

GAO

Report to the Chairman, Committee on
Government Reform, House of
Representatives

February 2005

FEDERAL ACQUISITION

Progress in Implementing the Services Acquisition Reform Act of 2003



G A O

Accountability * Integrity * Reliability



Highlights of [GAO-05-233](#), a report to the Chairman, Committee on Government Reform, House of Representatives

Why GAO Did This Study

In fiscal year 2004 federal spending on service contracts grew to over \$189 billion governmentwide. This growth, along with cuts in the acquisition workforce and increases in high-dollar procurement actions, creates a challenging environment.

In November 2003 the Services Acquisition Reform Act (SARA) was enacted to provide federal agencies with tools to optimize mission performance in this challenging environment. To implement the act, regulations and guidance must be developed, and other actions taken. GAO was asked to report on progress in implementing SARA's provisions.

FEDERAL ACQUISITION

Progress in Implementing the Services Acquisition Reform Act of 2003

What GAO Found

Just over a year after the enactment of SARA, progress made on regulations, guidance, and other implementing actions varies. While nearly all the key provisions of SARA are being implemented, some provisions are further along than others.

An Acquisition Workforce Training fund has been established. Efforts are ongoing to assess the skills and experience needed by the federal acquisition workforce, and to develop training to address those requirements.

The Chief Acquisition Officers (CAO) Council, established in May 2004, has met five times. The council's executive committee meets monthly; and working groups on human capital, competitive sourcing, electronic government and small business have been established.

Efforts to complete rulemaking on greater use of performance-based contracting are underway, with an interim rule issued and a final version being considered. An online acquisition center of excellence for services also has been created. Because of the complexities involved, rulemaking allowing the use of time-and-materials contracts to procure commercial services is proceeding at a more deliberate pace.

Rules allowing special emergency procurement authority have been finalized, but actions allowing agencies to use "other transactions" authority are incomplete.

Provisions of the Services Acquisition Reform Act of 2003

- Civilian acquisition workforce training fund
- Acquisition workforce recruitment flexibility
- Maintaining architectural and engineering acquisition workforce expertise
- Civilian Agency Chief Acquisition Officers (CAO)
- CAO Council
- Advisory panel on acquisition laws and regulations
- Extension of franchise fund programs
- Contracting for architectural/engineering services
- Telecommuting for federal contractors
- Incentives for performance-based contracts
- Time-and-materials contracts for commercial services
- Special "other transactions" acquisition authority
- Public disclosure of noncompetitive contracts for Iraq reconstruction
- Emergency procurement flexibilities

Source: GAO.

www.gao.gov/cgi-bin/getrpt?GAO-05-233.

To view the full product, including the scope and methodology, click on the link above. For more information, contact William T. Woods at (202) 512-4841 or woodsw@gao.gov.

Contents

Letter		1
	Results in Brief	2
	Scope and Methodology	3
	Agency Comments and Our Evaluation	3
Section 1412	Civilian Acquisition Workforce Training Fund	5
Section 1413	Civilian Acquisition Workforce Recruitment Flexibility	7
Section 1414	Maintaining Architectural and Engineering Acquisition Workforce Expertise	8
Section 1421	Civilian Agency Chief Acquisition Officers	9
Section 1422	Chief Acquisition Officers Council	10
Section 1423	Advisory Panel on Acquisition Laws and Regulations	11
Section 1426	Extension of Franchise Fund Programs	13
Section 1427	Contracting for Architectural and Engineering Services	14
Section 1428	Telecommuting for Federal Contractors	15

Section 1431	Incentives for Performance-Based Services Contracting	16
Section 1432	Time-and-Materials Contracting to Buy Commercial Services	19
Section 1441	Special “Other Transactions” Acquisition Authority	20
Section 1442	Public Disclosure of Noncompetitive Contracting for Iraq Reconstruction	22
Section 1443	Emergency Procurement Flexibilities	23
Table	Table 1: Provisions of the Services Acquisition Reform Act of 2003	1

Abbreviations

CAO	Chief Acquisition Officer
DAU	Defense Acquisition University
DHS	Department of Homeland Security
DOD	Department of Defense
FACA	Federal Advisory Committee Act
FAI	Federal Acquisition Institute
FAR	Federal Acquisition Regulation
FPDS	Federal Procurement Data System
GSA	General Services Administration
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
OPM	Office of Personnel Management
SARA	Services Acquisition Reform Act of 2003

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United States Government Accountability Office
Washington, DC 20548

February 28, 2005

The Honorable Tom Davis
Chairman
Committee on Government Reform
House of Representatives

Dear Mr. Chairman:

According to the General Services Administration (GSA), in fiscal year 2004 federal spending on services contracts grew to more than \$189 billion governmentwide. This level of spending on services contracts, combined with decreases in the acquisition workforce and an increase in the number of high-dollar procurement actions, creates a challenging acquisition environment. The Services Acquisition Reform Act of 2003 (SARA), signed into law on November 24, 2003, as Title XIV of Public Law 108-136, is intended to provide agencies an array of tools to improve the acquisition of services in four major areas as shown in table 1.

