



STATEMENT FOR THE RECORD
OF THE
PROFESSIONAL SERVICES COUNCIL

S. 2139 "THE COMPREHENSIVE CONTINGENCY
CONTRACTING
REFORM ACT OF 2012"

BEFORE THE
SUBCOMMITTEE ON CONTRACTING OVERSIGHT
COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

APRIL 17, 2012

Introduction

The Professional Services Council (PSC) appreciates the subcommittee's focus on and attention to improving federal contracting in contingency operations and for the work it has done to date in assessing the challenges associated with contracting in difficult, unstable environments. The "Contingency Contracting Reform Act of 2012," S.2139, which is, in large part, based on the recommendations of the congressionally chartered Commission on Wartime Contracting, and other "lessons learned" from the contingency operations in Iraq and Afghanistan, represents a culmination of that work and contains some valuable and thoughtful policy proposals that we believe can enhance future contingency support operations.

At the same time, we also feel strongly that several of the provisions in the bill, some of which would apply to all federal acquisition, would have precisely the opposite effect and would represent stark departures from longstanding principles of fairness and due process that are essential to the right and proper functioning of the federal acquisition system. We therefore appreciate the opportunity to offer our perspectives on key elements of the legislation as introduced.

Founded 40 years ago, PSC is the voice of the government professional and technical services industry. PSC's 350 member companies include small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the trade association's members employ hundreds of thousands of Americans in all 50 states.

We have been carefully following contingency contracting issues in Afghanistan and Iraq since the United States' initial military initiatives began in each of those countries and we have been privileged to work with our members, federal agencies including the Defense Department, State Department and U.S. Agency for International Development, and Congress on numerous issues associated with contracting in a contingency environment. We have testified numerous times before Congress, the Commission on Wartime Contracting, and executive branch reviews. We were pleased to be the only private sector association to have been invited by the Special Inspector General for Iraq Reconstruction to actively participate in all of the SIGIR's "lessons learned" sessions and co-chaired a similar review with the Commanding General of the Army Materiel Command. Over the past eight years we have also commented extensively on proposed legislation, agency regulations, and contracting implementing guidance and operating procedures.

Contingency contracting by its nature is done in a highly volatile and constantly changing military, political and security environment, with unstated duration and evolving mission objectives. In Iraq, for example, it is evident in retrospect that contracting took place in three distinct phases—an initial emergency contracting phase to support the initial military operations, a contingency phase to support the build-up of forces and support functions, and a sustainment phase to support longer-term stability and maintenance operations to support our troops. Also unique to the Iraq engagement was that traditionally sequential military, diplomatic and development activities were pursued simultaneously, often in the same geographic area and targeting the same population.

Afghanistan introduced other challenges for federal agencies and contractors and unique contracting circumstances, both in terms of the nature of the support required for the military and in the actions to support State, USAID and other agencies' missions. The rapidly changing security situation in Afghanistan and certain business challenges arising from the transition to Afghan sovereignty added to the complexity of the challenge.

As various reports have indicated, despite well documented instances of malfeasance, the vast majority of the challenges and problems in both Iraq and Afghanistan have not been driven by fraud and abuse. Rather, as the SIGIR and others have repeatedly stated, the “waste” that has occurred has been predominantly driven by poor planning, a lack of coordination, and workforce gaps. Yet it is undeniable that there were mistakes made by government officials and by contractors. The public record from the agencies' inspectors general, the two special Inspectors General and the civil and criminal prosecutions highlight the importance of a well-trained government contracting corps; clear contractual terms, conditions and results to be achieved; vigorous contract administration and oversight; and meaningful enforcement, including using appropriate administrative, civil and criminal remedies.

But what is also clear is that contingency contracting varies significantly based on the nature of the contingency operation. What worked (or didn't work) in Iraq and Afghanistan may not be appropriate for the operations that took place in East Timor or Haiti. And thus, Congress should be careful to avoid legislating for the last contingency and limiting agencies' or contractors' flexibility to be able to respond rapidly to the U.S. government's mission needs.

It is against that background that we have evaluated the provisions of S. 2139. We have already had several discussions with staff about the bill and look forward to continuing that discussion to address our concerns and to help improve the contingency contracting process before the legislation advances. This statement will include recommendations we believe will improve the legislation and address the concerns we have with several of the provisions.

