

# Procurement Alert Notice

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## PRESIDENT'S MESSAGE

### *Competitive Sourcing Under Fire*

Competitive sourcing is under fire from some members of Congress—not because it doesn't make good sense economically, but because of inaccurate information concerning its benefits. Although most Republicans are for it and most Democrats are against it, there are few people that deny that it is beneficial to the Federal Government. Over the last twenty years presidents from both parties have encouraged the use of competitive sourcing. Through the years, Congress has asked the GAO to review competitive sourcing and has consistently found that it has cost benefits.

This is especially true of service contracts. In most cases it would be less expensive for commercial contractors to perform work than for Government employees to do it. Examples where this has proven true include mess attendance contracts, custodial contracts, guard contracts, contracts for operation and maintenance of Government facilities, and contracts for preventative maintenance for information technology.

Unions representing Government employees have pledged to fight competitive sourcing because they believe that Government jobs will be lost. In some instances this may be true, but more often than not people in those jobs are hired by the new contractor or they are offered other positions in the Government. Some have enough years of Government service to retire from Government. In some instances, the retirees will go to work for the contractor.

So what's the beef? Mainly, it's Government employees' fear that their jobs will be filled by contractor employees. However, this insecurity is no

different from that in the commercial world. Contractors must provide services that are valuable and cost effective. If they don't, they will be replaced by someone that can offer better results.

If competitive sourcing brings better results at a fair and reasonable price, is it fair to the taxpayer to fight competitive sourcing for political reasons? What about the principle that the Government should act in a business capacity similar to private sector organizations?

To ensure that economic objectives are met, A-76 studies have been greatly encouraged. Last fall new guidance was published and endorsed by Government and business communities. The A-76 system ensures identification of areas in the Government with the greatest potential for cost savings. The commercial industrial world competes with the Government for work. Industry and Government submit proposals, the

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proposals are evaluated, and the one that offers the best value will win the award. Either the award will be made to a private sector business or the work will remain in house and be performed by Government employees. That's the reality of the whole situation.

I encourage all of you to think about this, write to your representatives, and give them your opinion. Feelings run deep on this issue, but I believe that not enough of us have voiced our opinions to those who represent us in Washington. As a result, we allow some members of Congress to block progress.

The significant impact of doing away or reducing competitive sourcing on the small business community is of great concern. As a small business, BMRA encourages all of its associates to get the message to their representatives in Washington.

## SERVICES ACQUISITION REFORM ACT (SARA)

On December 2, 2003, President Bush signed the Defense Authorization Act. Title XIV of that Act incorporates "The Services Acquisition Reform Act of 2003 (SARA)". The following summarizes the most significant changes introduced by SARA. We will not incorporate these changes in our textbooks until SARA itself has become part of the Federal Acquisition Regulation (FAR). However, instructors should alert their classes to these impending changes in the FAR.

### 1. *SARA "clarifies" application of the definition of commercial items to services.*

The definition in FAR section 2.101 for commercial item at paragraph (6) will read (new words in bold):

"(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed **or specific outcomes to be achieved** under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. ..."

Benefits that attach to commercial items will now be available not just for services sold in the marketplace for specific tasks such as grass cutting, but for more sophisticated services such as management consulting services used to improve agency processes.

### 2. *SARA authorizes application of FAR Part 12 to any firm fixed price performance based contract and task order for services similar to those offered the general public by the awardee "under terms and conditions similar to those offered to the Federal Government."*

SARA adds a new section 437 to title 41, United States Code, to authorize—but not require—application of FAR Part 12 to performance based contracts and task orders for services when—

"(1) the value of the contract or task order is estimated not to exceed \$25,000,000;

(2) the contract or task order sets forth specifically each task to be performed and, for each task—

(A) defines the task in measurable, mission-related terms;

(B) identifies the specific end products or output to be achieved; and

(C) contains firm, fixed prices for specific tasks to be performed or outcomes to be achieved; and

(3) the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Federal Government."

This authority is subject to sunset ten years after enactment.