Table 1: Provisions of the Services Acquisition Reform Act of 2003

Categories	Provisions
Acquisition workforce and training	<ul style="list-style-type: none">• Civilian acquisition workforce training fund• Acquisition workforce recruitment flexibility• Maintaining architectural and engineering acquisition workforce expertise
Business acquisition practices	<ul style="list-style-type: none">• Civilian Agency Chief Acquisition Officers (CAO)• CAO Council• Advisory panel on acquisition laws and regulations• Extension of franchise fund programs• Contracting for architectural and engineering services• Telecommuting for federal contractors
Commercial item acquisitions	<ul style="list-style-type: none">• Incentives for performance-based contracts• Time-and-materials contracting for commercial services
Other procurement flexibilities	<ul style="list-style-type: none">• Special "other transactions" acquisition authority• Public disclosure of noncompetitive contracts for Iraq reconstruction• Emergency procurement flexibilities

Source: GAO.

To implement these provisions, the administration needs to promulgate regulations, provide guidance to agencies, and take other actions. You asked us to review the status of implementation for each of SARA's provisions. As agreed with your office, we determined the status of regulations, guidance, and other actions initiated by the administration to implement the act. This report includes appendixes for each provision of SARA summarizing the status of implementation. In addition, for some provisions, the appendixes include our observations on potential implementation challenges, additional background information, and references to related GAO products.

Results in Brief

Just over a year after enactment of SARA, progress made by the administration on regulations, guidance, and other actions required to implement the act varies. While actions are underway to implement nearly all of the provisions, the administration is much further along in implementing some provisions than others. For example, in the area of acquisition workforce and training, the workforce training fund has been established. The Office of Personnel Management (OPM), however, has yet to complete rulemaking that allows agencies to determine if there are acquisition workforce shortages so they can recruit and directly hire qualified candidates. Likewise, in the area of business acquisition practices, the Chief Acquisition Officers (CAO) Council has been established, but rulemaking to require oversight of certain contracts by licensed professional engineers has not yet been finalized.

Progress also varies in the area of commercial item acquisition. Efforts to complete rulemaking to encourage increased use of performance-based contracting are underway. Further, the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) has established a center of excellence for services. Conversely, because of the complexities involved, rulemaking to allow the use of time-and-materials and labor-hour contracts for procurement of commercial services is moving at a more deliberate pace. In the area of other procurement flexibilities, rulemaking allowing special emergency procurement authority for contingency operations or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack has been finalized. But actions required to allow agencies to use other transactions authority have not been initiated.

This report does not contain recommendations.

Scope and Methodology

To determine progress made in implementing each of the SARA provisions, we obtained information from those organizations charged in the act with initiating actions: OFPP, GSA, OPM, and DOD. We interviewed officials within these organizations to identify actions taken pertaining to each of the provisions. We reviewed documentation such as guidance memos, reports, and proposed and final changes to the Federal Acquisition Regulation (FAR). We also attended interagency and public meetings relevant to implementation efforts. This review does not address how agencies are applying the rules and guidance issued by the administration; nor does it evaluate the effect SARA provisions and ongoing implementation activities may be having on the agencies, their acquisition workforce, or their acquisitions of services. We conducted our work from August 2004 to February 2005 in accordance with generally accepted government auditing standards.

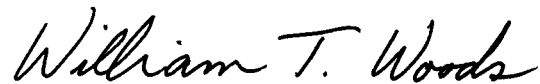
Agency Comments and Our Evaluation

We provided a draft of this report to OMB, GSA, DOD, and OPM for their review and comment. We received oral comments from OFPP. It concurred with the report and provided technical comments, which have been incorporated where appropriate. In e-mail responses, both GSA and OPM provided technical comments. We revised the report based on these comments where appropriate. DOD informed us that it had no comments on the report.

As requested by your office, unless you publicly announce the contents of this report earlier, we plan no further distribution of it until 30 days from the date of this letter. We will then send copies of this report to the Director, Office of Management and Budget; the Secretary of Defense; the Administrator of General Services; and the Acting Director, OPM. We also will make copies available to others on request. In addition, this report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you have any questions about this report, please contact me at (202) 512-4841, or Carolyn Kirby, Assistant Director, at (202) 512-9843. Other major contributors to this report were Robert Ackley, Noah Bleicher, Bob Swierczek, Susan Tindall, and Peter Zwanzig.