Suspension and Debarment – Section 113

Section 113 would fundamentally alter due process rights afforded to contractors under the current suspension and debarment process and would represent a significant shift in the intent and purpose of suspension and debarment. Section 113 would require the automatic suspension of a contractor for (1) any charge by indictment or information that the contractor engaged in a federal offense relating to the performance of a contract; (2) any failure of a contractor to pay or refund amounts due or owed to the government in connection with an overseas contingency operation; or (3) a charge by the government in a civil or criminal proceeding alleging fraudulent action on the part of the contractor related to any contract with the federal government. PSC strongly opposes Section 113 as currently written on several grounds. In effect, the provision amounts to a “suspend first, ask questions later” policy that tramples on the due process rights that all citizens and companies, including contingency contractors are entitled to.

The current Federal Acquisition Regulation (FAR) already allows government Suspension and Debarment Officials (SDO) to take appropriate and immediate actions to suspend a contractor for a broad array of inappropriate behaviors, including but not limited to criminal activity, whether related to the performance of a federal contract or not. However, the FAR directs SDOs to take into consideration an array of factors prior to making a determination about the appropriate course of action and to determine whether a contractor is “presently responsible.” Such factors include any mitigating actions by the contractor to prevent wrongdoing, to disclose such wrongdoing to the government, and to remedy the situation and prevent reoccurrences. These are important factors in determining whether it is appropriate for the government to take a suspension or debarment action since they recognize that individuals may engage in inappropriate actions regardless of the degree to which their employer has sought to prevent such activity. In simple terms, the FAR appropriately recognizes that a company’s response to inappropriate activity, coupled with its advance efforts to prevent it, is critical to the determination of the company’s responsibility. Yet Section 113 would eviscerate this important delineation and eliminate any discretion by the appropriate government officials by forcing an automatic suspension even for minor contract infractions.

Lastly, this provision eliminates the ability of agency SDOs to exercise their professional judgment to determine an appropriate course of action based on the totality of the circumstances.

Furthermore, Section 113 runs contrary to the intent of suspensions or debarments. FAR Part 9.4 states that suspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of an investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the government's interest. Neither suspension nor debarment is intended to be punitive. In testimony before this committee on November 16, 2011, then Administrator of the Office of Federal Procurement Policy Daniel Gordon stated:

"[T]he FAR makes clear that the existence of one or more [of the causes for debarment] does not require an agency to suspend or debar the contractor and cautions that suspension and debarment are to be used only to protect the public's interest in ensuring that taxpayers do business with contractors that are presently responsible, and not to punish prior contractor misconduct. Accordingly, an agency must consider the seriousness of the contractor's acts or omissions and any remedial measures or mitigation factors, such as disciplinary action taken by the contractor or new or stronger internal control procedures that it has instituted. The FAR further cautions that agency actions must be consistent with principles of fundamental fairness, which includes providing notice and an opportunity to respond before a debarment is imposed."

Administrator Gordon's comments echoed a statement he made during a February 28, 2011 hearing held by the Commission on Wartime Contracting, commenting on a February 24, 2011 interim commission recommendation to automatically invoke the government's suspension and debarment authority. He said then:

"The FAR's basic [suspension and debarment] policies and procedures remain sound, including its caution that these actions are to be used only to protect the public's interest in safeguarding public funds, not to punish prior contractor misconduct."

It is important and instructive to note that, upon conducting additional research and deliberation, the commission withdrew this interim recommendation from its final report. Unfortunately, the automatic suspension provision in Section 113 proliferates the misconception that suspensions and debarments are punitive in nature and ignores the appropriate evaluations that an agency should take and the steps that contractors do take to ensure they are presently responsible.

While PSC believes that Section 113 will have significant unintended consequences for both government and industry, we have a number of recommendations that would substantially improve it. For example, Section 113 could be amended to require federal departments and agencies to have processes in place that ensure the appropriate agency SDO is notified of

contractor misconduct, including any charges by indictment or civil actions brought by the government, or failure to pay or refund amounts due or owed to the government in a timely fashion. Further, Congress could provide for the prompt SDO review of such cases and expedited determinations that include appropriate contractor notification and collaboration. However, as the Commission on Wartime Contracting itself concluded, and as the Obama administration has testified, the provision as constructed crushes appropriate fairness and due process doctrines.

