

1 **SEC. ____.** **EXCEPTION TO REQUIREMENT TO INCLUDE COST OR PRICE TO THE**
2 **GOVERNMENT AS A FACTOR IN THE EVALUATION OF**
3 **PROPOSALS FOR CERTAIN MULTIPLE-AWARD TASK OR**
4 **DELIVERY ORDER CONTRACTS AND CERTAIN FEDERAL SUPPLY**
5 **SCHEDULE CONTRACTS.**

6 Section 3306(c) of title 41, United States Code, is amended—

7 (1) in paragraph (1), by inserting “except as provided in paragraph (3),” in
8 subparagraphs (B) and (C) after the subparagraph designation; and

9 (2) by adding at the end the following new paragraph:

10 “(3) EXCEPTIONS FOR CERTAIN INDEFINITE DELIVERY, INDEFINITE QUANTITY
11 MULTIPLE-AWARD CONTRACTS AND CERTAIN FEDERAL SUPPLY SCHEDULE CONTRACTS FOR
12 SERVICES ACQUIRED ON AN HOURLY RATE .—If the head of an agency issues a solicitation
13 for two or more contracts for services to be acquired on an hourly rate basis under the
14 authority of sections 4103 and 4106 of this title (multiple award task or delivery order
15 contracts) or section 152(3) of this title and section 501(b) of title 40 (Federal Supply
16 Schedule contracts), then—

17 “(A) when the contract or contracts feature individually competed task or
18 delivery orders based on or built up from hourly rates, the contracting officer need
19 not consider cost or price as an evaluation factor for contract award;

20 “(B) the disclosure requirement of subparagraph (C) of paragraph (1) shall
21 not apply; and

22 “(C) cost or price to the Federal Government shall be considered in
23 conjunction with the issuance pursuant to section 4106(c) of this title of any task

or delivery order under any contract resulting from the solicitation.”.

Section-by-Section Analysis

This proposal would amend title 41, United States Code, with respect to civilian contracting, to match authority provided to the Department of Defense by section 825 of the National Defense Authorization Act for Fiscal Year 2017 and help to standardize procurement authorities across the Federal Government. Specifically, the proposal would provide civilian agencies with an exception to the existing statutory requirement to include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals for all contracts. The exception would only apply to indefinite-delivery indefinite-quantity (IDIQ) contracts and to Federal Supply Schedule contracts for services that are priced at an hourly rate. Furthermore, the exception would only apply in those instances where the Government intends to make a contract award to qualifying offerors, thus affording maximum opportunity for effective competition at the task order level. An offeror would be qualified only if it is a responsible source and submits a proposal that conforms to the requirements of the solicitation, meets any technical requirements, and is otherwise eligible for award.

The Competition in Contracting Act (CICA) requires agencies to include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals. According to U.S. Government Accountability Office (GAO) case law, “agencies have considerable discretion in determining the appropriate method for taking cost into account, but the method used must provide for a reasonable assessment of the cost of performance of the competing proposals” (B-400705.2, B-400705.2 Medical Staffing Joint Venture LLC, March 13, 2009). With respect to multiple award task or delivery contracts, the Court of Federal Claims has agreed with the GAO in concluding that “there is no exception to the requirement set forth in CICA that cost or price to the government be considered in selecting proposals for award because the selected awardees will be provided the opportunity to compete for task orders under the awarded contracts” (SERCO INC. v. United States, 81 Fed. Cl. 463, 492 (COFC) (March 2008) citing MIL Corp., 2004 WL 3190217, at 7.).

However, in practice, the evaluation of price as a source selection factor in determining which offerors will receive initial contracts awards for service contracts is problematic at best and is, in many cases for all intents and purposes, meaningless. A legislative change is necessary to address this area of procurement law, particularly in light of the fact that over 51 percent of the dollars obligated for fiscal year (FY) 2014 in support of the Federal agencies’ acquisitions for services are executed under these types of contracts.

For multiple award task and delivery order contracts to acquire services, there are two primary techniques that the GAO has recognized as legitimate methods to evaluate cost and price. Each technique has to account for the “indefinite” nature of an IDIQ arrangement. By definition, the agency does not know specifically at the time the award is made to what extent the contract vehicle will be used to place orders. One technique is for the agency to structure the solicitation to instruct offerors to fill in a table in their proposal listing their labor rates for services. Another method is to instruct offerors to respond to a hypothetical (“sample”) task.

When using the rate table technique, agencies must develop estimates of the quantity and mix of various labor hours based on historical experience of similar services acquired in the past. These estimates reflect what the agency expects to experience over the life of the new contract. For evaluation purposes, the agency multiplies its estimated hours against the offerors' proposed rates to arrive at the evaluated price.

Although the rate table method has been accepted by the GAO as a valid means to evaluate price in multiple award IDIQ contracts, the technique is flawed because it presumes that a given set of fully loaded labor rates can be meaningfully evaluated by comparing one offeror's set to another's. The flaw lies in the fact that each prospective offeror has its own unique array of labor categories and its own unique practices that govern how work will be proposed and executed. Despite an agency's best attempt to develop and normalize a common set of labor rate categories from which each offeror will be required to propose, this set will likely not correlate with the company's actual labor structure. As a result, there is an artificial basis for comparison. Furthermore, the rate table technique runs counter to the statutory preference for performance-based service contracting. It should not matter how a particular offeror's proposed fully burdened labor rates compare another's if the awardees are required to propose bottom line firm fixed prices to perform task orders under performance-based terms. Since the rate table technique simply multiplies the offerors' rates by the Government's estimated hours, the evaluated price does not reflect any consideration for the fact that one offeror might ultimately bid an innovative or efficient means to accomplish the work under a particular task order.

An alternative to the rate table method is the use of sample tasks. When an agency lacks historical data from which to establish an estimate of the mix and quantity of labor hours to be expended over the life of the IDIQ contract, it may employ the sample task technique as a means to evaluate cost or price (as well as technical factors). The GAO found this approach may provide a reasonable basis to evaluate price/cost, even if it results in substantial variations in offeror responses (see *In re High-Point Schaer*, B-242616, May 28, 1991).

However, in another case, the GAO sustained the protestor's contention that the agency's price evaluation to acquire travel services under a multiple award IDIQ arrangement was flawed because the agency's request for proposals did not require offerors to propose binding prices for which they would be required to use in future task order proposals (see *In re CW Government Travel Inc.—Reconsideration*, B-295530, July 25, 2005). The GAO held that "[b]ecause the sample task pricing is not binding, a price realism and reasonableness analysis based on that pricing provides no meaningful assessment of the likely cost to the government of an offeror's proposal." When offerors are held bound under the resultant IDIQ contract to the rates proposed in their sample task order, agencies are able to assert that they fulfilled the current statutory requirement to evaluate cost or price to the Government. As a technique, agencies typically incorporate sample task rates as ceiling rates in the resultant contract, which enables awardees to bid lower rates (if they desire) in individual task order proposals. However, agencies often structure IDIQ service contracts to afford flexibility to award task orders under the full range of contract types, and when cost reimbursable orders are used, it is not appropriate to cap the order rates at the "ceiling" rates bid in the sample task. Notably, in the aforementioned case, the GAO decision stated, "We acknowledge that the evaluation of price or cost in the award of an ID/IQ 'umbrella' contract can be challenging, particularly in the procurement of services, because the

more meaningful price competition may take place at the time individual task or delivery orders are to be issued.”

Relieving the requirement to account for cost or price when evaluating proposals for service contracts featuring competitive orders based on hourly rates at the initial award of covered IDIQ contracts will enable procurement officials to focus their energy on establishing and evaluating the non-price factors that will result in more meaningful distinctions among offerors. Source selection officials typically spend (collectively) hundreds of hours evaluating cost and price as a factor in awarding any given multiple award IDIQ contract to acquire services. This is non-value added effort since the meaningful evaluation of cost and price takes place at the point in time when subsequent task or delivery order proposals are evaluated.