Sincerely yours,

A handwritten signature in black ink that reads "William T. Woods". The script is cursive and fluid, with the first letters of each word being capitalized and prominent.

William T. Woods
Director, Acquisition and Sourcing Management

Section 1412: Civilian Acquisition Workforce Training Fund

Summary of Provision

Section 1412 requires GSA to establish an acquisition workforce training fund. Managed by GSA's Federal Acquisition Institute (FAI), the fund will be used to develop acquisition training resources for civilian agencies and support acquisition workforce initiatives designed to ensure that the acquisition workforce acquires skills necessary to function effectively.

Each quarter, 5 percent of the fees collected by executive agencies under governmentwide task-and-delivery-order contracts, governmentwide information technology contracts, and GSA's schedule contracts are to be deposited into the fund. These amounts are available for 3 fiscal years and exist separately from funds appropriated to agencies for education and training.

Because DOD does not participate in the workforce training fund, fees charged to DOD for contracts covered by section 1412 are to be reduced by 5 percent.

Authority for the fund expires in November 2008 under a 5-year sunset provision.

Implementation Steps

- GSA Administrator is required to establish the training fund.
- Civilian agencies must make quarterly deposits to the fund equal to 5 percent of fees collected under governmentwide contracts.
- GSA, through FAI, must manage the fund in consultation with OFPP.

Status of Implementation

- GSA established the training fund in March 2004 and sent instructions to all civilian agencies for making deposits into it.
- Total fund deposits for fiscal year 2004 were \$5.2 million.
- The CAO Council Human Capital Working Group is working to assess the skills required in the federal acquisition workforce, identify skill gaps, and target training funds towards those gaps.
- FAI and the Defense Acquisition University (DAU) are collaborating to capitalize on existing civilian and defense training and avoid duplication.
- FAI is also working in conjunction with the OFPP, GSA, and DOD to develop education, training and experience requirements that will apply throughout the federal acquisition workforce.

GAO Observations

- GSA needs reliable information on fees charged and revenues generated by governmentwide service contracts to ensure agencies are appropriately contributing to the training fund. However, information on fee revenues generated has been incomplete.
- As the legislation requires, and as GAO has testified, the training fund should be used to augment acquisition training provided through the normal agency budgeting process.
- Traditionally civilian agencies have narrowly defined their acquisition workforce, excluding staff such as program, financial, and legal. OFPP is working with agencies to rewrite the definition of acquisition workforce to address this issue.

Background and Other Information

Civilian agencies have not effectively managed or trained their acquisition workforce in part because they do not use multidisciplinary definitions including noncontracting staff (such as program managers and others) integral to the acquisition process. In 2002, we recommended that OFPP refine its definition of “acquisition workforce” so training could be required of noncontracting staff. As we stated in 2003 before the House Committee on Government Reform, the procuring agencies should adequately fund training through the normal budgeting process. We supported the training fund as a way to augment those funds.

In a July 2004 instruction to executive agencies, GSA directed them to identify their interagency contracts; project fee revenues for 2005 and 2006; and deposit 5 percent of their fee revenues for 2004. OMB reinforced this requirement later in July 2004, but as late as the following November, only the GSA schedules program and four agencies with governmentwide contracts (Health and Human Services/National Institutes of Health, Department of Veterans Affairs, Commerce, and National Aeronautics and Space Administration) had made deposits for the first 3 quarters. GSA is working to identify the appropriate share of the other agency contracts. As administrator of the fund, GSA will need reliable information on interagency contract fee revenues. Our 2002 review of fees charged on governmentwide contracts found that some agencies had not sent to OMB complete reports on fee revenues.

Related GAO Products

Contract Management: Comments on Proposed Services Acquisition Reform Act. [GAO-03-716T](#). Washington, D.C.: April 30, 2003.

Acquisition Management: Agencies Can Improve Training on New Initiatives. [GAO-03-281](#). Washington, D.C.: January 15, 2003.

Acquisition Workforce: Agencies Need to Better Define and Track the Training of Their Employees. [GAO-02-737](#). Washington, D.C.: July 29, 2002.

Contract Management: Interagency Contract Program Fees Need More Oversight. [GAO-02-734](#). Washington, D.C.: July 25, 2002.

Section 1413: Civilian Acquisition Workforce Recruitment Flexibility

Summary of Provision

Section 1413 authorizes the head of civilian agencies (i.e., other than DOD) to determine if a shortage exists in certain federal acquisition positions so that persons with high qualifications can be recruited and directly hired.

Direct-hire authority allows an agency the flexibility to appoint individuals to positions without adherence to certain competitive examination requirements.

Authority to use the flexibility provided by this section expires in September 2007.

