

THE SERVICES ACQUISITION REFORM ACT OF 2003
SECTION-BY-SECTION ANALYSIS

Section 1 – Short Title; Table of Contents

Section 2 – Executive Agency Defined

The section would define the term “executive agency” as that term is defined in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)), unless stated otherwise.

TITLE I – ACQUISITION WORKFORCE AND TRAINING

Section 101 – Definition of Acquisition.

The section would amend section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) to provide a comprehensive Government-wide definition of the term “acquisition.” The new definition would encompass the entire spectrum of acquisition starting with the development of an agency’s requirements through management and measurement of contract performance.

Section 102 – Acquisition Workforce Training Fund.

The section would amend section 37 of the Office of Federal Procurement Policy Act (41 U.S.C. 433) to establish within the General Services Administration an acquisition workforce-training fund to be managed by the Federal Acquisition Institute (FAI). The fund is to be financed by depositing 5% of the fees collected by various executive agencies under their Government-wide contracts. This will provide the stabilized funding needed by FAI to develop training resources needed to enable our acquisition professionals to transition to the new service oriented and technology driven Federal market. The fund can only be used for sorely needed acquisition workforce training across the civilian Government agencies.

Section 103 – Government-Industry Exchange Program.

The section would amend Subpart B of part III of title 5, United States Code by adding a new Chapter 38 establishing an acquisition professional exchange program to permit the temporary exchange of high-performing acquisition professionals between the Federal Government and participating private-sector concerns. Under the program, which is modeled after the Information Technology Exchange Program included in section 209 of the recently passed E-Government Act, Pub. L. 107-347, a participating Federal employee would retain his/her Federal benefits and would be deemed during the period of the assignment (for a period of between 6 months and a year, with possible extensions

of up an additional year for both public and private-sector employees) to be detailed to regular work within the agency. Under the section an agency head would take necessary actions to ensure that 20 percent of those Federal employees assigned to private sector firms are assigned to small businesses. Private-sector employees could be assigned to a Federal agency. An assigned employee could still be paid by the private-sector employer and would be deemed a Federal employee for most purposes. The section would amend a number of current government employee ethics provisions to apply to private sector employees assigned to Federal agencies under the program. The Office of Personnel Management would submit semi-annual reports to the Committees on Government Reform and Governmental Affairs summarizing the operation of the program including the number of individuals assigned, the positions involved and the durations of the assignments. No assignments under the section could be made after the end of a 5-year period beginning on the date of enactment. The General Accounting Office would, 4 years after enactment, report on the effectiveness of the program and whether it should be continued. Finally, the section would provide conforming amendments to title 5 and title 18, United States Code and other law in connection with the new professional exchange program.

Section 104 – Acquisition Workforce Recruitment and Retention Program.

The section would permit the head of an agency to determine, for purposes of sections 3304, 5333, and 5753 of title 5, United States Code, that certain Federal acquisition positions are “shortage category” positions in order to recruit and directly hire such employees with high qualifications. The actions under this section would be subject to Office of Personnel Management policies. The Administrator for Federal Procurement Policy would be required to submit a report to Congress prior to the authority’s September 2007 expiration date concerning the efficacy of the program and recommending whether the authority should be extended.

Section 105 – Architectural and Engineering Acquisition Workforce.

The section would provide that the Administrator for Federal Procurement Policy in consultation with the Secretary of Defense, the Administrator of General Services and the Director of the Office of Personnel Management develop and implement a plan to assure that the Federal Government maintains a core in-house architectural and engineering capability to ensure that it has the capability to effectively contract for the performance of architectural and engineering services.

TITLE II – ADAPTATION OF BUSINESS ACQUISITION PRACTICES

Subtitle A – Adaptation of Business Management Practices

Section 201 – Chief Acquisition Officers.

The section would amend section 16 of the Office of Federal Procurement Policy Act (41 U.S.C. 414) to provide for the appointment of a non-career employee as the Chief Acquisition Officer for each executive agency other than the Department of Defense. The Department of Defense currently has a comparable position established pursuant to section 133 of title 10, United States Code. The Chief Acquisition Officer would have acquisition as the official's primary duty and advise and assist the agency head and other senior officials to ensure that the agency mission is achieved through the management of the agency's acquisition activities. The functions of the Chief Acquisition Officer would include monitoring the agency's acquisition activities, evaluating them based on applicable performance measurements, increasing the use of full and open competition in agency acquisitions, making acquisition decisions consistent with applicable laws, and establishing clear lines of authority, accountability, and responsibility for acquisition decisionmaking and developing and maintaining a acquisition career management program. The Chief Acquisition Officer would, as a part of the statutorily required annual strategic planning and performance evaluation process, assess agency requirements for agency personnel knowledge and skills in acquisition resources management and, if necessary, develop strategies and plan for hiring, training and professional development.