Limitation on Contract Length and Subcontracting Tiers – Section 201

Section 201 limits the length of contract performance periods related to a contingency operation to no longer than three years in the case of competitively bid contracts and limits to one year contingency contracts that are awarded without competition or for which only one bid was received. It further restricts the prime contractor's ability to use subcontractors for performance beyond a single tier below the prime.

PSC strongly supports efforts to maximize competition in the federal marketplace. However, we are opposed to establishing such arbitrary constraints on the period of contract performance for a number of reasons. Primarily, the limitation on contract length fails to recognize the benefits and efficiencies that can be achieved by longer contract lengths. One of the key lessons learned from the Special Inspector General for Iraq Reconstruction was that short periods of performance significantly increased the contract price and added to the government's burden to award new contracts and administer existing ones. At almost the same time that the government awarded a contract it was time to begin the planning for the follow on effort.

In addition, longer contract lengths often allow contractors to identify and implement efficiencies and pass along savings to the government over the longer life of the contract while also allowing contractors the ability to apply technology enhancements and recoup investments over a longer period of time.

Section 201 also ignores the robust competition that can and should occur at the task order level under long-term multiple award Indefinite Delivery, Indefinite Quantity (IDIQ) contracts. Such contract structures encourage recurring competitions for specific tasks while saving contractors and the government the substantial costs associated with repeated rounds of contract formations.

PSC also opposes the time restrictions on "single-bid" contracts to one year; the restrictions are based on misperceptions that single-bid contracts are akin to "no-bid" contracts and are thus

not subject to competition. In reality, contractors may have very limited insight into which, or how many, companies may be bidding against them on federal solicitation when evaluating whether to bid. As such, they must operate under the assumption that ample competition will exist and will therefore carefully evaluate the capabilities and the “incumbency value” of the current contract holder and the business and execution risks for performing the work. In addition, the limitations fail to recognize that contracting officers have broad discretion to negotiate efficiencies and cost savings into a contract, regardless of the number of bidders. There is also no guarantee that contracts that were awarded based on a single bid will generate additional bidders in future years. Again, in such circumstances, the agency would be imposing additional costs on itself and on the incumbent contractor that are not necessary. In short, despite that fact that only one-bid was submitted, it is incorrect to assume that all such awards are not competitive or that simply receiving multiple offers ensures that the government receives meaningful “competitive” offers.

Finally, the requirements of Section 201 may be unworkable or, at very least, would cause a great deal of confusion or hamper the ability of agencies and contractors to properly plan for contract solicitations and execution. For example, the contract length must be stated in the agency’s Request for Proposal (RFP). Even after conducting market research, at the time the RFP is published, the agency actually has little insight into the full level of competition the solicitation might generate. Thus, if a solicitation generates only one bid, and if Section 201 were in effect, the agency would be forced to limit the length of performance to one year, notwithstanding the period of performance specified in the RFP and notwithstanding that the bidding contractor would have crafted its solution, including the pricing structure, based on the RFP period of performance. Alternatively, if the agency were to specify a one year period of performance in order to be in compliance with the law should there be only one bid, the agency may actually disincentivize other potential competitors because of the short contract length. We believe there are better solutions than arbitrarily establishing a contract period of performance based on the number of competitors that submit an offer.

In addition, Section 201 arbitrarily establishes that services contracts in connection with contingency operations may only allow for a single tier of subcontractors. This provision is equally troubling because it eliminates the government’s and prime contractors’ ability to meet mission needs in a comprehensive, flexible manner that often requires multiple tiers of subcontracting. Indeed, in a contingency environment, where troop support involves a plethora of requirements from food, to fuel, and much more, and where the government routinely seeks to employ host-nation providers wherever possible, it is simply impractical to arbitrarily limit subcontracting.

Further, the provision is based on a misperception that subcontracting arrangements fail to bring expertise and value to federal government. This simply is not true as subcontracting often provides the government and prime contractors the ability to leverage a broad array of solutions, innovations, skills and efficiencies that are achieved through subcontracting agreements that allow the end user to benefit from the collective contributions of various sources of support. Additionally, this provision would restrict the government's ability to issue contracts that require a broad array of services as is common in the contingency environment. As discussed above, such contracts often deliver significant efficiencies to the government.