Section 1413 also requires OPM to consult with OFPP and report to Congress by March 2007 on the use and effectiveness of this recruitment flexibility and whether the authority should be extended past September 2007.

Implementation Steps

- OPM must issue regulations to implement civilian agencies' authority for determining that a shortage exists in certain acquisition positions.
- Civilian agency heads determine if such a shortage exists and directly hire highly qualified persons in response to their shortage determinations.

Status of Implementation

- OPM is developing rulemaking to amend its direct hire regulations to permit civilian agencies to determine whether a shortage exists for certain federal acquisition positions.
- OPM anticipates an interim rule to be published in the *Federal Register* in Spring 2005.

GAO Observations

- Civilian agencies cannot use their authority to determine if a shortage exists in acquisition positions until OPM completes interim rulemaking.

Related GAO Products

Human Capital: Additional Collaboration Between OPM and Agencies Is Key to Improved Federal Hiring. [GAO-04-797](#). Washington, D.C.: June 7, 2004.

Acquisition Workforce: Status of Agency Efforts to Address Future Needs. [GAO-03-55](#). Washington, D.C.: December 18, 2002.

Section 1414: Maintaining Architectural and Engineering Acquisition Workforce Expertise

Summary of Provision

Section 1414 requires OFPP to consult with DOD, GSA, and OPM to develop and implement a plan to ensure that the federal government maintains the necessary capability with respect to acquisitions of architectural and engineering services to

- determine agency requirements;
- establish priorities and acquisition plans;
- establish professional standards;
- develop scopes of work; and
- award and administer contracts

Implementation Steps

- OFPP must consult with other agencies to develop a plan for maintaining architectural and engineering acquisition expertise.
- OFPP must consult with other agencies to implement the plan.

Status of Implementation

- OFPP turned to GSA's Public Building Service to take the lead to draft the plan as part of an anticipated interagency task force with OFPP, DOD, GSA, and OPM.
- In August 2004, GSA drafted its plan for implementing each of the five architectural and engineering personnel expertise planning objectives listed in SARA.
- GSA has circulated the draft plan for review to representatives of OFPP, OPM, DOD, and the DAU. FAI officials are helping coordinate and facilitate this effort.
- GSA subsequently formed an interagency task force to develop the required plan with members from GSA, DOD, OFPP, and OPM. The task force began meeting in January 2005.

GAO Observations

- The August 2004 draft addresses all of SARA's planning objectives for maintaining architectural and engineering expertise, but is limited only to GSA rather than a broader plan for implementation across the federal government.

Section 1421: Civilian Agency Chief Acquisition Officers

Summary of Provision

Section 1421 requires the designation of a noncareer Chief Acquisition Officer (CAO) within certain civilian executive agencies. CAOs must have management of acquisition as their primary duty.

CAO responsibilities include

- evaluating the performance of acquisition programs and advising the agency head on business strategy;
- increasing competition and performance-based contracting;
- directing acquisition policy for the agency;
- developing agency acquisition career management programs; and
- addressing acquisition workforce needs and strategies as part of strategic planning and performance results processes.

The provision also requires executive agencies to have a senior procurement executive responsible for management of the agency's procurement system. If an agency has a CAO, the senior procurement executive may be the CAO or must report directly to the CAO.

Implementation Steps

- Seventeen civilian agencies are required to appoint or designate a noncareer employee as CAO.

Status of Implementation

- In May 2004, OMB requested agency heads required to designate a CAO to submit the name and title of their agency's CAO in June 2004.
- Each of the 17 agencies required to designate a CAO has done so.

GAO Observations

- Many of the CAOs also have other responsibilities, such as Chief Financial Officer or Assistant Secretary for Administration or Management, and may not have management of acquisition as their primary duty as required by SARA.
- Our work identifying a set of private sector best practices for taking a strategic approach to acquisition indicates that a CAO plays a critical role in changing the organization's culture and practices.

Related GAO Products

Best Practices: Using Spend Analysis to Help Agencies Take a More Strategic Approach to Procurement. [GAO-04-870](#). Washington, D.C.: September 16, 2004.

Best Practices: Improved Knowledge of DOD Service Contracts Could Reveal Significant Savings. [GAO-03-661](#). Washington, D.C.: June 9, 2003.

Best Practices: Taking a Strategic Approach Could Improve DOD's Acquisition of Services. [GAO-02-230](#). Washington, D.C.: January 18, 2002.

Section 1422: Chief Acquisition Officers Council

Summary of Provision

Section 1422 establishes a Chief Acquisition Officers (CAO) Council as the principal interagency forum for monitoring and improving the federal acquisition system.

The CAO Council is chaired by the Deputy Director for Management at OMB. Members include the OFPP Administrator; the Under Secretary of Defense for Acquisition, Technology, and Logistics; the civilian agency CAOs; senior procurement executives of the military departments; and other designated senior agency officials.