Section 202 – Chief Acquisition Officers Council

The section would add a new section 16A to the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 403 et seq.) to authorize the establishment of a Chief Acquisition Officers Council to monitor and improve the federal acquisition system. The Council is to be chaired by the Deputy Director for Management (DDM) of the Office of Management and Budget (OMB) and comprised of the Administrator for Federal Procurement Policy (Administrator), the Chief Acquisition Officers created under section 16 of the OFPP Act, and any other federal officer or employee designated by the chair. The Administrator is to lead the activities of the Council on behalf of the DDM. The General Services Administration is to provide administrative and other support to the Council. The Council will, among other things, develop recommendations for OMB on acquisition policies and requirements, assist the Administrator in the identification, development, and coordination of multiagency and other innovative acquisition initiatives, promote effective business practices to ensure timely delivery of best value products and services to the government, and work with the Office of Personnel Management to assess and address hiring, training, and professional development needs related to acquisition.

Section 203 – Statutory and Regulatory Review.

The section would provide that the Administrator for Federal Procurement Policy establish an advisory panel of at least nine experts in acquisition law and policy who represent diverse public and private sector experiences. The panel would review acquisition laws and regulations with a view toward ensuring the greater use of commercial practices and performance-based contracting and enhancing the performance of acquisition functions across agency lines, and the use of government-wide contracts. The panel would make recommendations for the repeal or amendment of laws or regulations that are unnecessary for the effective, efficient and fair award and administration of Government contracts while retaining the financial and ethical integrity of the acquisition programs and ensuring that the Government's best interest is protected. The report is to be completed within one year after the establishment of the panel and contain the findings and conclusions of the panel.

Subtitle B – Other Acquisition Improvements

Section 211 – Ensuring Efficient Payment.

The section would provide that the Federal Acquisition Regulation be revised to create a streamlined cost-effective, commercial-like payment process for service contracts. The revised process would, to the maximum extent practicable, provide for the submission of biweekly or monthly payment invoices for payments that are not contract financing payments. Biweekly invoices would have to be submitted electronically. All electronic invoices would be accepted or rejected by the agency within 7 working days and all accepted invoices would be paid as soon as possible, but in no case later than 30 days after the invoice date.

Section 212 – Extension of Authority to Carry Out Franchise Fund Programs.

The section would amend section 403 (f) of the Federal Financial Management Act of 1994 (31 U.S.C. 501 note) to reauthorize the Government's franchise funds until October 1, 2006. These six franchise fund programs were authorized in the Departments of the Interior, Commerce, Health and Human Services, Treasury, and Veterans Affairs and the Environmental Protection Agency to provide common administrative support services.

Section 213 – Agency Acquisition Protests.

The section would amend Chapter 137 of title 10, United States Code and the Federal Property and Administrative Services Act of 1949 to provide statutory authority for an agency-level acquisition protest process. It would provide for a "stay" of the award or of

contract performance during the 20 working day period an agency is given to decide the protest. The “stay” could be lifted by the head of the agency procuring activity upon a written finding that urgent and compelling circumstances do not permit waiting for the decision. The section would provide that filing an agency-level protest under this section would not affect the right of an interested party to file a protest with the Comptroller General or in the United States Court of Federal Claims. The section would also amend section 3553 (d) (4) of title 31, United States Code to provide that an interested party filing a protest on the same matter with the Comptroller General within 5 days of the issuance of the agency protest decision would qualify for a stay of performance in connection with such protest.

Section 214 – Improvements in Contracting for Architectural and Engineering Services.