Budget Implications: The proposal only addresses procurement processes and not amounts appropriated for the procurement of items or services.

Changes to Existing Law:

TITLE 41, UNITED STATES CODE

§3306. Planning and solicitation requirements

(a) PLANNING AND SPECIFICATIONS.—

(1) PREPARING FOR PROCUREMENT.—In preparing for the procurement of property or services, an executive agency shall—

- (A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;
- (B) use advance procurement planning and market research; and
- (C) develop specifications in the manner necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) REQUIREMENTS OF SPECIFICATIONS.—Each solicitation under this division shall include specifications that—

- (A) consistent with this division, permit full and open competition; and
- (B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

(3) TYPES OF SPECIFICATIONS.—For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy those needs. Subject to those needs, specifications may be stated in terms of—

- (A) function, so that a variety of products or services may qualify;
- (B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or
- (C) design requirements.

(b) CONTENTS OF SOLICITATION.—In addition to the specifications described in subsection (a), each solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(1) a statement of—

(A) all significant factors and significant subfactors that the executive agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(B) the relative importance assigned to each of those factors and subfactors; and

(2)(A) in the case of sealed bids—

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; or

(B) in the case of competitive proposals—

(i) either a statement that the proposals are intended to be evaluated with, and the award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and the award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(ii) the time and place for submission of proposals.

(c) EVALUATION FACTORS.—

(1) IN GENERAL.—In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency shall—

(A) establish clearly the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(B) except as provided in paragraph (3), include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) except as provided in paragraph (3), disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

(i) significantly more important than cost or price;

(ii) approximately equal in importance to cost or price; or

(iii) significantly less important than cost or price.

(2) RESTRICTION ON IMPLEMENTING REGULATIONS.—Regulations implementing paragraph (1)(C) may not define the terms “significantly more important” and “significantly less important” as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(3) EXCEPTIONS FOR CERTAIN INDEFINITE DELIVERY, INDEFINITE QUANTITY MULTIPLE-AWARD CONTRACTS AND CERTAIN FEDERAL SUPPLY SCHEDULE CONTRACTS FOR SERVICES

ACQUIRED ON AN HOURLY RATE.—If the head of an agency issues a solicitation for two or more contracts for services to be acquired on an hourly rate basis under the authority of sections 4103 and 4106 of this title (multiple award task or delivery order contracts) or section 152(3) of this title and section 501(b) of title 40 (Federal Supply Schedule contracts), then—

(A) when the contract or contracts feature individually competed task or delivery orders based on or built up from hourly rates, the Contracting Officer need not consider cost or price as an evaluation factor for contract award;

(B) the disclosure requirement of subparagraph (C) of paragraph (1) shall not apply; and

(C) cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to section 4106(c) of this title of a task or delivery order under any contract resulting from the solicitation.

(d) ADDITIONAL INFORMATION IN SOLICITATION.—This section does not prohibit an executive agency from—

(1) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(2) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(e) LIMITATION ON EVALUATION OF PURCHASE OPTIONS.—An executive agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in the solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the executive agency has determined that there is a reasonable likelihood that the options will be exercised.

(f) ***

1 **SEC. ____.** **REVISION TO EXECUTIVE COMPENSATION REPORTING**

2 **REQUIREMENTS APPLICABLE TO CONTRACTS OR**

3 **SUBCONTRACTS SUBJECT TO COST ACCOUNTING STANDARDS.**

4 Section 2(b)(1)(F) of the Federal Funding Accountability and Transparency Act of 2006
5 (Public Law 109-282; 31 U.S.C. 6101 note), as amended, is amended by inserting “for contracts
6 and subcontracts described in subsection (a)(4)(A)(ii) for which cost accounting standards are
7 applicable,” before “the names”.

Section-by-Section Analysis

 This proposal would reduce burdens associated with government-unique reporting requirements by narrowing the requirement for federal contractors to report executive compensation costs of their most highly compensated officers under the Federal Funding Accountability and Transparency Act of 2006 (FFATA, Public Law 109-282, as amended, codified at 31 U.S.C. 6101 Note), so that it only applies to contractors or subcontractors who are subject to cost accounting standards. Generally, executive compensation data is not used in making procurement decisions. Therefore, limiting executive compensation reporting requirements will reduce unnecessary costs associated with doing business with the government.

 FFATA mandates that Federal contractors and subcontractors must reveal names and total compensation of their five most highly compensated officers if (1) the company’s Federal awards equate to at least 80 percent of annual gross revenue; (2) such awards account for at least \$25 million in annual gross revenue; and (3) public information on executive compensation is not available through other channels, such as reports required by the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

 These statutory requirements were implemented via a pilot program on August 29, 2007, as well as through several relevant changes to the Federal Acquisition Regulation (FAR), effected between 2009 and 2014. The current language at FAR Subpart 4.14 and clause 52.204-10 paragraphs (d)(1) and (d)(3) stipulate that, under the conditions listed above, Federal contractors shall report the names and compensation details of their top five executives, as well as the top five executives of their first-tier subcontractors.

 The data are centrally reported to the GSA System for Award Management (SAM). If the data are already publicly available via reporting to the Securities and Exchange Commission, the contractor (or subcontractor) must still report in SAM and reference the public availability. The FAR Council’s determination that this reporting requirement is responsible for more than 55,000 hours of paperwork burden each year does not reflect the burden incurred by first tier subcontractors who are not registered in SAM. A statistical analysis of the SAM compensation data shows that of the approximately 4,700 unique respondents, just over half are small

businesses.¹

When passing the Digital Accountability and Transparency Act of 2014 (P.L. 113-101, codified at 31 U.S.C. 6101 et seq.), Congress called on OMB and agencies to identify “unnecessarily burdensome reporting requirements for recipients of Federal awards.” See section (a)(3) of P.L. 113-101. Public comment received both during the development of the rule and in response to public notices issued in connection with renewal of the information collection have repeatedly questioned the value that justifies this ongoing burden. Additionally, unnecessary exposure of contractor business information creates a disincentive to do business with the government.²

This proposal is designed to address these concerns and reduce burden by limiting disclosure to contractors and subcontractors who are subject to cost accounting standards under 41 U.S.C. 1502. It is in these situations that the disclosed compensation information is most likely to be considered, such as in determining if these costs, where they are allowable, are being measured, assigned and allocated in a uniform and consistent manner across the contractor’s contracts. By creating this tighter nexus between disclosure and potential use of the information in the procurement process, the proposal will lower the cost for contractors (and their first tier subcontractors) doing business with the government and eliminate the need for the government to maintain database information that is not used in making Federal contract awards.

Budget Implications: There would be no budgetary impact for civilian agencies as a result of this legislative change because the proposal only addresses a reporting requirements for contractors and therefore does not affect the overall budget requirements of agencies.

Changes to Existing Law: This proposal would amend section 2 of the Federal Funding Accountability and Transparency Act of 2006 (31 U.S.C. 6101 note) as follows:

SEC. 2. FULL DISCLOSURE OF ENTITIES RECEIVING FEDERAL FUNDING.

(a) Definitions.-In this Act: * * * * *

(4) Federal award.-The term “Federal award”-

(A) means Federal financial assistance and expenditures that-

(i) include grants, subgrants, loans, awards, cooperative agreements, and other forms of financial assistance;

(ii) include contracts, subcontracts, purchase orders, task orders, and delivery orders;

¹ The Integrated Award Environment Program Office reviewed a random sample of 161 respondents. There is a 99% certainty that a survey of the entire population would produce a figure between 42% and 62% for the small business portion.