The functions of the CAO Council include

- developing recommendations on acquisition policies and requirements;
- sharing experiences, ideas, best practices and innovative approaches;
- assisting in multi-agency projects and innovative initiatives;
- promoting effective business practices that ensure timely and best value products and services;
- furthering acquisition integrity, fairness, competition, openness, and efficiency; and
- working with OPM on acquisition workforce hiring, training, and professional development needs.

Implementation Steps

- OMB charters the CAO Council and requests agency heads to designate representative members.
- OMB's chair convenes CAO Council members for organizational and ongoing meetings.

Status of Implementation

- In May 2004, OMB notified agency heads of the establishment of the CAO council and requested they identify members.
- Agencies responded by designating their CAO Council principal and alternate representatives.
- From August 2004 to February 2005, the CAO Council met five times, discussing items such as the integrated acquisition environment, the "Get it Right" campaign, and the Federal Procurement Data System-Next Generation.
- The CAO Council has working groups to address particular issues and initiatives. Currently, the working groups include human capital, competitive sourcing, electronic government/performance management, and small business.
- The CAO Council Executive Committee—comprised of the OFPP Administrator, CAO Council Vice-Chair, working group committee chairs, and representatives from DOD and GSA—is meeting monthly.

GAO Observations

- The purposes, roles and responsibilities of the CAO Council are consistent with the functions outlined in SARA.
- The structure and purpose of the CAO Council are comparable to the Chief Financial Officers and Chief Information Officers councils.

Section 1423: Advisory Panel on Acquisition Laws and Regulations

Summary of Provision

Section 1423 requires the OFPP Administrator to establish an advisory panel to review acquisition laws and regulations regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines, and the use of governmentwide contracts.

The panel is to have at least nine experts in acquisition law and policy who represent diverse public and private sector experiences.

OFPP's Administrator was to establish the panel within 90 days of enactment. Once established, the provision allows the panel 1 year to conduct its review and report findings and recommendations to OFPP and listed congressional committees.

Implementation Steps

- OFPP must consult with the Secretary of Defense, the GSA Administrator, and congressional armed services and governmental affairs and government reform committees in making panel appointments.
- OFPP was required to establish the panel by the 90-day deadline.
- OFPP determined that they must also follow Federal Advisory Committee Act (FACA) requirements concerning panel membership, public notice, and access to meetings.

Status of Implementation

- In 2004, OFPP completed executive branch and congressional consultations on potential appointees.
- On February 1, 2005, which was later than the 90-day deadline, OMB announced appointment of 14 advisory panel appointees.
- OFPP has developed and provided to Congress the panel charter as required by FACA.
- The two initial panel meetings, which were open to the public, took place or are scheduled to take place in February 2005.
- OFPP officials say the advisory panel delay was in part due to compliance with FACA administrative procedures.
- Since section 1423 did not address funding or support for the panel, OFPP requested CAO Council member organizations to provide funding and/or staff to support panel operations. GSA and DOD have provided five employees to support the panel. GSA has also provided office space and equipment.

Background and Other Information

On February 1, 2005, OMB announced the advisory panel membership. Panel members are as follows

Panel Chair: Marcia G. Madsen, Partner, Mayer, Brown, Rowe and Maw;
Louis M. Addeo, President, AT&T Government Solutions;
Frank J. Anderson, Jr., President, Defense Acquisition University;
Allan V. Burman, President, Jefferson Solutions;
Carl DeMaio, President and Founder, The Performance Institute;
Marshall J. Doke, Jr., Partner, Gardere Wynne Sewell;
David A. Drabkin, Deputy Associate Administrator for Acquisition Policy,
General Services Administration;
Jonathan Etherton, Vice President, Legislative Affairs, Aerospace
Industries Association of America, Inc.;
James A. Hughes, Jr., Deputy General Counsel for Acquisition, Department
of the Air Force;
Deidre A. Lee, Director for Defense Procurement and Acquisition Policy,
Department of Defense;
Tom Luedtke, Assistant Administrator for Procurement, National
Aeronautics and Space Administration;
Melanie R. Sabelhaus, Deputy Administrator, Small Business
Administration;
Joshua I. Schwartz, Professor of Law and Co-Director of the Government
Procurement Law Program, George Washington University School of
Law;
Roger D. Waldron, Director, Acquisition Management Center, General
Services Administration; and
Laura Auletta, Chairperson of the Civilian Agency Acquisition Council, will
serve as the panel's Designated Federal Officer (Executive Director).

Section 1426: Extension of Franchise Fund Programs

Summary of Provision

Section 1426 extended through December 31, 2004, the franchise fund programs first authorized under the Federal Financial Management Act of 1994 (Public Law 103-356, Title IV).

