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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 20, 2008

The Honorable Jim Nussle
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Mr. Nussle:

We are concerned about a proposed change to federal contracting rules that would exempt overseas contracts from a requirement that the contractor detect and prevent fraud and report it to the government. At a time when the United States is engaged in wars in Iraq and Afghanistan, conducting extensive redevelopment programs in both countries, and employing the services of an unprecedented number of private contractors, preventing fraud by contractors overseas should be a high priority. Instead, the exemption for contracts to be performed overseas appears to have been inserted in the rule late in the process and against the wishes of the Department of Justice, which raises serious questions as to why and how such a policy was developed.

On May 23, 2007, the Department of Justice (DOJ) requested that the Federal Acquisition Regulation be amended to “require contractors to establish and maintain internal controls to detect and prevent fraud in their contracts, and that they notify contracting officers without delay whenever they become aware of a contract overpayment or fraud, rather than wait for its discovery by the government.” DOJ believed such a rule was necessary because few government contractors voluntarily disclose suspected instances of fraud. DOJ proposed specific changes to the Federal Acquisition Regulation.¹

In response, on November 14, 2007, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a proposed rule on “Contractor Compliance Program and Integrity Reporting.”² This rule requires contractors to have a code of ethics and

¹ Letter from Assistant Attorney General Alice Fisher to Administrator for Federal Procurement Policy Paul Denett (May 23, 2007).

² 72 Fed. Reg. 64019, FAR Case 2007-006 (Nov. 14, 2007).

business conduct, to establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of government contracts or subcontracts, and to notify contracting officers without delay whenever they become aware of violations of Federal criminal law with regard to such contracts or subcontracts. The proposed changes to the Federal Acquisition Regulation closely track the DOJ proposal, with two primary substantive changes: the exemption for contracts to be performed overseas and a second exemption for contracts for commercial items.

On January 14, 2008, DOJ filed a comment on the proposed rule stating that “we do not agree with” the exemption for overseas contracts. According to DOJ, “[a]lthough these contracts may be performed outside the United States, the United States still is a party to these contracts and potentially a victim when overpayments are made or when fraud occurs in connection with the contracts. Under these circumstances, the government still maintains jurisdiction to prosecute the perpetrators of the fraud. Moreover, these types of contracts, which in many cases support our efforts to fight the global war on terror, need greater contractor vigilance because they are performed overseas where U.S. government resources and remedies are more limited.”³

The addition of the exemption for overseas contracts against the wishes of the Justice Department, as well as the exemption for commercial items, raises questions as to why and how these provisions were added to the new rule proposed by DOJ.

To assist the Committee in its review of this proposed rule and related legislation, we ask that you provide the following documents to the Committee no later than April 4, 2008. At this point, only documents created on or before November 14, 2007, need to be provided to the Committee:

1. Any documents received from or sent to persons outside the executive branch relating to the overseas exemption or the commercial item exemption;
2. Any documents describing the reasons or justification for the overseas exemption or the commercial item exemption or urging the inclusion of the overseas exemption or the commercial item exemption in the proposed rule; and
3. Any documents objecting to the overseas exemption or the commercial item exemption or urging the exclusion of the overseas exemption or the commercial item exemption from the proposed rule.

The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives, with broad investigative jurisdiction as set forth in

³ Letter from Assistant Attorney General Alice Fisher to GSA Regulatory Secretariat (Jan. 14, 2008).

The Honorable Mr. Nussle
March 20, 2008
Page 3 of 3

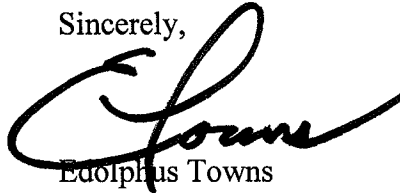
House Rule X. An attachment to this letter provides additional information about how to respond to the Committee's request.

If you have any questions, please contact Mike McCarthy at (202) 225-3741.

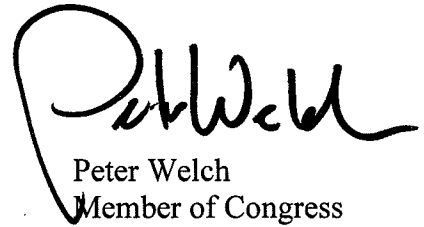
Sincerely,



Henry A. Waxman
Chairman
Committee on Oversight and
Government Reform



Edolphus Towns
Chairman
Subcommittee on Government
Management, Organization and
Procurement



Peter Welch
Member of Congress

Enclosure