Congress previously addressed concerns with excessive subcontracting by enacting Section 866 of the Duncan Hunter National Defense Authorization Act (NDAA) for fiscal year 2009 and Section 852 of the fiscal year 2007 NDAA. These sections required the FAR Councils and the secretary of Defense to prescribe regulations to minimize excessive pass-through charges by contractors from subcontractors, or from tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect profit/fee (i.e. pass-through charges) on work performed by a lower-tier subcontractor to which a higher-tier subcontractor adds no negligible value. The FAR Councils published a final rule in the Federal Register on December 31, 2010 and the rule went into effect on January 11, 2011. PSC believes this rule acts as an effective safeguard to ensure that higher-tier subcontractors and prime contractors are bringing value to the contract performance and we do not support further arbitrary restrictions at this time.

Proponents of Section 201 refer to the waiver authority provided for in the section as a means of allowing multiple tiers of subcontracting in certain circumstances. However, in our view, the written justification and approval required by a contracting officer in order to permit a waiver, in addition to the approval required by the head of the agency—an official who is often geographically separated from the front line environment (a challenge highlighted in early SIGIR and other reports)—are significant barriers to allowing for multiple tiers of subcontracting and will result in too many instances where contracting officers decide not to exercise this waiver authority even when the use of multiple tiers is entirely appropriate and a determination to do so would benefit the government. The waiver authority would also add an unnecessary step and stretch the administrative lead time of the contracting process in a contingency environment where often the need to deliver capabilities in an expedited matter is paramount.

Combating Trafficking in Persons – Section 222

PSC supports initiatives to prevent instances of trafficking in persons, whether it occurs through the contracting environment or elsewhere. Section 222 may be helpful in reducing instances of

trafficking in persons related to federal contracting and PSC supports this section to the extent that it requires contractors to implement procedures to prevent trafficking in persons or related activities and processes to monitor and detect such actions whether committed by employees, subcontractors, labor recruiters, or brokers. Unfortunately, Section 222 also places excessive requirements on contractors that will be impossible to meet, yet will place the contractors themselves at excessive risk.

Section 222 requires contractors to certify prior to contract award and annually thereafter that the contractor, the contractor's subcontractors, labor recruiters, brokers, or employees under the contract are not engaged in any trafficking in persons activities. While contractors may be able to implement trafficking in persons prevention and monitoring procedures, it is impossible for them to "certify" with absolute certainty that none of their employees, subcontractors, or recruiters or brokers have engaged in any such activity—particularly in advance of knowing what employees will be performing work on the contract and before entering into any contractual relationship with subcontractors, recruiters or brokers. Thus, PSC strongly recommends that subparagraph (B)(i) of Section 222 be deleted from future versions of the bill. At a minimum, PSC recommends that the subparagraph be amended to require contractor certification "to the best of their knowledge and belief" that none of their employees or subcontractors engage in trafficking in persons activities. This is the standard that has been proposed in other similar trafficking legislative proposals, such as S. 2234, the "End Trafficking in Government Contracting Act of 2012", which is cosponsored by Senator McCaskill and other members of this subcommittee.

Contractor Past Performance Evaluations and the Past Performance Information Retrieval System – Section 224

Section 224 would require the FAR to be amended to terminate existing requirements to (1) submit agency evaluations of contractor performance to a contractor; (2) permit contractor responses to evaluations, and; (3) retain such responses in performance evaluations. PSC strongly opposes this section because it represents a stunning reversal of the longstanding tenets of fairness that underpins the government's past performance reporting process. It also unnecessarily eliminates due process rights for federal contractors in an attempt to resolve a problem that is largely attributed to government mismanagement and inaction. Furthermore, Section 224 goes far beyond the recommendations of the Commission on Wartime Contracting and ignores provisions that were included in the fiscal year 2012 NDAA that more appropriately address reforms to contractor past performance evaluations and the government-wide Past Performance Information Retrieval System (PPIRS).

PSC is a strong supporter of the current structure for evaluating contractor past performance. Government past performance evaluations of contractors are an important tool that allows contractors to build a record of performance that, in most cases, is a valuable company asset that can lead it to future contract awards. Past performance evaluations are also of significant benefit to the government, as they can instill confidence in contracting officers that they are contracting with responsible and capable entities or raise red flags that they must consider prior to entering into a contract with a contractor that may have a blemish on its past performance record.

One critical element of the current process is that contractors shall be: (1) provided with completed evaluations as soon as practicable; (2) given an opportunity to submit comments, rebutting statements, or provide additional information regarding evaluations, and; (3) entitled to an evaluation review at one level above the contracting officer to consider disagreements between parties regarding the evaluation. It is also important to note that the ultimate conclusion of the performance evaluation is a decision of the contracting agency.