² See, for example, Federal Register Notice for Information Collection 9000-0177, Reporting Executive Compensation and First-Tier Subcontract Awards at 80 FR 36341: <https://www.federalregister.gov/articles/2015/06/24/2015-15516/submission-to-omb-for-review-federal-acquisition-regulation-reporting-executive-compensation-and>; (one respondent to the information collection explained that it represents numerous defense and aerospace companies that are “significantly affected by” the reporting requirement. <http://www.regulations.gov/#!documentDetail;D=FAR-2015-0055-0026>); Acquisition Reform Working Group (March 2013). 2013 Legislative Recommendations. Available at <http://www.ndia.org/Advocacy/LegislativeandFederalIssuesUpdate/Documents/2013%20ARWG%20Legislative%20Pack%20FINAL.pdf>; and 75 FR 39414 (summarizing public comments on the interim rule implementing FFATA).

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(b) In General.-

(1) Website.-Not later than January 1, 2008, the Office of Management and Budget shall, in accordance with this section, section 204 of the E-Government Act of 2002 (Public Law 107-347; [44 U.S.C. 3501 note](#)), and the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 403 [401] et seq.) [now division B (except sections 1123, 2303, 2304, and 2313) of subtitle I of title 41], ensure the existence and operation of a single searchable website, accessible by the public at no cost to access, that includes for each Federal award-

(A) the name of the entity receiving the award;

(B) the amount of the award;

(C) information on the award including transaction type, funding agency, the North American Industry Classification System code or Catalog of Federal Domestic Assistance number (where applicable), program source, and an award title descriptive of the purpose of each funding action;

(D) the location of the entity receiving the award and the primary location of performance under the award, including the city, State, congressional district, and country;

(E) a unique identifier of the entity receiving the award and of the parent entity of the recipient, should the entity be owned by another entity;

(F) **for contracts and subcontracts described in subsection (a)(4)(A)(ii) for which cost accounting standards are applicable**, the names and total compensation of the five most highly compensated officers of the entity if-

(i) the entity in the preceding fiscal year received-

(I) 80 percent or more of its annual gross revenues in Federal awards; and

(II) \$25,000,000 or more in annual gross revenues from Federal awards; and

(ii) the public does not have access to information about the compensation of the senior executives of the entity through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 ([15 U.S.C. 78m\(a\)](#), [78o\(d\)](#)) or section 6104 of the Internal Revenue Code of 1986. [; and]

(G) any other relevant information specified by the Office of Management and Budget.

* * *

(2) Reporting of subawards.-

(A) In general.-Based on the pilot program conducted under paragraph (1), and, except as provided in subparagraph (B), not later than January 1, 2009, the Director-

(i) shall ensure that data regarding subawards are disclosed in the same manner as data regarding other Federal awards, as required by this Act; and

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1 **SEC. ____.** **EXTENSION OF AUTHORITY TO FILL SHORTAGE CATEGORY**

2 **POSITIONS FOR CERTAIN FEDERAL ACQUISITION POSITIONS.**

3 Section 1703(j)(2) of title 41, United States Code, is amended by striking “September
4 30, 2017” and inserting “September 30, 2022”.

Section-by-Section Analysis

Direct-hire authority permits an agency to appoint candidates to positions for which there is either a severe shortage of candidates or a critical hiring need. Section 1413 of National Defense Authorization Act for Fiscal Year 2004 (P.L. 108-136) authorized agency heads to determine, under regulations prescribed by the Office of Personnel Management (OPM), that certain federal acquisition positions are shortage category positions in order to use direct hire authorities. Supporting evidence of a shortage must be kept in a file for documentation and reporting purposes.

Section 1413 was originally set to expire at the end of Fiscal Year 2007. Congress extended the authority until September 30, 2012 (see section 853 of the National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181) and again in 2012 until September 30, 2017 (see section 1103 of the NDAA for Fiscal Year 2013, P.L. 112-239), following its enactment into positive law as section 1703 of title 41, U.S. Code, by P.L. 111-350. This section would further extend the sunset until September 30, 2022.

The government depends on skilled acquisition and program personnel to understand complex market dynamics, develop clear requirements, negotiate in the best interest of the taxpayer, and hold contractors to high performance standards. The expediency that direct hire authority allows can be helpful to an agency both in meeting critical initiatives that may require particular expertise, such as to support information technology modernization or cyber security efforts, as well as to support the agency as it plans and executes on its reorganization activities.

Budget Implications: There would be no budgetary impact for civilian agencies as a result of this legislative change because the proposal only extends an authorization and does not affect the overall budget requirements of agencies.

Changes to Existing Law: Section 1703(j)(2) of title 41, U.S. Code, is amended to read as follows:

TITLE 41, UNITED STATES CODE: PUBLIC CONTRACTS

Sec. 1703. Acquisition workforce.

(j) Recruitment program.—

(1) Shortage category positions.—For purposes of sections 3304, 5333, and 5753 of title 5, the head of a department or agency of the Federal Government (other than the Secretary of Defense) may determine, under regulations prescribed by the Office of Personnel Management, that certain Federal acquisition positions (as described in subsection (g)(1)(A)) are shortage category positions in order to use the authorities in those sections to recruit and appoint highly qualified individuals directly to those positions in the department or agency.

(2) Termination of authority.—The head of a department or agency may not appoint an individual to a position of employment under this section after September 30, ~~2017~~ 2022.

1 **SEC. ____.** **AMENDMENTS TO THE FEDERAL ACTIVITIES INVENTORY REFORM**
2 **ACT.**

3 Section 2 of the Federal Activities Inventory Reform Act of 1998 (Public Law 105-270;
4 31 U.S.C. 501 note) is amended—

5 (1) in subsection (a), by inserting “ending in an odd number” after “the third
6 quarter of each fiscal year”; and

7 (2) in subsection (b), by striking “fiscal” each time it appears and inserting
8 “reporting”.

Section-by-Section Analysis

The purpose of this proposal is to improve government efficiency in the use of management resources by reducing the reporting burden associated with the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270 as amended), 31 U.S.C. 501 note. The FAIR Act requires federal agencies to annually prepare and submit to the Office of Management and Budget (OMB) inventories of commercial activities performed by federal employees. This proposal would amend the FAIR Act to require development of workforce inventories on no less than a biennial basis. OMB would require agency submission of inventories of their inherently governmental activities to OMB on a similar biennial reporting cycle.

Development of workforce inventories can help agencies gain a better understanding of how Federal employee labor is being used to carry out the agency’s mission and improve human capital resource distribution. If an agency is considering public-private competition, the inventory also plays a role in helping to ensure that federal positions under consideration for competition are commercial and suitable for performance by either the private sector or public sector.

On average, the status of functions does not change dramatically year over year. In fact, a trend analysis of the inventories prepared between FYs 2012 and 2015 indicates that government-wide, the percentage of workforce FTEs performing commercial work has generally been between 55-60%. In addition, individual agency inventories have rarely shown a change of more than 10 percentage points during this period. Moreover, only a very small portion of any agency’s workforce positions has been subject to study for public-private competition in any year in which public-private competition has not been subject to a statutory moratorium and history suggests that tailored and focused consideration of this management tool (as opposed to overly broad application) increases the likelihood for successful outcomes. By adjusting the cycle for developing inventories from once a year to once every two years, resources otherwise

required to review and update the inventory can instead be applied in a more impactful manner to other performance improvement initiatives.

Budget Implications: There would be no negative budgetary impact as a result of these legislative changes because the proposal would reduce a requirement and therefore would not increase the overall budget requirements of the Department or any other Federal agency.

