

Position on
FY 09 National Defense Authorization Acts (S.3001, H.R. 5658)
Database for Department of Defense Contracting Officers and Suspension and
Debarment Officials

ISSUE:

Section 831 of the Senate bill would require the establishment and maintenance of a DoD database for use by contracting officers regarding the integrity and performance of federal contractors. For every contractor awarded a federal contract in excess of \$500,000, the database would include a brief description of any criminal, civil or administrative proceeding, in connection with the award or performance of a contract with the federal government or, to the maximum extent practicable, a state government, if the proceeding resulted, in the last five years, in the following dispositions:

- 1) A criminal conviction;
- 2) A civil proceeding, that based on a finding of liability, results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more;
- 3) An administrative proceeding that, because of a finding of liability, results in the payment of a monetary fine or penalty of \$5,000 or more; or the payment of a reimbursement, restitution, or damages in excess of \$100,000; or
- 4) A civil or administrative proceeding that was disposed of by consent or compromise if the proceeding could have led to a criminal conviction, a civil or administrative proceeding that would have resulted in a fine or penalty of \$5,000 or more, or reimbursement or restitution of \$100,000 or more.

The database would also have to include information relating to the person within the past five years on:

- 1) Each federal contract and grant awarded that was terminated due to default;
- 2) Each federal suspension and debarment of the person;
- 3) Each federal administrative agreement (and to the maximum extent possible any State agreements) to resolve a suspension or debarment proceeding; and
- 4) Each final finding by a federal official that the person has been determined not to be a responsible source.

DoD would be required to develop policies to ensure the timely and accurate input of information into the database; notification to the person when information relevant to the person is entered into the database; and an opportunity for that person to submit comments pertaining to such information. Contracting officers would be required to consider the information in making an assessment of the responsibility or past performance of the person before awarding any contract in excess of \$500,000..

Sections 4502-4504 of the House-passed NDAA (H.R. 5658) address this issue by including the House-passed text of H.R. 3033, the "Contractors and Federal Spending Accountability Act of 2008." The language of section 4502-4504 differs from that of Section 831, S. 3001 in the following key respects:

- Section 831 includes only contractors; Section 4502 would also include grantees.
- Section 831 includes only those contractors awarded a contract in excess of \$500,000; Section 4502 includes all contractors and grantees, regardless of the size of their contract or grants.
- Section 831 would include in the database only proceedings in connection with the award or performance of a contract with the federal government or, to the maximum extent practicable, a state government; Section 4502 would include any and all proceedings against a person without any relation to the performance of Federal contracts.
- Section 831 would make the database available to only government officials; Section 4502 would make the database available to the public.

- Section 831 would apply to the award of a contract in excess of \$500,000; Section 4502 would apply to any contract or grant in excess of the Simplified Acquisition Threshold (currently \$100,000).
- Section 831 would require a review of the database and consideration of the information in any past performance evaluation or responsibility determination; the contracting officer would be required to document in the file on any contract above \$500,000 how the database material was considered. Section 4502 would require documentation of the file only if a prospective awardee had been the subject of a judgment or conviction more than once in any 3-year period for the same or similar offense and that judgment or conviction is a cause for debarment.
- Section 831 would require contractors with contracts in excess of \$10 million to report information on a semi-annual basis (in addition to the annual certification they make under current regulations); Section 4502 would require contractors and grantees to submit information every time they submit a bid or proposal.

DISCUSSION:

PSC does not oppose the creation of a DoD database that includes objective information based on factual, accurate, government-provided, input that includes sufficient descriptors to fully explain the nature of the reported data, the nature of remedial action taken by the company, and the relative severity of the infractions cited. Without this additional data, contracting officers will not have the information necessary to determine what impact the information in the database might have on the contractor's present ability to perform the contract.

PSC does not oppose the consolidation of information the government already collects about companies and contracting, or making that information available to the public in a consolidated database—if it is already available to the public. Given the challenges the government has faced on past efforts to create similar databases, we recommend that Congress establish the database for DoD contractors first, as a pilot program, and expand it, where appropriate, once there has been sufficient experience using the consolidated database.

To the extent any database contains data that is not now publicly available, it should remain available only to the government contracting community. There are serious concerns that if the scope of information proposed to be included in the database in H.R. 5658 were in fact included in a publicly available, searchable database, we would be jeopardizing both our national security and our economic competitiveness. Information that is now publicly available has been vetted and a policy determination made that disclosure would not jeopardize our national security or result in the release of proprietary data. Each data element not now publicly available needs to go through an individual vetting process. In addition, we believe there is a serious risk that the aggregation of such data (most of which is not now publicly available) would make it easy for an individual to “put the pieces together” in a manner that would make theft of national security or proprietary industrial knowledge easier. If the government were required to redact information in an effort to eliminate such vulnerabilities, the task would be overwhelming.

In addition, each data element to be included in the database must also be individually vetted to ensure that required disclosure would not create a conflict with any law, regulation or longstanding policy regarding disclosure of confidential, proprietary or private information. There are many provisions in law that protect against disclosure of information to protect the public's interest. The best example may be the protection of information disclosed in accident investigations, so that the public's interest in protection in the future is not jeopardized by concerns about admission of mistakes.

PSC does not oppose the inclusion in a DoD database of information about final, concluded civil or criminal proceedings. These are a matter of public record, though not easily accessible now by the contracting community or the public. **PSC does oppose** inclusion of information that has not reached that stage of finality. There are many issues in the contracting realm that are subject to differing interpretations, and until any legal proceeding is concluded (appeals decided, etc.), judgments about those proceedings and the impact on a contractor are premature and potentially prejudicial.