The section would amend section 1102 of title 40 of the United States Code to clarify the terms “surveying and mapping” as used in the definition of architectural and engineering services to ensure that the quality-based selection process in chapter 11 of title 40 of the United States Code is used for the full spectrum of surveying and mapping services. The Federal Acquisition Regulation would also be amended to include the new clarified definition. Further, the section would amend section 2855 (b) of title 10, United States Code to raise from \$85,000 to \$300,000 the threshold for a participation incentive for small business concerns in acquisitions for architectural and engineering services and to conform section 2855 to the title 40 amendments. Finally, the section would require that architectural and engineering services offered under multiple-award schedule contracts awarded by the General Services Administration or under Government-wide task and delivery order contracts be performed under the supervision of a licensed professional engineer and be awarded pursuant to the quality-based selection procedures in chapter 11 of title 40 of the United States Code.

Section 215– Authorization of Telecommuting for Federal Contractors.

The section would provide for an amendment to the Federal Acquisition Regulation (FAR) providing that solicitations for Federal contracts should not contain any requirement or evaluation criteria that would render an offeror ineligible for award or would reduce the scoring of the offeror’s proposal based upon the offeror’s inclusion of a plan to allow its employees to telecommute unless the contracting officer first determines in writing that the needs of the agency, including security needs, could not be met without the requirement. The General Accounting Office would report to Congress on the implementation one year after the FAR amendment is published.

TITLE III – CONTRACT INCENTIVES

Section 301 - Share-in-Savings Initiatives

The section would amend section 2332 title 10, United States Code and section 317 of the Federal Property and Administrative Services Act (Property Act) to authorize government-wide the use of share-in-savings contracts. These contracts represent an

innovative approach to encourage industry to share creative solutions with the Government. Through these contracts agencies can lower their costs and improve service delivery without large “up front” investments as the contractor provides the technology and is compensated by receiving a portion of savings achieved. The section would amend and clarify the provisions in title 10 and the Property Act that were added to the United States Code by section 210 of the E-Government Act of 2002, Pub. L. 107-347. The new section would expand the authorization beyond information technology and provide for the use of such contracts whenever the proper approvals are granted.

The section would authorize agencies to enter into share-in-savings contracts for a term of 5 years, and with the appropriate approval, for up to 10 years, to pay contractors from the savings realized, and to retain those savings that exceed the amount paid to the contractor. The section would permit agencies to use various options for funding cancellation or termination costs and would permit the cancellation or termination amount to be negotiated by the parties. The section would require that share-in-savings contracts include a provision containing a quantifiable baseline for savings that is approved by the agency’s chief acquisition officer. The section would not permit the award of such contracts where funding for the full cost of cancellation or termination is not available unless the amount of unfunded contingent liability does not exceed the lesser of 50% of the estimated cancellation or termination costs or \$10,000,000. Any unfunded contingent liability in excess of \$5,000,000 would require approval by the Director of the Office of Management and Budget (OMB). Further, the section would require that the Federal Acquisition Regulation (FAR) be revised to implement this section and to provide for such matters as the use of competitive procedures and innovative provisions for technology refreshment, appropriate regulatory flexibility to facilitate the use of such contracts and assurance that the contractor’s share of the savings reflects the risk involved and the market conditions. The Director of OMB is to provide incentives to agencies in identifying additional opportunities for the use of these contracts and guidance for determining baselines and savings share ratios. Finally, the section would require the Director of OMB to report to Congress two years after the FAR revisions are issued describing the number of share-in savings contracts entered into, the total payments made and savings achieved, agency efforts to determine baseline costs and making recommendations for changes in law needed to encourage the effective use of share-in-savings contracts.

Section 302- Incentives for Contract Efficiency

The section would amend the Office of Federal Procurement Policy Act (41 U.S.C. 403 et seq.) to add a new section 41 authorizing agencies to include in service contracts options to extend the contract by one or more performance periods based on exceptional performance as measured by standards set forth in the contract. The contract is, to the maximum extent practicable, to be performance based.

TITLE IV – ACQUISITIONS OF COMMERCIAL ITEMS

Section 401 – Additional Incentive for Use of Performance-Based Contracting for Services.

The section would amend section 41 of the Office of Federal Procurement Policy Act (41 U.S.C. 41), as added by section 302 above, to add a new subsection that would provide that a performance-based service contract or task order may be treated as a contract for a commercial item if it defines tasks to be performed in measurable, mission related terms, identifies specific products or outputs and the source provides similar services to the public under similar terms to those offered the Government. This would authorize the use of special simplified procedures provided in the Federal Acquisition Regulation for commercial items if the performance-based contract or task order is valued at \$5,000,000 or less and apply to those contracts the current waivers of requirements and certifications applicable to contracts for commercial items. Finally, the section would require the Administrator for Federal Procurement Policy to establish a center of excellence for service contracting to assist the acquisition community in identifying best practices in service contracting.