### 3. *SARA authorizes use of time and material and labor hour contracts for services under certain circumstances.*

SARA amends a note to section 264 of title 41, United States Code, to authorize use of a "time-and-materials contract or a labor-hour contract for the procurement of commercial services that are commonly sold to the general public through such contracts and are purchased by the procuring agency on a competitive basis." A number of conditions apply. First, the contracting officer has to execute "a determination and findings that no other contract type is suitable", include "a ceiling price that the contractor exceeds at its own risk", and authorize "any subsequent change in the ceiling price only upon a determination, documented in the contract file, that it is in the best interest of the procuring agency to change such ceiling price." Also, the contracting



officer can only use T&M or LH terms when buying—

- Installation, maintenance, repair, training, and other services incidental to buying a commercial item of supply (see the FAR definition of “commercial item” at 2.101, paragraph (5)), or
- “Any other category of commercial services that is designated by the Administrator for Federal Procurement Policy in the Federal Acquisition Regulation for the purposes of this paragraph on the basis that (i) the commercial services in such category are of a type of commercial services that are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and (ii) it would be in the best interests of the Federal Government to authorize use of time-and-materials or labor-hour contracts for purchases of the commercial services in such category.”

#### 4. SARA redefines the term “acquisition”.

SARA amends Section 403 of title 41, United States Code, to add an entirely new definition for the term “acquisition” (words in bold are significant additions to the current definition of “acquisition” in the Federal Acquisition Regulation).

“(16) The term ‘acquisition’—

(A) means the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established **in consultation with the chief acquisition officer of the executive agency**; and

(B) includes—

- (i) **the process of acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated;**
- (ii) the description of requirements to satisfy agency needs;
- (iii) solicitation and selection of sources;
- (iv) award of contracts;
- (v) contract performance;

- (vi) contract financing;
- (vii) **management and measurement of contract performance through final delivery and payment;** and
- (viii) technical and management functions directly related to the process of fulfilling agency requirements by contract.”

#### 5 SARA requires appointment of non-career “Chief Acquisition Officers” in the larger procuring non-Defense agencies.

SARA amends Section 414 of title 41, United States Code, to require that the heads of the following agencies appoint or designate the appointment of “a non-career employee as Chief Acquisition Officer for the agency.”

- (A) Department of Agriculture
- (B) Department of Commerce
- (D) Department of Education
- (E) Department of Energy
- (F) Department of Health and Human Services
- (G) Department of Housing and Urban Development
- (H) Department of Interior
- (I) Department of Justice
- (J) Department of Labor
- (K) Department of State
- (L) Department of Transportation
- (M) Department of Treasury
- (N) Department of Veterans Affairs
- (O) Environmental Protection Agency
- (P) National Aeronautics and Space Administration.
- (Q) General Services Administration

By law, these Chief Acquisition Officers must have “acquisition management as that official’s primary duty”; and “advise and assist the head of the executive agency and other agency officials to ensure that the mission of the executive agency is achieved through the management of the agency’s acquisition activities.”



The revised section 414 directly delegates authorities and functions to the Chief Acquisition Officer previously vested in agency heads. Moreover, section 414 enlarges the scope of authority and responsibilities so delegated. The following is the complete list of authorities and functions delegated by law to Chief Acquisition Officers, with the new authorities and functions bold face.

“[414](b) AUTHORITY AND FUNCTIONS OF AGENCY CHIEF ACQUISITION OFFICERS. The functions of each Chief Acquisition Officer shall include—

(1) **monitoring the performance of acquisition activities and acquisition programs of the executive agency, evaluating the performance of those programs on the basis of applicable performance measurements, and advising the head of the executive agency regarding the appropriate business strategy to achieve the mission of the executive agency;**

(2) increasing the use of full and open competition in the acquisition of property and services by the executive agency by establishing policies, procedures, and practices that ensure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest cost **or best value** considering the nature of the property or service procured;

(3) **increasing appropriate use of performance-based contracting and performance specifications;**

(4) **making acquisition decisions consistent with all applicable laws and** establishing clear lines of authority, accountability, and responsibility for acquisition decisionmaking within the executive agency;

