

## DOD Implements Limits on Prices Paid for Contracted Services

Written by Nick Sanders

Tuesday, 19 June 2012 00:00

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We have devoted several blog articles to the question as to whether or not the Federal government's use of contracted ("outsourced") services results in any cost savings. As we [reported](#), opinions vary. The Project on Government Oversight (POGO) had an opinion; so did the Government Accountability Office (GAO); so did the Congressional Budget Office (CBO). Opinions varied and we suggested that our readers should look at the various studies and reach their own conclusions.

In the meantime, Congress has spoken. In a [little-known section](#) of the FY 2012 National Defense Authorization Act, Congress imposed "a temporary limitation" on the amount of funds available for contracted services by Department of Defense. The Public Law reads—

Except as provided in subsection (b), the total amount obligated by the Department of Defense for contract services in fiscal year 2012 or 2013 may not exceed the total amount requested for the Department for contract services in the budget of the President for fiscal year 2010 (as submitted to Congress ...) adjusted for net transfers from funding for overseas contingency operations.

In addition, Congress directed the Secretary of Defense as follows—

Not later than 60 days after the date of the enactment of this Act, the Secretary shall issue guidance to the military departments and the Defense Agencies on implementation of this section during fiscal years 2012 and 2013. The guidance shall, at a minimum—

(1) establish a negotiation objective that labor rates and overhead rates in any contract or task order for contract services with an estimated value in excess of \$10,000,000 awarded to a contractor in fiscal year 2012 or 2013 shall not exceed labor rates and overhead rates paid to the contractor for contract services in fiscal year 2010;

(2) require the Secretaries of the military departments and the heads of the Defense Agencies to approve in writing any contract or task order for contract services with an estimated value in excess of \$10,000,000 awarded to a contractor in fiscal year 2012 or 2013 that provides for continuing services at an annual cost that exceeds the annual cost paid by the military department or Defense Agency concerned for the same or similar services in fiscal year 2010;

As contractors have been discovering this little landmine buried in the Public Law, they have become concerned that overzealous contracting officers might use the foregoing to limit any contractor increases to direct labor rates and/or to indirect cost rates. A careful reading of the language should clarify that the statute does *not* impose any such limits; instead, it requires that such limits be used to establish the government's

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### *negotiation objectives*

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That is not at all the same thing. The government may establish for itself any negotiation objective it wishes; that does not mean government negotiators will achieve those goals.

In order to comply with the statutory requirement, the DOD could not wait for the usual rule-making bodies to act. Instead, the Defense Procurement and Acquisition Policy (DPAP) Directorate issued a [Class Deviation](#) in June, 2012. The Class Deviation essentially reiterates the statutory language quoted above, and notes that the Class Deviation will “remain in effect until incorporated in the FAR or DFARS, or rescinded.”

The thing is, why would this ever need to be in the FAR or DFARS? The statute required that “*guidance*

” be issued, and so it was issued. Nothing more need be done. In fact, we would assert that “guidance” doesn’t belong in the FAR or DFARS. If DPAP thinks it’s necessary to codify the guidance, then the proper place for it would be in the

### [DOD PGI](#)

(Procedures, Guidance, and Information). That may sound like a bit of a nitpick (and perhaps it is). But the folks at DPAP are supposed to be the top regulatory policy and rule-makers at DOD, and they are not supposed to make mistakes like that. (If it wasn’t a mistake and they really do think that the proper place for “guidance” is in the FAR or DFARS, then Heaven help us all.)

One might wonder why Congress felt it was necessary to implement such funding controls over outsourced DOD services. According to the Senate Conference Report (helpfully provided at the WIFCON website)—

The efficiencies initiatives announced by the Secretary of Defense on August 9, 2010, included a 3-year, 10 percent per year reduction in support contractors performing ‘staff augmentation services’ and a 3-year freeze on DOD civilian personnel. The committee notes that ‘staff augmentation services’ has a subjective definition, and this category of contractors is not tracked in any of the Department’s business systems. Moreover, many comparable functions are performed both by civilian employees of the Department and pursuant to contracts for services. Expected savings from the reduction in staff augmentation services and the civilian workforce freeze could easily be lost if other categories of services contracts are permitted to grow without limitation so that spending can shift to these contracts.

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Over the last decade, DOD spending for contract services has more than doubled, from \$72.0 billion in fiscal year 2000 to more than \$150.0 billion (not including spending for overseas contingency operations), while the size of the Department's civilian employee workforce has remained essentially unchanged. The Under Secretary of Defense for Acquisition, Technology, and Logistics testified in September 2010:

'I just tell you, the low-hanging fruit really is [in contract services]. There's a lot of money. There has been a very, very high rate of growth over the last decade, in services. They have grown faster than everything else. . . . So, there's a lot we can do. ... I think great savings can be had there, across the Services' spend. It's essential that we look there, because that's half the money.' ...

The committee concludes that an across-the-board freeze on DOD spending for contract services comparable to the freeze that the Secretary of Defense has imposed on the civilian workforce is warranted to ensure that the Department maintains an appropriate balance between its civilian and contractor workforces and achieves expected savings from planned reductions to both workforces.

In other words, DOD promised to cut its support contractors as well as its civilian workforce as part of its “Better Buying Power Initiative.” Congress didn’t want those promised cost savings offset by increases in other areas of service contracting. Moreover, DOD officials testified that they could find lots of cost savings in that area; Congress was simply taking them at their words.

In other words, DOD did this to itself. Now they—and defense contractors—need to live with the results.