Section 402 – Authorization of Additional Commercial Contract Types.

The section would provide that section 8002 (d) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355; 41 U.S.C. 264 note) be amended to provide that the Federal Acquisition Regulation (FAR) include a provision that would provide that time and material and labor-hour contracts could be used for commercial services that are commonly sold to the general public through such contracts. Time and material and labor-hour contracts are treated in the current Part 16 of the FAR as a separate contract type, as are fixed-price contracts and cost-reimbursement contracts. While section 8002 (d) provides that the FAR is to prohibit the use of cost-type contracts for commercial items, there is no comparable prohibition applicable to time and material and labor-hour contracts. Section 402 would make clear that, under the appropriate circumstances, time and material and labor-hour contracts should be specifically authorized by the FAR for commercial services.

Section 403 – Clarification of Commercial Services Definition.

The section would amend section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403 (12)) to clarify the definition of commercial item to place commercial services on an equal level with supplies in Federal acquisitions.

Section 404 – Designation of Commercial Business Entities.

The section would amend section 4 of the Office of Federal Procurement Policy Act, 41 U.S.C. 403 to add to the definition of commercial item services or items provided or produced by a commercial entity that over the past 3 business years made 90% of its sales

to private-sector entities. The section would further provide for a Comptroller General review of the implementation of the new section to determine its effectiveness in increasing the availability of goods and services to the Federal Government at fair and reasonable prices.

TITLE V – OTHER MATTERS

Section 501 – Authority to Enter Into Certain Procurement-Related Transactions and to Carry Out Certain Prototype Projects.

The section would amend title III of the Federal Property and Administrative Services Act of 1949 (Property Act) (41 U.S.C. 251 et seq.) to authorize the head of a civilian executive agency, if authorized by the Director of the Office of Management and Budget (OMB), to enter into transactions (other than contracts, cooperative agreements, and grants) to carry out basic, applied and advanced research, and development projects that are otherwise authorized and necessary to the responsibilities of the agency that may facilitate defense against, or recovery from, terrorism or nuclear, biological, chemical, or radiological, attack. This authority would be similar to that exercised by the Secretary of Defense under section 2317 of title 10, United States Code with certain exceptions.

The section would further amend the Property Act to provide that the head of an executive agency, designated by the Director of OMB to enter into transactions (other than contracts, cooperative agreements, and grants) may, with the approval of the Director of OMB, carryout prototype projects in accordance with the same requirements and conditions for prototype projects as are provided under section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160; 10 U.S.C. 2371 note).

Section 502 - Amendments Relating to Federal Emergency Procurement Flexibility

The section would amend section 852, and various other sections of subtitle F of The Homeland Security Act of 2002, Pub. L. 107-296 to make permanent and clarify the authorities applicable to agencies other than the Department of Homeland Security for procurements for defense against terror. The procurement flexibilities in subtitle F of the Homeland Security Act, sections 851-858, provide for special streamlined procedures for the procurement of property or services when the head of the agency determines the property or services are to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack.

The section would maintain the current expanded thresholds in subtitle F, but would more closely align the accompanying provisions with those in section 833 of the Homeland Security Act that provide special streamlined acquisition authorities for the Department of Homeland Security. Specifically, section 601 would provide for the application of the expanded simplified acquisition threshold to acquisitions other than those in support of

humanitarian or peacekeeping or contingency operations and eliminate notice and reservation restrictions. The section would also provide for the full application of the attributes of a commercial item to an impacted acquisition, as is the case in section 833 of the Homeland Security Act.

Section 503– Authority to Make Inflation Adjustments to Simplified Acquisition Threshold.

The section would provide that the Administrator for Federal Procurement Policy may adjust the simplified acquisition threshold as defined in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403 (11)) every five years to an amount equal to \$100,000 in constant fiscal year 2003 dollars.

Section 504– Technical Corrections Related to Duplicative Amendments.

The section would repeal subchapter II of chapter 35 of title 44 of the United States Code and chapter 115 of title 40 of the United States Code. The section would also conform various amendments made by the Homeland Security Act of 2002, Pub.L. 107-296, with those made by the E-Government Act of 2002, Pub.L. 107-347.