. In your response, please include the regulatory requirement (including reference to the section of the Code of Federal Regulations) that was not met and the SBA's determination concerning whether the business would be able to meet that regulatory requirement by the commencement of the contract.

- 3) In response to a question, you noted that not all small businesses would appeal a non-responsibility determination. Please clarify whether the contracting officer is under an affirmative obligation to transmit a lack of responsibility determination to the SBA for its review irrespective of whether the small business seeks to appeal the finding. In addition, please clarify whether a small business may request that the SBA not reconsider the adverse finding after transmittal by the contracting officer.

If you have any questions, please contact Barry Pineles or Mike McLaughlin of the Committee staff at (202) 225-5821.

Sincerely,

James Talent
Chairman



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

NOV 5 1999

Honorable James Talent
Chairman
Committee on Small Business
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your October 25, 1999 letter in reference to the Small Business Administration's (SBA), Certificate of Competency (COC) Program. We are responding to the three questions concerning COC integrity and business ethics appeals sent to SBA by Federal agencies.

Your first question requested detailed information in reference to sixteen COC appeals received by SBA over the past three fiscal years. Unfortunately, some of those detailed records are no longer available. They were purged from our files in accordance with SBA's record retention procedures. These procedures require SBA to destroy material relating to the case files two years after the end of a calendar year. We have attempted to fill in some of the missing information from data contained in our headquarters database. This information is furnished in the enclosure.

Your second question concerned COC appeals over the past three fiscal years that allege violations of regulatory requirements of other agencies. SBA does not track COC appeals in that manner. However, we are aware of COC appeals from the Defense Logistics Agency alleging noncompliance with 21 CFR 210, Current Good Manufacturing Practices, issued by the Food and Drug Administration (FDA). In those instances, SBA's role was to determine if the small business took action to correct the problem, if that action was brought to FDA's attention and if FDA accepted the action and placed the small business in good standing. If FDA placed the business in good standing, we would issue a COC on behalf of the small business. As you are aware, SBA cannot waive regulatory requirements imposed by other agencies.

Your third question asks whether the contracting officer is under an affirmative obligation to transmit a non-responsibility determination to the SBA for its review irrespective of whether the small business seeks to appeal the finding. Section 8(b)(7) of the Small Business Act (15 U.S.C 637(b)) states, in part, that a Government procurement officer may not preclude any small business concern or group of such concerns from being awarded a contract without referring the matter to the SBA for a final disposition.

Honorable James Talent

Page 2

This requirement, implemented in Title 13 of SBA's regulations and FAR 19.602, affirms that a contracting officer must refer a small business to SBA for a COC determination. You also asked whether a small business can request that the SBA not reconsider the adverse finding after transmittal by the contracting officer. The SBA regulation (13 CFR 125.5) and FAR 19.602-1 state that a small business referred to SBA as nonresponsible may apply for a COC. Thus, the small business has the option either to apply or not apply for a COC.

Should you have further questions concerning this response, you may contact me directly or Linda Williams, my Deputy, on (202) 205-6459.

Sincerely,

A handwritten signature in black ink, appearing to read "James Ballentine", with a stylized flourish at the end.

James Ballentine
Associate Deputy Administrator
Office of Government Contracting and
Minority Enterprise Development

**Integrity and Business Ethics COC Referrals
Fiscal Years 1996 to 1998**

COC Case Number	Number of Employees	Contracting Officer's Rationale	SBA Rationale	Other
FY96				
INT-02-21730	Unknown	Company is affiliated with debarred firm and is ineligible for contract award	COC denied. Company affiliated with firm that appears on Debarred List.	Affiliation is based on SBA's Formal Size Determination. Co Ineligible for COC. No Appeal
INT-02-21791	3	Company owner has 7 arrests since 1967	COC Issued. One charge dismissed in '92, remainder over 10 yrs. old & penalties paid	No appeal to SBA HQ
INT-02-21898	100	Unauthorized manufacture of Congressional Metal of Honor violation of 10 USC 704	COC Denied Guilty plea entered by company	No Appeals were filed
INT-02-21899	100	Unauthorized manufacture of Congressional Metal of Honor 10 USC 704	COC Denied Guilty plea entered by company	No Appeals were filed
INT-03-21321	8	Alleged violations of Service Contract Act/Fair Labor Standards Act and improper payments on State of Pennsylvania Income Taxes	COC Issued. SBA's procedure requires "substantial evidence" Contracting Officer failed to meet this requirement.	No appeal filed by Contracting Officer to SBA HQ

**Integrity and Business Ethics COC Referrals
Fiscal Years 1996 to 1998**

COC Case Number	Number of Employees	Contracting Officer's Rationale	SBA Rationale	Other
INT-04-21824 Case file destroyed 1 ½ years ago IAW SBA Record Retention procedures.	Unknown	Unknown	COC Denied per information contained in SBA's data base	Unknown
INT-04-21893 Case file destroyed 1 ½ years ago IAW SBA Record Retention procedures.	Unknown	Unknown	Company did not file for COC based on information contained in SBA's data base	Unknown
INT-05-21468 Case file destroyed 1 ½ years ago IAW SBA Record Retention procedures.	Unknown	Unknown	COC Denied based on information contained in SBA's data base	Unknown
FY97				
INT-02-21903	100	Unauthorized manufacture of Congressional Metal of Honor violation of 10 USC 704	COC Denied. Company did not contest finding.	Additional appeals actions unknown.
INT-02-21904	100	Unauthorized manufacture of Congressional Metal of Honor violation of 10 USC 704	COC Denied Guilty plea entered by Company	Additional appeal actions unknown.

**Integrity and Business Ethics COC Referrals
Fiscal Years 1996 to 1998**

COC Case Number	Number of Employees	Contracting Officer's Rationale	SBA Rationale	Other
INT-02-22083	17	Firm's proposal did not disclose default termination IAW FAR 52.209-5	COC Issued Settlement with Government reversed termination	No appeal filed with SBA HQ
INT-03-21506	Unknown	Alleged violations unsupported, appeal withdrawn	SBA requires "substantial evidence" from contracting officer	Contract D/A ¹ by contracting officer
INT-04-21977	Unknown	Alleged violations unsupported, appeal withdrawn	SBA requires "substantial evidence" from contracting officer	Contract D/A ² by contracting officer.
FY98 INT-04-22114	12	Company ineligible for contract. Owner appeared on List of Debarred Contractors	COC denied. SBA could find no reason to overcome contracting officer's concerns	Additional appeal actions unknown
INT-09-22678	Unknown	Owner convicted of embezzlement	Company did NOT file for COC	Additional appeal actions unknown
INT-09-22707	201	Alleged violations of Truth in Negotiation Act	SBA requires "substantial evidence" from contracting officer – none supplied	COC appeal not accepted lacked "substantial evidence" Contract D/A ³ no other action

¹ D/A is a direct award. A direct award indicates that the contracting officer has withdrawn its COC appeal prior to the completion of the process and has awarded the contract to the referred small business.

² D/A is a direct award. A direct award indicates that the contracting officer has withdrawn its COC appeal prior to the completion of the process and has awarded the contract to the referred small business.

³ D/A is a direct award. A direct award indicates that the contracting officer has withdrawn its COC appeal prior to the completion of the process and has awarded the contract to the referred small business.