Franchise fund programs operate as fully self-supporting, business-like entities within the federal government to deliver common administrative support services—such as contracting—to federal customers.

Authorization of the franchise funds originally was set to expire on October 1, 1999. However, a series of amendments, including this provision, has extended the termination date.

The Consolidated Appropriations Act, 2005 (Public Law 108-447), Division H, section 632) extended authority for franchise fund programs until October 1, 2005.

Congress continues to consider whether to authorize the franchise fund programs on a long-term or permanent basis.

Implementation Steps

- None required.

Status of Implementation

- None required.

GAO Observations

- As directed by the conference report that accompanied section 1426, GAO is reviewing DOD use of franchise fund programs for contracting services, including accountability and oversight issues. GAO's results are anticipated by May 2005.

Related GAO Products

High-Risk Series: Management of Interagency Contracting. [GAO-05-207](#). Washington, D.C.: January 2005.

Budget Issues: Franchise Fund Pilot Review. [GAO-03-1069](#). Washington, D.C.: August 22, 2003.

Contract Management: Interagency Contract Program Fees Need More Oversight. [GAO-02-734](#). Washington, D.C.: July 25, 2002.

Section 1427: Contracting for Architectural and Engineering Services

Summary of Provision

Section 1427 provides that architectural and engineering services can not be offered under a GSA multiple-award schedule contract or under governmentwide task-and-delivery-order contracts unless performed under the supervision of a licensed, professional architect or engineer and awarded pursuant to quality-based selection procedures.

This section also raises to \$300,000 the threshold for a participation incentive for small businesses in architectural and engineering services and construction design in connection with a military construction project or a military family housing project.

Implementation Steps

- Amend the FAR to address architect-engineer services contracting under GSA schedule and governmentwide contracts.

Status of Implementation

- In September 2004, a draft interim rule to amend the FAR was submitted to OMB for advance review and clearance prior to public issuance.
- OMB completed its clearance process in November 2004. According to GSA, the FAR Council anticipates publishing an interim rule as part of the issuance of the next Federal Acquisition Circular.

Section 1428: Telecommuting for Federal Contractors

Summary of Provision

Section 1428 required the FAR to be amended within 180 days of enactment to permit telecommuting by employees of federal contractors.

Specifically, the provision requires that solicitations for federal contracts should not contain any requirement or evaluation criteria that would preclude or reduce the score of a proposal that includes a contractor's plan to allow employees to telecommute, unless the contracting officer determines in writing that the agency's needs, including security requirements, could not be met.

Implementation Steps

- This section requires an amendment to the FAR to allow telecommuting by federal contractors.

Status of Implementation

- In October 2004, an interim rule was published amending the FAR; comments were requested by December 2004, to be considered in finalizing the rule.
- According to GSA, as of February 2005, the final rule is at OMB for clearance.

GAO Observations

- The FAR Council did not meet the 180-day deadline for issuing the interim rule.
- The interim changes to the FAR are consistent with section 1428 provisions.

Section 1431: Incentives for Performance-Based Services Contracting

Summary of Provision

Section 1431 provides an incentive for the use of performance-based contracting for services by giving executive agencies authority to treat qualifying contracts or task orders as contracts for commercial items.

To qualify for these incentives, the contract or task order must be valued at \$25 million or less; describe the work in measurable, mission-related terms; identify the specific output; contain a firm, fixed-price; and be awarded to a contractor that provides similar services to the public under similar terms.

This provision also requires agencies to collect data on contracts or task orders treated as contracts for commercial items. Additionally, OMB must report to Congress, not later than 2 years from enactment, on the use of this incentive.

The provision also required OFPP to establish a center of excellence in service contracting within 180 days from enactment.

Implementation Steps

- An amendment to the FAR to allow use of this incentive and require agencies to collect and maintain reliable data.
- OFPP is required to establish an acquisition center of excellence for services by the 180-day deadline.
- The Director of OMB must report to Congress on the contracts or task orders using this incentive.

Status of Implementation

- In June 2004, an interim rule amending the FAR was issued; comments are being considered.
- According to GSA, FPDS will be updated by February 2005 to allow agencies to report data on performance-based services contracts or task orders treated as procurements for commercial items.
- OFPP established an online acquisition center of excellence for services in November 2004. The center's Web site is available at <http://www.acqnet.gov/ace/>
- In September 2004, OFPP sent a memorandum to federal acquisition leaders targeting 40 percent of service contract actions for use of performance-based methods and providing instructions for reporting these actions in FPDS.

GAO Observations

- In September 2002, GAO recommended that OFPP clarify guidance to ensure performance-based contracting is appropriately used.
- OFPP has since taken steps to clarify and expand the guidance.