(5) managing the direction of acquisition policy for the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency;

(6) developing and maintaining an acquisition career management program in the executive agency to ensure that there is an adequate professional workforce; and

(7) **as part of the strategic planning and performance evaluation process required under**

**section 306 of title 5, United States Code, and sections 1105(a)(28), 1115, 1116, and 9703 of title 31, United States Code—**

**(A) assessing the requirements established for agency personnel regarding knowledge and skill in acquisition resources management and the adequacy of such requirements for facilitating the achievement of the performance goals established for acquisition management;**

**(B) in order to rectify any deficiency in meeting such requirements, developing strategies and specific plans for hiring, training, and professional development; and**

**(C) reporting to the head of the executive agency on the progress made in improving acquisition management capability.”**

Section 414 preserves the requirement for senior procurement executives in all agencies, with the following caveat:

“In the case of an executive agency for which a Chief Acquisition Officer has been appointed or designated under subsection (a), the head of such executive agency shall either—

(A) designate the Chief Acquisition Officer as the senior procurement executive for the executive agency; or

(B) ensure that the senior procurement executive designated for the executive agency under paragraph (1) reports directly to the Chief Acquisition Officer without intervening authority.”

Finally, Section 414 is amended to require the Office of Federal Procurement Policy (OFPP) to establish and conduct meetings of a “Chief Acquisition Officers Council”, which is strictly advisory in character and is not to be confused with the Federal Acquisition Regulatory Council that maintains the Federal Acquisition Regulation. However, the Federal Acquisition Regulatory Council must now be comprised of “the officials assigned by statute with the responsibility for acquisition policy in each of their respective agencies”—namely now the “Chief Acquisition Officers” of NASA and GSA, along with the Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition,

Technology, and Logistics. Authority to represent those agencies on the Federal Acquisition Regulatory Council cannot be redelegated.

## **SBA PUSHES TO DECREASE NUMBER OF BUNDLED CONTRACTS**

“Bundling” contracts is combining several small contracts into one larger contract to simplify processing and administration. Since the mid 1990’s this practice has become more widespread.

The Small Business Administration (SBA) announced the publication of a final rule on contract bundling and on October 20th the final rule was issued in the FAR. It places greater limitations on Federal agencies’ ability to “bundle” requirements for different goods and services in a manner that makes the resulting contract unsuitable for award to small business. This action will enable small businesses to better compete for Federal contracts.

The SBA Administrator stated, “When contracts are bundled together and small businesses are excluded from Federal contract opportunities, the country suffers. Small business contractors are at a disadvantage because they are generally unable to satisfy the requirements of a bundled contract.” The SBA Office of Advocacy estimates that for every 100 “bundled” contracts, 106 individual contracts are not available to small businesses.

Contracting with small business has always been Federal Government policy. Small business participation in Government contracts has been recognized as a source of innovation and cost savings to Federal agencies. Opportunity for small businesses to compete for Federal contracts benefits the economy by encouraging small business growth as well as by creating more jobs.

## **AFFILIATE’S PAST PERFORMANCE IMPROPERLY ATTRIBUTED TO PROTESTER**

An offeror’s past performance is important, not only for determining responsibility, but also as an evaluation factor for contractor selection. It is important for the evaluators to substantiate a negative performance report before evaluating a potential contractor’s performance. This means notifying the offeror and asking for comments on the negative performance information. The offeror’s response

should be considered in the subsequent evaluation. A Comp General Decision issued in 1997 shows the importance of doing so.

Downgrading the offeror’s proposal on the basis of a negative past performance evaluation of the offeror’s affiliate was improper because the Government did not establish whether the work force, management, or facilities of one might affect the other’s performance of the contract.

The Government argued that the protester gave the affiliate as a reference and emphasized the cohesiveness of the group of companies. It then concluded that other companies in the group would be involved in performance and attributed the past performance of the affiliate to the protester without giving the protester the opportunity to address the issue during discussions.

The protester maintained that although the two companies were owned by the same holding company, they were distinct entities with completely separate facilities, management, and work forces.