Changes to Existing Law: The proposal would amend P.L. 105-270, as amended by section 840 of Division A of P.L. 109-115, as follows:

TITLE 31, UNITED STATES CODE

§ 501 Note

P.L. 105-270, as amended by section 840 of Division A of P.L. 109-115.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Federal Activities Inventory Reform Act of 1998”.

SEC. 2. ANNUAL LISTS OF GOVERNMENT ACTIVITIES NOT INHERENTLY GOVERNMENTAL IN NATURE.

(a) **LISTS REQUIRED.**—Not later than the end of the third quarter of each fiscal year **ending in an odd number**, the head of each executive agency shall submit to the Director of the Office of Management and Budget a list of activities performed by Federal Government sources for the executive agency that, in the judgment of the head of the executive agency, are not inherently governmental functions. The entry for an activity on the list shall include the following:

- (1) The fiscal year for which the activity first appeared on a list prepared under this section.
- (2) The number of full-time employees (or its equivalent) that are necessary for the performance of the activity by a Federal Government source.
- (3) The name of a Federal Government employee responsible for the activity from whom additional information about the activity may be obtained.

(b) **OMB REVIEW AND CONSULTATION.**—

The Director of the Office of Management and Budget shall review the executive agency’s list for a ~~fiscal~~ **reporting** year and consult with the head of the executive agency regarding the content of the final list for that ~~fiscal~~ **reporting** year.

(c) **PUBLIC AVAILABILITY OF LISTS.**—

(1) **PUBLICATION.**—Upon the completion of the review and consultation regarding a list of an executive agency—

(A) the head of the executive agency shall promptly transmit a copy of the list to Congress and make the list available to the public; and

(B) the Director of the Office of Management and Budget shall promptly publish in the Federal Register a notice that the list is available to the public.

(2) **CHANGES.**—If the list changes after the publication of the notice as a result of the resolution of a challenge under section 3, the head of the executive agency shall promptly—

(A) make each such change available to the public and transmit a copy of the change to Congress; and

(B) publish in the Federal Register a notice that the change is available to the public.

(d) **COMPETITION REQUIRED.**—Within a reasonable time after the date on which a notice of the public availability of a list is published under subsection (c), the head of the executive agency concerned shall review the activities on the list. Each time that the head of the executive agency considers contracting with a private sector source for the performance of such an activity, the head of the executive agency shall use a competitive process to select the source (except as may otherwise be provided in a law other than this Act, an Executive order, regulations, or any executive branch circular setting forth requirements or guidance that is issued by competent executive authority). The Director of the Office of Management and Budget shall issue guidance for the administration of this subsection.

(e) **REALISTIC AND FAIR COST COMPARISONS.**—For the purpose of determining whether to contract with a source in the private sector for the performance of an executive agency activity on the list on the basis of a comparison of the costs of procuring services from such a source with the costs of performing that activity by the executive agency, the head of the executive agency shall ensure that all costs (including the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs) are considered and that the costs considered are realistic and fair.

SEC. 3. CHALLENGES TO THE LIST.

(a) **CHALLENGE AUTHORIZED.**—An interested party may submit to an executive agency a challenge of an omission of a particular activity from, or an inclusion of a particular activity on, a list for which a notice of public availability has been published under section 2.

(b) **INTERESTED PARTY DEFINED.**—For the purposes of this section, the term “interested party”, with respect to an activity referred to in subsection (a), means the following:

(1) A private sector source that—

(A) is an actual or prospective offeror for any contract, or other form of agreement, to perform the activity; and

(B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.

(2) A representative of any business or professional association that includes within its membership private sector sources referred to in paragraph (1).

(3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

(4) The head of any labor organization referred to in [section 7103\(a\)\(4\) of title 5](#), United States Code, that includes within its membership officers or employees of an organization referred to in paragraph (3).

(c) **TIME FOR SUBMISSION.**—A challenge to a list shall be submitted to the executive agency concerned within 30 days after the publication of the notice of the public availability of the list under section 2.

(d) **INITIAL DECISION.**—Within 28 days after an executive agency receives a challenge, an official designated by the head of the executive agency shall—

(1) decide the challenge; and

(2) transmit to the party submitting the challenge a written notification of the decision together with a discussion of the rationale for the decision and an explanation of the party’s right to appeal under subsection (e).

(e) **APPEAL.**—

(1) AUTHORIZATION OF APPEAL.—An interested party may appeal an adverse decision of the official to the head of the executive agency within 10 days after receiving a notification of the decision under subsection (d).

(2) DECISION ON APPEAL.—Within 10 days after the head of an executive agency receives an appeal of a decision under paragraph (1), the head of the executive agency shall decide the appeal and transmit to the party submitting the appeal a written notification of the decision together with a discussion of the rationale for the decision.

SEC. 4. APPLICABILITY.

(a) EXECUTIVE AGENCIES COVERED.—Except as provided in subsection (b), this Act applies to the following executive agencies:

(1) EXECUTIVE DEPARTMENT.—An executive department named in [section 101 of title 5](#), United States Code.

(2) MILITARY DEPARTMENT.—A military department named in [section 102 of title 5](#), United States Code.

(3) INDEPENDENT ESTABLISHMENT.—An independent establishment, as defined in [section 104 of title 5](#), United States Code.

(b) EXCEPTIONS.—This Act does not apply to or with respect to the following:

(1) GOVERNMENT ACCOUNTABILITY OFFICE.—The Government Accountability Office.

(2) GOVERNMENT CORPORATION.—A Government corporation or a Government controlled corporation, as those terms are defined in [section 103 of title 5](#), United States Code.

(3) NONAPPROPRIATED FUNDS INSTRUMENTALITY.—A part of a department or agency if all of the employees of that part of the department or agency are employees referred to in [section 2105\(c\) of title 5](#), United States Code.

(4) CERTAIN DEPOT-LEVEL MAINTENANCE AND REPAIR.—Depot-level maintenance and repair of the Department of Defense (as defined in [section 2460 of title 10](#), United States Code).

(5) Executive agencies with fewer than 100 full-time employees as of the first day of the fiscal year. However, such an agency shall be subject to section 2 to the extent it plans to conduct a public-private competition for the performance of an activity that is not inherently governmental.

SEC. 5. DEFINITIONS.

In this Act:

(1) FEDERAL GOVERNMENT SOURCE.—The term “Federal Government source”, with respect to performance of an activity, means any organization within an executive agency that uses Federal Government employees to perform the activity.

(2) INHERENTLY GOVERNMENTAL FUNCTION.—

(A) Definition.—The term “inherently governmental function” means a function that is so intimately related to the public interest as to require performance by Federal Government employees.

(B) Functions included.—The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—

(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) to significantly affect the life, liberty, or property of private persons;

(iv) to commission, appoint, direct, or control officers or employees of the United States; or

(v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

(C) Functions excluded.—The term does not normally include—

(i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials; or

(ii) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

SEC. 6. EFFECTIVE DATE.

This Act shall take effect on October 1, 1998.

1 **SEC. ____.** **MICRO-PURCHASE THRESHOLD APPLICABLE TO GOVERNMENT**
2 **PROCUREMENTS.**

3 (a) **INCREASE IN THRESHOLD.**—Section 1902(a)(1) of title 41, United States Code, is
4 amended—

5 (1) by striking “sections 2338 and 2339” and inserting “section 2339”; and

6 (2) by striking “\$3,000” and inserting “\$10,000”.

7 (b) **CONFORMING AND CLERICAL AMENDMENTS.**—(1) Section 2338 of title 10, United
8 States Code, is repealed.

9 (2) The table of sections at the beginning of chapter 137 of such title is amended by
10 striking the item relating to section 2338.

11 (c) **CONVENIENCE CHECKS.**—A convenience check may not be used for an amount in
12 excess of one half of the micro-purchase threshold under section 1902(a) of title 41, United
13 States Code, or a lower amount set by the head of the agency. Use of convenience checks shall
14 comply with controls prescribed in Office of Management and Budget Circular A-123, Appendix
15 B.