Background and Other Information

Agencies use performance-based contracts to specify the desired outcomes and allow contractors to determine how best to achieve those outcomes, rather than prescribing the methods contractors should use. Although performance-based contracts can offer significant benefits, such as encouraging contractors to find innovative ways of delivering services, historically, the government has not widely used this strategy.

Our review of federal procurement trends showed that in fiscal year 2001, agencies reported that 24 percent of their eligible service contracts were performance-based. However, there was wide variation in the extent to which agencies used these contracts, with 3 of the 10 agencies we reviewed falling short of OMB's goal that 10 percent of eligible service contracts be performance-based.

In a 2002 report, we examined the extent to which service contracts characterized by agencies as performance-based actually contained performance-based attributes. We found agencies lacked a good understanding of this contracting approach and how to take advantage of it. Consequently, we recommended that OFPP clarify existing guidance to ensure performance-based contracting is appropriately used. Since that time, OFPP has taken steps to increase awareness and use of performance-based contracting. For example, a report resulting from an interagency task force convened by OFPP was issued including recommendations for changes designed to assist agencies in applying performance-based service acquisition more effectively. In a September 2004 memo to civilian and defense agencies, OFPP implemented several of the task force recommendations including instructions for reporting performance-based contracts and task orders in the FPDS. Additionally, OFPP encouraged agencies to follow new guidance in development of their performance-based service acquisitions.

Related GAO Products

Use of Legislative Incentive for Performance-Based Contracting Unknown. [GAO-03-674R](#). Washington, D.C.: May 22, 2003.

Federal Procurement: Spending and Workforce Trends. [GAO-03-443](#). Washington, D.C.: April 30, 2003.

*Contract Management: Guidance Needed for Using Performance-Based
Service Contracting.* [GAO-02-1049](#). Washington, D.C.: September 23, 2002.

Section 1432: Time-and-Materials Contracting to Buy Commercial Services

Summary of Provision

Section 1432 amends the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) to authorize time-and-materials or labor-hour contracts for buying commercial services under certain circumstances. With time-and-materials contracts, an agency buys services on the basis of fixed-price direct labor hours plus the actual cost of materials.

This section would allow a time-and-materials or labor-hour contract for procurement of certain commercial services if the contracting officer determines no other contract type is suitable and includes a ceiling price in the contract that cannot be exceeded without written justification by the contracting officer.

Implementation Steps

- Amend the FAR to authorize use of time-and-materials and labor-hour contracts to buy commercial services.

Status of Implementation

- In September 2004, the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council jointly published an advanced notice of proposed rulemaking to seek public comments by November 2004 to help draft amendments to the FAR.
- In October 2004, the two councils, in collaboration with OFPP, held a public hearing to discuss possible changes to the FAR and safeguards to manage the risks associated with time-and-materials contracting.
- In November 2004, comments received from the public were published by GSA. In December GSA told us it was working closely with OFPP on this but had not set a timeframe for issuing an interim or proposed rule.

GAO Observations

- The FAR currently requires government surveillance of time-and-materials contractor performance to give reasonable assurance that efficient methods and effective cost controls are being used.
- Because of the enhanced surveillance required, agencies facing acquisition workforce shortages will have to ensure they have sufficient resources to properly oversee time-and-materials contracts.
- The conference report accompanying this section emphasizes that the option to use time-and-materials contracting is not intended to supplant the preference for performance-based, fixed-price contracting for buying commercial services. Also in the conference report, GAO is directed to review the use of section 1432 time-and-materials contracting.

Section 1441: Special “Other Transactions” Acquisition Authority

Summary of Provision

Section 1441 authorizes civilian agencies to enter into agreements called “other transactions” for research and development and prototype projects related to defense against or recovery from terrorism, or nuclear, biological, chemical, or radiological attacks. Use of this authority will require OMB approval.

Other transactions are flexible agreements that are not procurement contracts, grants, or cooperative agreements, and are generally not subject to federal laws and regulations governing standard procurement contracts. Similar authority has already been granted to the departments of Defense and Homeland Security; section 1441 expands other transactions authority to other agencies for specified purposes.

The flexibilities authorized under section 1441 expire in September 2008.

Implementation Steps

- OMB must prescribe regulations to implement section 1441 before civilian agencies can utilize the “other transactions” agreement authority.
- The OMB Director is required to authorize agencies to use other transaction agreements for specific prototype or research and development projects.
- Civilian agencies using this authority must report annually to specified congressional committees.

Status of Implementation

- OFPP is reviewing guidance pertaining to similar authority previously granted to the departments of Defense and Homeland Security and intends to base section 1441 regulations on the same guidance.