The Comp General stated that since the Government failed to ascertain the relationship of the two companies through discussions before it relied on the affiliate’s negative past performance rating, the contract award was improper.

## **FISCAL YEAR 2004 PER DIEM RATES**

When you receive a BMRA work assignment, the per diem rate for the area to which you will be traveling is given on your assignment sheet. You can also get this information from the GSA website at [www.gsa.gov](http://www.gsa.gov).

## **NAICS CODES MODIFIED**

The North American Industry Classification System (NAICS) codes have been modified. The latest modification of the NAICS codes is referred to as “NAICS 2002”. The previous version was NAICS 1997.

The NAICS 2002 version more accurately supports classification and identification of small businesses as defined by the Small Business Administration (SBA). These mandatory codes are six-digits long and define the qualifications of a small business.



For example, a particular NAICS code may indicate that a qualifying small business must have fewer than 500 employees. Another NAICS code may specify that a qualifying small business has average annual receipts over a 3-year period of less than \$5,000,000.

### **PROMPT PAYMENT ACT INTEREST RATE**

The Prompt Payment Act (PL 97-177) provides for interest due on claims at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. 3902(a). Rates are changed twice a year, in January and July. The current rate, beginning July 1, 2003, and ending December 31, 2003, is 3.125% (3.125 per centum) per annum. This is a 1% decrease from the previous period that ended on June 30, 2003.

### **GSA CORPORATE SCHEDULE PROGRAM CHANGE**

The General Services Administration (GSA) is changing a little-used program that allows vendors to combine offerings from multiple GSA schedule contracts into single deals. The program was originally instituted in the late 1990's but has not been widely used.

The program works as follows. Suppose a company sells computers off the 70 Schedule and consulting services through MOBIS (Management, Organization and Business Improvement Services). The company could offer the Government agency the computers from the 70 Schedule and consulting services under the MOBIS under one contract, allowing agencies to combine multiple purchases into faster, less expensive single transactions.

Neal Fox, assistant commissioner of GSA's Federal Supply Service said there are several reasons that the current program has not been used more widely. First the name itself did not identify clearly what the program is. A second reason is that in large companies different divisions are under different schedules and there is little or no coordination between them.

In hopes that the program will be more widely accepted, GSA has changed the program's name to Consolidated Products and Services Schedules.

### **GAO RULES ON AGENCY'S AFFIRMATIVE RESPONSIBILITY**

The GAO rarely rules on an agency's affirmative action determination concerning the responsibility of a contractor that has been awarded a contract. However, recently the GAO sustained a protest from Southwestern Bell Telephone Company against an agency's affirmative determination of the awardee, Adelphia Business Solutions, Inc., B-292476, October 1, 2003.

Southwestern Bell argued that the agency erred in awarding the contract despite the indictment and arrest of many of Adelphia's principals and officers on charges that related to fraud and violations of the securities laws. In its protest, Southwestern Bell argued that the agency failed to comply with the requirements of FAR 9.104(d) by failing to consider evidence that reflected poorly on the awardee's integrity and business practices.

The GAO found that the protester provided substantial or significant information that demonstrated the officers' involvement in the operations of Adelphia and cast serious doubt on the contractor's responsibility.

The GAO assumed that Adelphia was not disqualified and recommended that the agency perform a new source selection evaluation and responsibility determination. They recommended that the source selection perform a thorough and reasonable analysis of Adelphia's record of integrity and business ethics.

### **CONTRACTORS REQUIRED TO REGISTER IN CCR**

A final rule amending the FAR to require all contractors to register in the Central Contractors Registration (CCR) database was published in the Federal Register on October 1, 2003. The rule requires that any contract, basic ordering agreement, basic agreement, or blanket purchase agreement issued on or after October 1, 2003, must require contractors to register in the CCR. In addition, Contracting Officers must also modify any contract extending beyond December 31, 2003 to require contractors to register in the CCR database by December 31, 2003.