**[PLEASE NOTE: THE “CHANGES TO EXISTING LAW” SECTION BELOW SETS OUT IN LINE-IN LINE
OUT FORMAT HOW THE LEGISLATIVE TEXT ABOVE WOULD AMEND EXISTING LAW.]**

Section-by-Section Analysis

This proposal is designed to raise and standardize the government-wide micro-purchase threshold set forth in 41 U.S.C. 1902 so that Defense and civilian agencies can have equally greater access to a streamlined cost-effective and administratively efficient method for purchasing common products and services in small dollar amounts. In section 821 of the National Defense Authorization Act (NDAA) for fiscal year (FY) 2017, Congress increased the micro-purchase threshold for the Department of Defense (DoD) to \$5,000 through the creation of a new section 2338 of title 10. This proposal would increase the micro-purchase threshold in 41 U.S.C. 1902 from \$5,000 to \$10,000 for Defense agencies and from \$3,500 to \$10,000 for civilian agencies so that all agencies across the government would have the option to authorize personnel, as appropriate, to have higher limits on their Government purchase card, referred to hereafter as “purchase card”. This increase would affect less than one percent of federal contract

spending, but could allow hundreds of thousands of transactions to be conducted more efficiently.

Purchase cards give agency end users an efficient tool to make simple purchases themselves and, at the same time, offer a number of additional benefits for both the agency and its vendors. In the two decades since the micro-purchase threshold (MPT) was established, purchase cards have reduced administrative transaction costs for government payment offices by lowering the number of budgetary/accounting entries that need to be processed in financial management systems, allowed agencies to earn rebates, and helped vendors receive timely payment without the burden of having to process government invoices. Equally important, by putting purchase cards into the hands of properly trained end users to make purchases directly, the burden of making micro-purchases has largely been lifted from the shoulders of contracting officers, allowing them to instead give greater attention to larger, more complex procurements, where their acquisition training and expertise can be put to better use and have greater impact.

In 2016, the MPT was adjusted for inflation from \$3,000 to \$3,500, pursuant to authority provided in 41 U.S.C. 1908. While these adjustments will help agencies to leverage the efficiencies of the purchase card for additional small dollar transactions, there are many needs between \$3,500 and \$10,000 that can be more efficiently acquired with a purchase card in the hands of a trained end user. Some of these routine needs did not exist in the 1990s and therefore were not envisioned when the MPT level was first established, such as those for digital services, including web applications, application program interfaces, simple cloud services, scalable web hosting services, case management, platforms to support on-line interactive dialogues, information technology (IT) systems monitoring, and tools to measure and improve digital customer experiences -- all of which can be purchased easily by program and IT technical experts through existing government-wide and multi-agency contracts that include pre-negotiated terms and conditions which are well suited for small dollar purchases. In recognition of the benefits of the purchase card program, section 821 of the FY 2017 NDAA increased the micro-purchase threshold for DoD to \$5,000 to enable easy and administratively efficient purchasing of small dollar items. The further increase to \$10,000 for all agencies would help streamline the way agencies do business and meet mission critical requirements without delay. The Office of Management and Budget will continue to promote coupling use of purchase cards with smart buying practices, such as those that encourage purchases through existing vehicles that meet agency needs.

In the past 10 years, Federal agencies have deployed a number of systems and internal controls to reduce the risk of fraud, waste, abuse, and misuse associated with the purchase card. Examples of agency actions include implementation of government-wide metrics for Government charge card programs under the General Services Administration (GSA) SmartPay program to improve security including purchase card transactions. As part of Federal efforts, GSA SmartPay has made available data analytics and data mining tools provided by servicing banks and brands. The metrics identify potential areas of misuse or fraud for further investigation in categories of disputed charges; single merchant spending; use of data analytics tools; as well as a targeted group of questionable transactions.

If this proposal is enacted, individual purchase card limits would not be raised automatically. Instead, agencies would review existing limits and make adjustments based on

organizational need and the responsibilities of the end user. For instance, an agency may leave unchanged an office manager's current authorization level of \$1,000 to make purchase card transactions for office supplies from the OS3 contract established under the Federal Strategic Sourcing Initiative if this limit remains sufficient in light of the organization's needs for office supplies. By contrast, the agency may raise the purchase card limits for technical personnel in the agency's digital strategy office for the reasons stated above, so that these users can make purchases directly, rather than burdening their contracting officer for a rapid decision and clearance to place an order. In situations where contracting officers continue making purchases for the agency under \$10,000, they will still benefit by being able to take advantage of the efficiencies offered by the purchase card in conducting these transactions.

Finally, GSA will continue to ensure there is appropriate transparency of purchase card activity on USASpending.gov so information on use of the purchase card below the micro-purchase threshold is available to the public, consistent with agency security requirements.

Budget Implications: There would be no budgetary impact for civilian agencies as a result of this legislative change because the proposal only addresses the micro-purchase dollar threshold and would not increase the overall budget requirements of the agencies.

Changes to Existing Law: This proposal would amend title 41, United States Code, and title 10, United States Code, as follows:

TITLE 41, UNITED STATES CODE

§ 1902. Procedures applicable to purchases below micro-purchase threshold

(a) DEFINITION.—(1) Except as provided in sections ~~2338 and~~ 2339 of title 10 and paragraph (2) of this subsection, for purposes of this section, the micro-purchase threshold is ~~\$3,000~~ \$10,000.

(2) For purposes of this section, the micro-purchase threshold for procurement activities administered under sections 6303 through 6305 of title 31 by institutions of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), or related or affiliated nonprofit entities, or by nonprofit research organizations or independent research institutes is—

(A) \$10,000; or

(B) such higher threshold as determined appropriate by the head of the relevant executive agency and consistent with clean audit findings under chapter 75 of title 31, internal institutional risk assessment, or State law.

(b) COMPLIANCE WITH CERTAIN REQUIREMENTS AND NONAPPLICABILITY OF CERTAIN AUTHORITY.—

(1) COMPLIANCE WITH CERTAIN REQUIREMENTS.—The head of each executive agency shall ensure that procuring activities of that agency, when awarding a contract with a price exceeding the micro-purchase threshold, comply with the requirements of

section 8(a) of the Small Business Act (15 U.S.C. 637(a)), section 2323 of title 10, and section 7102 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355, 15 U.S.C. 644 note).

(2) NONAPPLICABILITY OF CERTAIN AUTHORITY.—The authority under part 13.106(a)(1) of the Federal Acquisition Regulation (48 C.F.R. 13.106(a)(1)), as in effect on November 18, 1993, to make purchases without securing competitive quotations does not apply to a purchase with a price exceeding the micro-purchase threshold.

(c) NONAPPLICABILITY OF CERTAIN PROVISIONS.—An executive agency purchase with an anticipated value of the micro-purchase threshold or less is not subject to section 15(j) of the Small Business Act (15 U.S.C. 644(j)) and chapter 83 of this title.

(d) PURCHASES WITHOUT COMPETITIVE QUOTATIONS.—A purchase with a price not greater than the micro-purchase threshold may be made without obtaining competitive quotations if an employee of an executive agency or a member of the armed forces, authorized to do so, determines that the price for the purchase is reasonable.

(e) EQUITABLE DISTRIBUTION.—Purchases with a price not greater than the micro-purchase threshold shall be distributed equitably among qualified suppliers.

(f) IMPLEMENTATION THROUGH FEDERAL ACQUISITION REGULATION.—This section shall be implemented through the Federal Acquisition Regulation.