Because of the importance of past performance evaluations, contractors take great care in ensuring they are meeting the needs of their government customers by performing well on federal contracts and monitoring their past performance record to be sure it accurately reflects that performance. However, in some instances contractors do not perform well and it is necessary for the past performance evaluation to include adverse information. The current requirements that allow for contractors to submit comments on past performance evaluations and/or elevate disputes above the contracting officer level are important safeguards to ensure contractors are treated fairly. Unfortunately, Section 224 would universally do away with these important contractor protections. As a result, contractors would be left with little recourse for actions taken by an individual contracting officer that posted an unsupported or improper negative past performance evaluation of the contractor.

PSC finds it alarming that such protections would be thrown by the wayside in an effort to fix unrelated problems associated with the government's use of the past performance process. The Commission on Wartime Contracting found that, in some cases, a contractor's past performance evaluation was not being conducted at all or was not posted in the PPIRS. PSC also finds this concerning. However, the solution is not to eviscerate contractors' rights under the current process. The solution is to reinforce the contracting officers' responsibilities to post current, complete and accurate past performance evaluations in a timely manner.

Furthermore, Section 806 of the fiscal year 2012 NDAA changed the timeframe for allowing contractors to respond to a past performance evaluation and in so doing addressed concerns

that the lag time in contractor responses to, or comments on, past performance reports could have an unintended impact on current procurements. Prior to enactment, the FAR required contractors to be given a minimum of 30 days to respond to an evaluation. Section 806 requires the FAR to be amended to provide contractors only up to 14 calendar days from the date of the delivery of the evaluation information to respond. After the 14 day period expires, the contracting officer is to post the evaluation in the appropriate government databases, even though the contractor may subsequently submit a comment that must be treated as any other contractor comment. Importantly, Section 806 preserves the right for contractors to elevate challenges to evaluations to one level above the contracting officer. PSC believes that Section 806 retains appropriate and necessary contractor due process rights and fairness while still permitting the contracting officer to promptly and timely post past performance information. Therefore, in addition to its extraordinary overreach with regard to due process and fundamental fairness, Section 224 is simply not needed. At the very least, Congress should allow for the implementation and evaluation of Section 806 of the fiscal year 2012 NDAA prior to adding new requirements.

Other Provisions

There are several other provisions that are also of concern and we hope there will be opportunity for further discussion on each of them. For example, we are aware of the subcommittee's long-standing work in addressing a contractor's consent to jurisdiction for certain civil actions, as provided for in Section 221. We have significant concerns that a mandatory contract clause can de facto create in personam jurisdiction over an individual for civil actions. Next, while we can see the value to a uniform contract writing system as provided for in Section 211, we have also seen the difficulty the agencies have had in executing such a system. Earlier this year, even the Defense Department abandoned efforts to develop a comprehensive, department-wide, contract writing system, although there has been some success in developing a system for CENTCOM, through the former Joint Contracting Command Iraq-Afghanistan (JCC-I/A) organization. Finally, Section 202 requires a review and risk analysis of certain "covered security functions" as defined in the bill. Clearly the role of private security functions has been an area of concern to the Congress and the executive branch. But care must be taken to ensure that the review addresses all of the uses for security, including those contracted for directly by government agencies as well as those contracted for by organizations that are performing work on behalf of DoD or other federal agencies. Absent a holistic view of the role of private security, we are concerned that the executive branch review could significantly impact the ability of non-governmental organizations of all types to fully perform their work.

Conclusion

PSC thanks the subcommittee for holding this important hearing. As noted above, S. 2139 addresses a number of reforms that seek to promote acquisition planning, coordination, oversight, and management during contingency operations. To the extent that provisions of this bill promote such reforms without unduly complicating the government's internal processes or its ability to contract for contingency support in an effective, efficient and timely manner, PSC is supportive. However, we have identified several provisions in the bill that, if enacted, would have a severe negative impact on the government's ability to effectively and efficiently contract during contingency operations or would gut fairness and current due process rights of contractors.

We also recognize the complexities of crafting effective reforms and the challenges in identifying unintended consequences of well-intentioned reforms. Thus, we commend this subcommittee for exploring these issues and welcome the opportunity to engage in a comprehensive and meaningful engagement with the bill's sponsors, the subcommittee and the full committee to make necessary improvements to the bill.