## REV NUMBERS: CONTROLLING OUR PUBLICATIONS

When I first began working for BMRA, our biggest administrative problem was making sure the right number of the right books got delivered to the right place at the right time. Over the years, we developed measures to decrease the number of errors but, unfortunately, increased reliability usually came at the expense of flexibility.

Now, more than ever before, we need flexibility in addition to reliability. It's an electronic world today, and a body of knowledge is more like a river than a mountain. Books are more like water than granite. Important sources forming the basis for our text materials (e.g., the FAR) are primarily electronic documents: they're easy to change, so they are changed frequently. Not only must our materials change to reflect changes in the information sources, our materials must meet the standards of just-enough, just-in-time, just-for-me that people have come to expect. They demand currency and adaptability—fluidity, you might say.

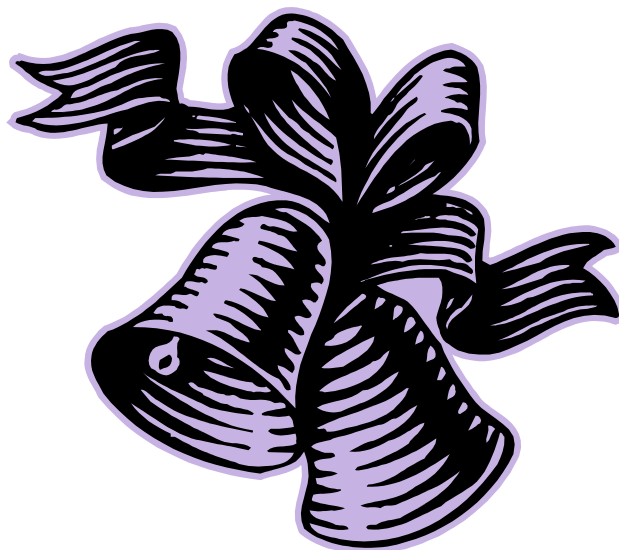
In addition, the Government's way of doing business with us has changed radically. Prior to 1999, we performed on 4 or 5 long-term contracts for a set number of courses. Now, more and more, our clients order as needed under broad vehicles such as GSA Schedules. In effect, we have dozens of mini-contracts, each one with some unique characteristic to suit the particular needs of the customer.

Keeping track of the variations on each of 10 to 30 elements in 70 (at least) sets of instructional materials has become increasingly complex. We needed to be able to reference a particular document by citing a number, so this year we began using the revision date as a control number. We assigned each element of each set of materials a unique date. The "Rev Date" became a six-digit "Rev Number": the first two digits indicated the month in which the document was revised; the last two the year; and the middle two digits were unique identifying numbers. (Which caused some people to wonder what planet we were on when marked documents with something like "094003", but the system served our purposes pretty well.)

Six digits are no longer enough, so soon you will begin seeing numbers in the lower left-hand corner of

pages in our documents that do not look like revision dates or Rev Numbers. They will not have "Rev:" in front of them. They may have more than six digits. You will still be able to translate this number into the date when the material was last changed: the first two digits will indicate the year, the second two digits will indicate the month. We will preserve the uniqueness of the previous numbers: "Rev:040803" will continue to mean "Participant's Handbook for PBSC for NRC" and will not be used for something we revise in August of 2004.

Peggy Kramer  
Director of Publication  
and Plumbing



## BMRA'S HOLIDAY SCHEDULE

- December 12<sup>th</sup>: BMRA's annual Holiday party (1-5 PM).
- December 25<sup>th</sup>: Christmas—office closed.
- December 26<sup>th</sup>: Office closed.
- January 1<sup>st</sup>: New Years—office Closed.
- January 2<sup>nd</sup>: Minimal staffing.
- January 19<sup>th</sup>: Holiday (Martin Luther King Day).

If you have any questions regarding the holiday schedule, please check with Edna Joyner or Doris Carter.



# SEASONS GREETINGS TO ALL

BMRA WISHES ALL OF ITS ASSOCIATES AND  
CLIENTS THE HAPPIEST OF HOLIDAY SEASONS.

*MAY YOU ENJOY GOOD FORTUNE AND MUCH SUCCESS  
IN 2004!*



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