TITLE 10, UNITED STATES CODE

~~§ 2338. Micro-purchase threshold~~

~~Notwithstanding subsection (a) of section 1902 of title 41, the micro-purchase threshold for the Department of Defense for purposes of such section is \$5,000.~~

1 **SEC. ____ TASK AND DELIVERY ORDER PROTEST DOLLAR THRESHOLD.**

2 Section 4106 of title 41, United States Code, is amended in subsection (f) by striking
3 “\$10,000,000” and inserting “\$25,000,000”.

Section-by-Section Analysis

This proposal would standardize the threshold for filing protests with the Government Accountability Office (GAO) in connection with the issuance, or proposed issuance, of task and delivery orders under multiple award task or delivery order contracts, irrespective of whether the contract or order was awarded by the Department of Defense (DoD) or a civilian agency. This action would help to simplify the acquisition process and avoid unnecessary complexity and litigation.

For almost 15 years after Congress formally codified multiple award task and delivery order contracts, protests of orders awarded under these contracts were limited to those arguing that the order increases the scope, period, or maximum value of the underlying contract. In 2008, Congress expanded the ability to file protests when it authorized the GAO to hear protests challenging task and delivery order solicitations and awards with an anticipated value of \$10 million or more. Following a brief lapse in the authority at the beginning of FY 2017, Congress restored the expanded the ability for prospective contractors to challenge civilian agency task and delivery orders valued at \$10 million. See Public Law 114-260; H.Rept. 114-779. However, less than two weeks later, Congress passed the National Defense Authorization Act for FY 2017 (P.L. 114-328), which included a provision raising the threshold to \$25 million for protesting task and delivery orders awarded by DoD, the National Aeronautics and Space Administration, and the Coast Guard. See section 835.

Unnecessary complexity and uncertainty results when different agencies are subject to inconsistent thresholds for application of GAO’s protest mechanism. DoD and civilian agencies use many of the same government-wide contract vehicles, such as GSA’s Alliant and OASIS government-wide acquisition contracts, and DoD often obtains contracting support from civilian agencies. As a result, unnecessary litigation is arising to sort out which, if any, orders are protestable at values between the two thresholds when orders are placed by DoD, NASA, or the Coast Guard on vehicles awarded by other agencies, either directly or by another agency on their behalf. Standardizing the threshold at \$25 million would avoid this unnecessary complexity, provide offerors with continued ability to avail themselves of the broadened protest authority for the most significant orders, and extend to civilian agencies the same modest protest reform that Congress provided to Defense, NASA, and the Coast Guard in the NDAA for FY 2017.

Budget Implications: There would be no budgetary impact for civilian agencies as a result of this legislative change because the proposal only addresses the protest threshold it would not increase the overall budget requirements of any Federal agency.

Changes to Existing Law: The proposal would amend section 4106(f) of title 41, United States Code, as follows:

§ 4106. ORDERS

* * * * *

(f) Protests.—

(1) Protest not authorized.—A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of ~~\$10,000,000~~ **\$25,000,000**.

1 **SEC. ____.** **REMOVAL OF RECOVERED MATERIALS CERTIFICATION**

2 **REQUIREMENT FOR CONTRACTORS OR SUBCONTRACTORS.**

3 Section 6002 of the Solid Waste Disposal Act (42 U.S.C. 6962), is amended—

4 (1) in subsection (c), by striking paragraph (3); and

5 (2) in subsection (i)(2)—

6 (A) by inserting “and” after the semicolon in subparagraph (B);

7 (B) by striking subparagraph (C); and

8 (C) by redesignating subparagraph (D) as subparagraph (C).

[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would eliminate statutory requirements in 42 U.S.C. 6962(c)(3) and (i)(2)(C) that require a federal contractor to certify that it will use recovered material in accordance with the terms of the contract and, following completion of the contract, estimate the percentage of recovered materials that were used or certify that it has met its contractual obligations. The basic requirement to use recovered materials remains unchanged. However, contractor estimates and certification required by 42 U.S.C. 6962(c)(3)) and (c)(3)(A)(ii) are unnecessary because compliance with the requirement to use recovered/recycled products can be verified through contract administration processes in accordance with Federal Acquisition Regulation (FAR) requirements, including through inspection, acceptance, and documentation. As part the review process, contracting officers can validate compliance by checking manufacturer's product documentation and [EPA's Comprehensive Procurement Guideline \(CPG\) Product Supplier Directory](#). Moreover, FAR clause 52.211-5 requires Government approval for a contractor to provide used, reconditioned, or remanufactured supplies, which puts the Government on notice when recovered materials are provided or used by a federal contractor.

Requiring the contractor to submit a separate certification and estimate places an additional burden on the contractor that is unnecessary and duplicative when the objective can be better achieved at a lower cost for the Government and contractors by providing agencies the flexibility to use normal contract administration activities for validating compliance and allowing contractors to demonstrate compliance using existing commercial practices.

Budget Implications: There would be no budgetary impact for civilian agencies as a result of this legislative change because the proposal only addresses removal of a certification requirement placed on contractors and would not increase the overall budget requirements of any Federal agency.

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Changes to Existing Law: The proposal would amend section 6002 of the Solid Waste Disposal Act (42 U.S.C. 6962) as follows:

FEDERAL PROCUREMENT

SEC. 6002. (a) APPLICATION OF SECTION.—Except as provided in subsection (b), a procuring agency shall comply with the requirements set forth in this section and any regulations issued under this section, with respect to any purchase or acquisition of a procurement item where the purchase price of the item exceeds \$10,000 or where the quantity of such items or of functionally equivalent items purchased or acquired in the course of the preceding fiscal year was \$10,000 or more.

* * * * *

(c) REQUIREMENTS.—(1) After the date specified in applicable guidelines prepared pursuant to subsection (e) of this section, each procuring agency which procures any items designated in such guidelines shall procure such items composed of the highest percentage of recovered materials practicable (and in the case of paper, the highest percentage of the postconsumer recovered materials referred to in subsection (h)(1) practicable), consistent with maintaining a satisfactory level of competition, considering such guidelines. The decision not to procure such items shall be based on a determination that such procurement items—

(A) are not reasonably available within a reasonable period of time;

(B) fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or

(C) are only available at an unreasonable price. Any determination under subparagraph (B) shall be made on the basis of the guidelines of the Bureau of Standards in any case in which such material is covered by such guidelines.

(2) Agencies that generate heat, mechanical, or electrical energy from fossil fuel in systems that have the technical capability of using energy or fuels derived from solid waste as a primary or supplementary fuel shall use such capability to the maximum extent practicable.

~~(3)(A) After the date specified in any applicable guidelines prepared pursuant to subsection (e) of this section, contracting offices shall require that vendors—~~

~~(i) certify that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements and~~

~~(ii) estimate the percentage of the total material utilized for the performance of the contract which is recovered materials.~~

~~(B) Clause (ii) of subparagraph (A) applies only to a contract in an amount greater than \$100,000.~~

* * * * *

(e) GUIDELINES.—The Administrator, after consultation with the Administrator of General Services, the Secretary of Commerce (acting through the Bureau of Standards), and the Public Printer, shall prepare, and from time to time, revise, guidelines for the use of procuring agencies in complying with the requirements of this section. Such guidelines shall—

(1) designate those items which are or can be produced with recovered materials and whose procurement by procuring agencies will carry out the objectives of this

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section, and in the case of paper, provide for maximizing the use of postconsumer recovered materials referred to in subsection (h)(1); and

(2) set forth recommended practices with respect to the procurement of recovered materials and items containing such materials and with respect to certification by vendors of the percentage of recovered materials used, and shall provide information as to the availability, relative price, and performance of such materials and items and where appropriate shall recommend the level of recovered material to be contained in the procured product. The Administrator shall prepare final guidelines for paper within one hundred and eighty days after the enactment of the Hazardous and Solid Waste Amendments of 1984, and for three additional product categories (including tires) by October 1, 1985. In making the designation under paragraph (1), the Administrator shall consider, but is not limited in his considerations, to—

- (A) the availability of such items;
- (B) the impact of the procurement of such items by procuring agencies on the volume of solid waste which must be treated, stored or disposed of;
- (C) the economic and technological feasibility of producing and using such items; and
- (D) other uses for such recovered materials.