For these reasons, PSC supports the adoption of Section 831, S. 3001, provided that the specific elements set forth below are addressed.

Inclusion of Old Data and Settlements with No Admission of Guilt Violates Due Process and Fairness

Section 831 requires the inclusion of matters resolved through a settlement agreement if the matter could have led to a conviction or finding of liability that meets the monetary threshold in the section. This turns an agreement by a contractor to settle a matter without an admission of guilt, perhaps only because the cost (both in time and

money) of litigation would exceed its monetary exposure in a settlement, into a de facto determination of guilt. It also places an unreasonable burden on contracting officers to interpret the relevance of a settlement agreement in their determination of whether a contractor is presently capable of performing a government contract.

The same rationale applies to both Sections 831 and 4502 relating to entry of federal administrative agreements to resolve a debarment or suspension proceeding. Again, contractors will be penalized for agreeing to settle rather than challenge in court a proposed suspension or debarment they believe to be inappropriate. Including settlements in the database, and the associated stigma that attaches to it will force contractors to litigate to “clear their names” rather than agree to a settlement and actions that might be in the government’s best interest.

PSC has no objection to requiring the inclusion of settlements if there has been an admission of guilt or liability, and the existence of the settlement is otherwise disclosable. We would also point out that litigating rather than settling issues will also increase costs to both the government and contractor.

In neither Section 831 nor Section 4502 is there a specified due process for the inclusion of comments by the person that is the subject of the data that includes a time-frame for when the information a contractor submits will be placed in the database (although Section 4502 refers to allowing the person to “append” comments, which could indicate the information would not be published without the comments). Fundamental due process and fairness require that information a contractor submits that would place the data in context, or information regarding remedial actions taken to ensure that violations will not occur in the future, should be included at the same time the data is entered into the system. The severity of the consequences, both in terms of denying a contractor consideration for a contracting opportunity as well as limiting competition, make this due process element critical.

Scope of the Data in the Database is Too Broad

In general, a “look-back” period of three years has been considered the correct standard for information to be relevant in decisions of past performance and present responsibility. This standard was developed after thorough public vetting of the pertinent Federal Acquisition Regulations. Including data from beyond three years will result in the inclusion of irrelevant data that will only clutter the database, and make it more difficult for all parties to assess present responsibility. In addition, there is no requirement to eliminate data from the database beyond the required maintenance period. We believe it is imperative that the government be required to purge data beyond the required time period from the system so that bidders are not prejudiced by outdated information.

While we endorse the concept of a different threshold for reporting information associated with administrative proceedings, we believe the \$5,000 threshold is too low. It would result in the database containing hundreds of thousands of actions, particularly those relating to proceedings at the state level that would not be material in making a responsibility determination. In addition, under the language requiring reporting of settlements, even a \$10 settlement of an administrative proceeding would have to be reported if, based on the underlying complaint, it could have resulted in an a penalty of \$5,000 or more.

Unreasonable Burden on Contracting Officers

If all of the information required under this provision were included in the database, it would place yet another burden on an already understaffed and overstretched acquisition workforce to sift through reams of irrelevant but perhaps prejudicial data. In addition, it would require contracting officers to make determinations about the relevance of complex legal documents and the impact of the data on the contractor’s present responsibility. Contracting officers can and should take into account in making present responsibility determinations or past performance assessments whether a contractor has been convicted of a crime, or judged liable in a civil or administrative proceeding. They are not, and should not have to be trained in the intricacies of the law sufficient to make a determination of the relevance of complicated settlement agreement.

Additional Filing Burden on Contractors

Contractors are already required to provide annual certifications and representations regarding this information, but in addition, Section 831 would require those contractors that have government contracts in excess of \$10m to file semi-annual reports on the information to be covered in the database. Section 4502 would require contractors to file the date each time they submit a bid—contravening the intent of allowing annual certifications and representations. We believe this additional reporting requirement is unnecessary.

RECOMMENDATION:

PSC supports strengthening the government's information sharing capabilities and ensuring that contractors and grantees who exhibit a pattern of violations of the law are held accountable for their actions, as long as minimum standards of due process, relevancy and accuracy are adopted. We believe this might be achieved by adopting Section 831 with the following modifications:

- Only (older data must be purged) data relating to the past three years, the current standard for review of data relating to past performance and debarment or suspension, will be included in the database;
- Only data relating to performance of federal contracts, not state contracts, will be included;
- The threshold for reporting data relating to administrative proceedings should be raised to the small purchase threshold;
- Data is not to be made available in the database without contemporaneous posting of an entity's explanatory information;
- Deletion of the provision requiring inclusion of civil or administrative proceedings that were disposed of by consent or compromise, unless there was an admission of liability and there is no restriction on disclosure of the settlement; and
- Deletion of the provision requiring inclusion of federal administrative agreements entered into to resolve debarment or suspension.

We remain concerned, however, about the cost of developing such a database—including reconciling data obtained from various sources, and ensuring it is maintained. The government's inability to maintain the Federal Procurement Data System, addressed in Section 4509 of H.R. 5658, suggests that this may be a difficult task. We recommend that the Congressional Budget Office and the General Accounting Office be asked to conduct independent assessments of the cost and benefits of creating this database. In addition, we support the inclusion of Section 4508 of H.R. 5658 and encourage Congress to include the additional elements to be reported on that ARWG identified in its comments on that section.

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