GAO Observations

- DOD has had some success in using other transactions to attract nontraditional firms to do business with the government. The Department of Homeland Security (DHS) has had much less time to gain experience using other transaction agreements, but has attracted nontraditional government contractors in two such prototype projects since 2002.
- The guidance developed by DOD and DHS in using other transactions may prove helpful to other agencies.

Background and Other Information

“Other transactions” agreements provide flexibility by being exempt from the FAR, cost accounting standards, and a variety of other acquisition requirements. These agreements were authorized to provide flexibility for the federal government to acquire cutting-edge research and technology. Because fewer government-unique requirements apply, other transactions can be useful in attracting private-sector entities that traditionally have not done business with the government.

Related GAO Products

Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority. [GAO-05-136](#). Washington, D.C.: December 15, 2004.

Defense Acquisitions: DOD Has Implemented Section 845 Recommendations but Reporting Can be Enhanced. [GAO-03-150](#). Washington, D.C.: October 9, 2002.

Acquisition Reform: DOD’s Guidance on Using Section 845 Agreements Could be Improved. [GAO/NSIAD-00-33](#). Washington, D.C.: April 7, 2000.

Section 1442: Public Disclosure of Noncompetitive Contracting for Iraq Reconstruction

Summary of Provision

Section 1442 requires agencies to publicly disclose information about noncompetitive contracts awarded for the repair, maintenance, or construction of infrastructure in Iraq from October 2002 through September 2005.

Within 30 days of contract award or enactment of SARA, agencies must publish

- the amount of the contract;
- a description of the scope of the contract;
- a list of contractors solicited for offers and a discussion of how the agency identified and solicited offers from these potential contractors; and
- the justification and determination to use other than full and open competition.

Agencies do not have to publicly disclose classified information, but this information must be made available to certain congressional committees.

Implementation Steps

- Defense and civilian agencies that award noncompetitive contracts for reconstruction of infrastructure in Iraq between October 2002 and September 2005 must publish information in the *Federal Register* or *FedBizOpps*, or otherwise make it available, within the required timeframe.

Status of Implementation

- In a January 2004 letter to the Civilian Agency Acquisition Council, the Council Chair informed civilian agencies about the SARA publishing requirement for noncompetitive Iraq-related contracting.
- In November 2004, the Army project contracting headquarters began developing instructions for Iraq contracting personnel of all Army commands and agencies on submitting information regarding noncompetitive contract awards using appropriated funds. An Army official told us they did not have a time frame or a plan yet for publishing the information.
- According to a State Department official in December 2004, one noncompetitive action was publicly reported in January 2004, in response to separate legislative disclosure requirements of the 2004 emergency supplemental appropriations (Public Law 108-106).

Section 1443: Emergency Procurement Flexibilities

Summary of Provision

Section 1443 gives agencies special emergency procurement flexibilities to buy supplies or services to support contingency operations or to defend against, or recover from nuclear, biological, chemical, or radiological attacks.

In addition, this section increased certain thresholds for these procurements; authorized agencies to treat procurements relating to defense or recovery from attack as procurements of commercial items; and raised the dollar limit for the use of simplified acquisition test program procedures for the procurement of items covered by this section.

Last, section 1443 extends through January 1, 2006, the authority to use the test program procedures for commercial item purchases below established thresholds.

Implementation Steps

- Amend the FAR to implement the special emergency procurement authorities.

Status of Implementation

- In December 2003, in a technical change to the FAR, GSA implemented the extension of the test program through January 2006.
- In February 2004, an interim rule was issued to amend the FAR. The interim rulemaking increases the micropurchase and simplified acquisition thresholds and limitations for using the simplified acquisition test program. Comments were requested for the FAR Council's consideration in finalizing the changes.
- Section 817 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) extends to January 1, 2008, the authority to use the simplified acquisition test program.
- According to GSA, the January 2008 extension under section 817's simplified acquisition test program authority will be implemented when the next Federal Acquisition Circular is published.
- In December 2004 the interim rule was converted to a final rule, implementing section 1443, and also incorporating the higher micro-purchase and simplified acquisition thresholds authorized for contracts awarded or performed outside the U.S. by section 822 of Public Law 108-375.

Related GAO Products

Agencies' Use of Procurement Flexibilities Provided in the Homeland Security Act of 2002 (Public Law 107-296). [GAO-04-447R](#). Washington, D.C.: March 31, 2004.

Contract Management: No Reliable Data to Measure Benefits of the Simplified Acquisition Test Program. [GAO-03-1068](#). Washington, D.C.: September 30, 2003.

Contract Management: Benefits of Simplified Acquisition Test Procedures Not Clearly Demonstrated. [GAO-01-517](#). Washington, D.C.: April 20, 2001.

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