* * * * *

(i) **PROCUREMENT PROGRAM.**—(1) Within one year after the date of publication of applicable guidelines under subsection (e), each procuring agency shall develop an affirmative procurement program which will assure that items composed of recovered materials will be purchased to the maximum extent practicable and which is consistent with applicable provisions of Federal procurement law.

(2) Each affirmative procurement program required under this subsection shall, at a minimum, contain—

- (A) a recovered materials preference program;
- (B) an agency promotion program to promote the preference program adopted under subparagraph (A);
- ~~(C) a program for requiring estimates of the total percentage of recovered material utilized in the performance of a contract; certification of minimum recovered material content actually utilized, where appropriate; and reasonable verification procedures for estimates and certifications; and~~
- ~~(D)~~ annual review and monitoring of the effectiveness of an agency's affirmative procurement program.

In the case of paper, the recovered materials preference program required under subparagraph (A) shall provide for the maximum use of the post consumer recovered materials referred to in subsection (h)(1).

(3) In developing the preference program, the following options shall be considered for adoption:

- (A) **Case-by-Case Policy Development:** Subject to the limitations of subsection (c)(1) (A) through (C), a policy of awarding contracts to the vendor offering an item composed of the highest percentage of recovered materials practicable (and in the case of paper, the highest percentage of the post consumer recovered materials referred to in subsection (h)(1)). Subject to such limitations, agencies may make an award to a vendor offering items with less than the maximum recovered materials content.

PRE-DECISIONAL INTERNAL EXECUTIVE BRANCH DRAFT

(B) Minimum Content Standards: Minimum recovered materials content specifications which are set in such a way as to assure that the recovered materials content (and in the case of paper, the content of post consumer materials referred to in subsection (h)(1)) required is the maximum available without jeopardizing the intended end use of the item, or violating the limitations of subsection (c)(1) (A) through (C). Procuring agencies shall adopt one of the options set forth in subparagraphs (A) and (B) or a substantially equivalent alternative, for inclusion in the affirmative procurement program.

1 **SEC. ____.** **AMENDMENTS RELATING TO SERVICE CONTRACT INVENTORY**
2 **REPORTING REQUIREMENTS.**

3 Section 743(a)(3) of Division C of the Consolidated Appropriations Act, 2010 (Public
4 Law 111-117; 123 Stat. 3216) is amended in the matter preceding subparagraph (A)—

5 (1) in the first sentence, by inserting “that have a value of more than \$3,000,000,
6 including all options,” in the first sentence before “awarded or extended through the
7 exercise of an option”; and

8 (2) in the second sentence, by inserting “covered” before “service contract”.

Section-by-Section Analysis

This provision is designed to reduce procurement reporting burdens on Federal contractors and civilian agencies by raising the applicability threshold of section 743 of Division C of the Consolidated Appropriations Act, 2010 (P.L. 111-117). Section 743 requires (i) contractors to report the total amount invoiced and the direct labor hours expended on covered contracts, (ii) civilian agencies to prepare and analyze inventories of the functions performed by their service contractors (including the total amount invoiced and direct labor hours expended), and (iii) the Office of Management and Budget to provide Congress with a summary of the agencies’ analyses. Despite the good intention underlying this provision, the inventory process has produced limited value for the significant amount of effort required of contractors and related work required of agencies. By raising the applicability threshold, contractors’ reporting burdens would be reduced. Additionally, the higher threshold is consistent with that in section 812 of the National Defense Authorization Act for FY 2017 for a similar requirement imposed on the Department of Defense in 10 U.S.C. 2330a. Finally, the Federal government could benefit from increased reliance on alternative approaches that are increasing insight into how agencies are using service contractors.

The purpose of the inventory is to help agencies better understand, by function, how contracted services are being used and if the mix of Federal employees and contractors for a given program is effectively balanced. Since the law was enacted, agencies have prepared inventories using a standard format and data sequence set forth in OMB guidance that has been updated periodically to highlight best practices, including recommendations made by the Government Accountability Office to improve the quality of reporting. The majority of agencies reviewed at least some work related to information technology, and many reviewed program management, professional support services and engineering and technical services. Several agencies also reviewed functions that are significant to their mission activities (e.g., the Department of Education studied debt collection services performed by its contractors and the Small Business Administration looked at credit reporting).

As part of its evaluation of paperwork burden under the Paperwork Reduction Act, the Federal Acquisition Regulatory Council determined that this reporting requirement creates almost 48,000 hours of burden annually on contractors. Despite this burden, service contract inventory data is likely to have only limited value as a general indicator, because contract reporting is currently based on the predominant service performed and requires contractors to report data that would not normally be required by the Government under firm fixed price contracts.

Since the law was enacted, a number of important steps have been taken to improve the government's ability to better understand how it is using contractor resources and consider how such resources are most effectively balanced with work performed by Federal employees. In particular:

- Agency insight into spending for common goods and services is being improved through the use of category management, a proven business practice where spending for common goods and services (including professional services) is supported by teams of subject matter experts share market intelligence specific to their category with the acquisition workforce so they can make better and more informed buying decisions to improve contracts and leverage government-wide solutions when it makes sense.
- Efforts have been taken to determine where common administrative services managed by Federal agencies might be consolidated or shared.
- Recent regulatory changes create standards for contracts to include uniform use of line items that will provide more details on what is being purchased. In addition, an ongoing migration to electronic invoicing will provide greater visibility and access to more granular data that will allow the Government to use information already reported by contractors to meet the majority of the SCI reporting requirement for prime contractors. These changes and ongoing efforts to transition to electronic invoicing will help ensure better transparency into and analysis of Federal contract pricing and purchasing activities.
- Reporting under the Digital Accountability and Transparency Act of 2014 (DATA Act) (P.L. 113-101) will provide agencies, oversight bodies, and the public the information on funds expended under all contracts.

By raising the applicability threshold to contracts over \$3,000,000 to match the level Congress set for the Department of Defense, relief would be provided for tens of thousands of contracts and the many entities that perform under them and agencies would rely instead on the alternative efforts described above for more meaningful insight.

Budget Implications: There would be no budgetary impact as a result of these legislative changes because the proposal is only an authorization and would not increase the overall budget requirements of the Department or any other Federal agency.

Changes to Existing Law: The proposal would amend section 743 of Division C of the

Consolidated Appropriations Act, 2010 as follows:

SEC. 743. (a) SERVICE CONTRACT INVENTORY REQUIREMENT.—

(1) GUIDANCE.—Not later than March 1, 2010, the Director of the Office of Management and Budget shall develop and disseminate guidance to aid executive agencies in establishing systems for the collection of information required to meet the requirements of this section and to ensure consistency of inventories across agencies.

(2) REPORT.—Not later than July 31, 2010, the Director of the Office of Management and Budget shall submit a report to Congress on the status of efforts to enable executive agencies to prepare the inventories required under paragraph (3), including the development, as appropriate, of guidance, methodologies, and technical tools.

(3) INVENTORY CONTENTS.—Not later than December 31, 2010, and annually thereafter, the head of each executive agency required to submit an inventory in accordance with the Federal Activities Inventory Reform Act of 1998 (Public Law 105–270; 31 U.S.C. 501 note), other than the Department of Defense, shall submit to the Office of Management and Budget an annual inventory of service contracts **that have a value of more than \$3,000,000, including all options** awarded or extended through the exercise of an option on or after April 1, 2010, for or on behalf of such agency. For each **covered** service contract, the entry for an inventory under this section shall include, for the preceding fiscal year, the following:

(A) A description of the services purchased by the executive agency and the role the services played in achieving agency objectives, regardless of whether such a purchase was made through a contract or task order.

(B) The organizational component of the executive agency administering the contract, and the organizational component of the agency whose requirements are being met through contractor performance of the service.

(C) The total dollar amount obligated for services under the contract and the funding source for the contract.

(D) The total dollar amount invoiced for services under the contract.

(E) The contract type and date of award. H. R. 3288—184

(F) The name of the contractor and place of performance.

(G) The number and work location of contractor and subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract.

(H) Whether the contract is a personal services contract.

(I) Whether the contract was awarded on a noncompetitive basis, regardless of date of award.

1 **SEC. ____.** **USE OF INTERAGENCY ACQUISITIONS.**

2 (a) **IN GENERAL.**—Section 865(b)(1) of the National Defense Authorization Act for Fiscal
3 Year 2009 (Public Law 110-417; 122 Stat. 4550) is amended—

4 (1) by striking subparagraph (B); and

5 (2) by redesignating subparagraph (C) as subparagraph (B).

6 (b) **CLERICAL AMENDMENT.**—The heading of such section is amended by striking
7 “**CONTRACTS**” and inserting “**ACQUISITIONS**”.

Section-by-Section Analysis

This proposal seeks to improve the efficiency of federal contracting by rescinding a portion of section 865 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417), which requires contracting officers to make a determination that an interagency acquisition is the best procurement alternative before placing an order over \$550,000 against Federal Supply Schedule (FSS) contracts, or before placing any order against government-wide acquisition contracts or multi-agency contracts (regardless of dollar value). This requirement runs contrary to more recent Congressional direction and Government Accountability Office (GAO) recommendations for agencies to leverage purchasing power via interagency acquisition and to reduce unnecessary contract duplication.

Section 865 was enacted during a period when the management of interagency contracting was on the GAO High-Risk List. To address this risk, the Office of Management and Budget (OMB), the Federal Acquisition Regulatory Council, and agency Chief Acquisition Officers and Senior Procurement Executives pursued a number of strong corrective actions. These steps included: (1) issuance of a model interagency agreement to help agencies map out the respective roles and responsibilities played by servicing and customer agencies in awarding and managing interagency acquisitions; (2) comprehensive revisions to the Federal Acquisition Regulation to help agencies more effectively use interagency contracts; (3) guidance on developing, reviewing and approving business cases for interagency acquisitions; and (4) the creation of a council to facilitate coordinated procurement of common goods and services.

In removing the management of interagency contracting from the High-Risk List in 2013, GAO reaffirmed the central role of interagency acquisition in promoting efficiencies, and acknowledged that a variety of safeguards are in place to reduce risk. More importantly, GAO pushed the Executive Branch to make greater use of strategically sourced contract vehicles. Specifically, in its October 2016 report, *Smarter Buying Initiatives Can Achieve Additional Savings, but Improved Oversight and Accountability Needed*, <http://www.gao.gov/assets/690/680634.pdf>, GAO recommended that agencies set specific use targets and metrics to facilitate greater adoption of vehicles and solutions developed through

category management, a proven business practice where spending for common goods and services is supported by teams of subject matter experts who use their deep market intelligence to help agencies make better and more informed buying decisions and leverage government-wide solutions when they make sense. The GAO recommendation is consistent with a push by Congress, in section 836 of the NDAA for FY 2015 (Public Law 113-291), which requires contracting officers to justify any decision not to use a Federal Strategic Sourcing Initiative (FSSI) vehicle when one is available to meet their requirements. This proposal to rescind a portion of section 865 of the NDAA for FY 2009 supports recent GAO recommendations, and is consistent with section 836 of the NDAA for FY 2015; all encourage greater use of interagency solutions.

Although some members of the small business community have suggested that the requirement to justify interagency contracting as the best procurement alternative serves as a protection for small business participation because small businesses tend to fare well in open market transactions (i.e., the alternative to using existing interagency and strategically sourced vehicles), this suggestion is misplaced. Agencies remain responsible for meeting their small business contracting goals under the Small Business Act, irrespective of the extent to which they use interagency contracts. The removal of parts of section 865 would not, in any way, change this responsibility. In fact, buying trends through interagency vehicles evidence healthy small business participation: the percentage of dollars going to small businesses under FSS contracts increased from 33% in 2011 to 41% in 2016. In addition, managers of interagency contracts are statutorily required to address the interests of small businesses if a planned action constitutes a contract consolidation or bundling.

Budget Implications: There would be no budgetary impact for civilian agencies as a result of this legislative change because the proposal only addresses a policy preference and does not affect the overall budget requirements of agencies.

Changes to Existing Law: Section 865 of the NDAA for FY 2009, Public Law 110-417, is amended to read as follows:

SEC. 865. PREVENTING ABUSE OF INTERAGENCY CONTRACTS ACQUISITIONS.

(a) OFFICE OF MANAGEMENT AND BUDGET POLICY GUIDANCE.—

(1) REPORT AND GUIDELINES.—Not later than one year after the date of the enactment of this Act, the Director of the Office of Management and Budget shall— (A) submit to Congress a comprehensive report on interagency acquisitions, including their frequency of use, management controls, cost-effectiveness, and savings generated; and (B) issue guidelines to assist the heads of executive agencies in improving the management of interagency acquisitions.

(2) MATTERS COVERED BY GUIDELINES.—For purposes of paragraph (1)(B), the Director shall include guidelines on the following matters:

(A) Procedures for the use of interagency acquisitions to maximize competition, deliver best value to executive agencies, and minimize waste, fraud, and abuse.

- (B) Categories of contracting inappropriate for interagency acquisition.
- (C) Requirements for training acquisition workforce personnel in the proper use of interagency acquisitions.

(b) REGULATIONS REQUIRED.—

(1) IN GENERAL.—Not later than one year after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to require that all interagency acquisitions—

(A) include a written agreement between the requesting agency and the servicing agency assigning responsibility for the administration and management of the contract;

~~(B) include a determination that an interagency acquisition is the best procurement alternative; and~~

~~(C)~~ include sufficient documentation to ensure an adequate audit.

(2) MULTI-AGENCY CONTRACTS.—Not later than one year after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to require any multi-agency contract entered into by an executive agency after the effective date of such regulations to be supported by a business case analysis detailing the administration of such contract, including an analysis of all direct and indirect costs to the Federal Government of awarding and administering such contract and the impact such contract will have on the ability of the Federal Government to leverage its purchasing power.

(c) AGENCY REPORTING REQUIREMENT.—The senior procurement executive for each executive agency shall, as directed by the Director of the Office of Management and Budget, submit to the Director annual reports on the actions taken by the executive agency pursuant to the guidelines issued under subsection (a).

(d) DEFINITIONS.—In this section:

(1) The term “executive agency” has the meaning given such term in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1)), except that, in the case of a military department, it means the Department of Defense.

(2) The term “head of executive agency” means the head of an executive agency except that, in the case of a military department, the term means the Secretary of Defense.

(3) The term “interagency acquisition” means a procedure by which an executive agency needing supplies or services (the requesting agency) obtains them from another executive agency (the servicing agency). The term includes acquisitions under section 1535 of title 31, United States Code (commonly referred to as the “Economy Act”), Federal Supply Schedules above \$500,000, and Government wide acquisition contracts.

(4) The term “multi-agency contract” means a task or delivery order contract established for use by more than one executive agency to obtain supplies and services, consistent with section 1535 of title 31, United States Code (commonly referred to as the “Economy Act”).