Department of Commerce-Office of General Counsel

# CONTRACT LAW DIVISION

**Office of the Assistant General Counsel for Finance & Litigation**

**A Lawyer's View of Walsh-Healey**

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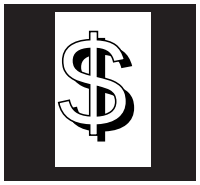
Assistant General Counsel for Finance & Litigation

## A Lawyer's View of the Walsh-Healey Act

**by Jeff Hughes**

### Introduction

A young co-worker recently told my wife of his newest get-rich-quick scheme. It seems he had heard that the Government would pay incredibly high prices, like "$10,000,000 for a hammer." He decided he would bid $5000 to sell computers and then buy them for $1000, for a clear profit of $4000 per computer. "I just need a truck to deliver them," he mused. Besides "minor" obstructions like "competition" and "responsibility," he would have a major problem in selling more than $10,000 of computers to the Government - the Walsh-Healey Act..



Many of us see the Walsh-Healey provisions in contracts or solicitations every day with little idea of its importance or practical value. The Walsh-Healey Act is a labor statute intended to protect American workers and qualified employers and ensure compliance with such matters as minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions. The intent is to ensure that the Government is not supporting the operation of "sweat shops" within the United States, Puerto Rico, or the Virgin Islands. Additionally, the intent is to prevent the use of "bid brokering," where a contractor obtains a contract and then "sells" the subcontract to another business in that line of work without adding any value.

In a recent GSBCA protest of a NOAA ADP procurement, the Board allowed an offeror to carry his protest forward to a hearing, despite the fact that pre-hearing testimony showed his Walsh-Healey certification that he was a regular dealer to be specious. The protest was ultimately denied on other grounds. Given the Board's position that it does not have jurisdiction over such matters, the Government has an interest to raise such matters as early as possible, before a protest is asserted. Additionally, regulations underlying the Walsh-Healey Act ("Act") were revised significantly last summer. This article is intended to review the provisions of the Act and of the amended regulations.

### Applicability

The first step in the process is to determine the applicability of the Act to your contract. The Act generally requires all federal agencies to enter supply contracts over $10,000 only with manufacturers or regular dealers of the supplies sought and to require a representation that the contractor is a manufacturer or a regular dealer of the supplies being procured.

The Act is implemented by Department of Labor (DOL) regulations, many of which may be found in FAR Subpart 22.6. The requirements of the Act do not apply to "open market" purchases which have been expressly authorized by another statute; to purchases made under the "unusual and compelling urgency" competition exception of FAR 6.303-2; to many food and agricultural items; to public utility services; to supplies manufactured outside of the U.S., Puerto Rico, or the Virgin Islands; to reprocurements if the original contract did not include Walsh-Healey; and to the purchase of publications which are to be delivered by the publishers. Other contracts listed in the regulation are exempted in part from the Act.

If the Act will apply to the contract, the solicitation must include FAR 52.222-19, Walsh-Healey Public Contract Act Representation, and the solicitation and contract must contain FAR 52.222-20, Walsh-Healey Public Contract Act.

The contracting officer must obtain a representation that the offeror is a manufacturer or regular dealer if the solicitation may lead to a contract subject to the Act, FAR 22.608-1. If the representation indicates that an offeror is not a manufacturer or a regular dealer of the supplies offered or if the offer qualifies or places a reservation on the representation or stipulations of the Act to avoid full compliance, the Contracting Officer must reject the offer. The focus of the Contracting Officer's determination of eligibility

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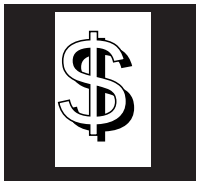
***A Lawyer's View*** is a monthly publication of the Contract Law Division designed to give practical advice to the Department's procurement officers. Comments, criticisms, and suggestions for future topics are welcome.—Call Jerry Walz at FTS 202-482-1122, or via e--mail to Jerry Walz@OGCMAC@OSEC

is on the offeror's legal entity. The capabilities of parent corporations, affiliates, or proposed subcontractors do not affect the determination.

The Contracting Officer, however, may generally rely on the offeror's representation that it is a regular dealer or a manufacturer. Nevertheless, if the Contracting Officer has knowledge that raises a question as to the validity of the representation; a protest as to eligibility has been brought; the offeror in line for contract award has not previously been awarded a supply contract over $10,000 by that procurement office; or if a preaward survey or investigation of the offeror's operations is made to determine the capabilities of the offeror; then the Contracting Officer must investigate and determine the eligibility of the offeror, FAR 22.608-2.



Having enough knowledge to question the validity of the representation is often difficult. In the NOAA procurement mentioned above, NOAA personnel knew that the protester had never had a supply contract with NOAA and that it had never sold the item being procured before, but did not know what other contracts or sales the protester had previously made until its president testified before trial.

In negotiated procurements, contracting officers should develop their knowledge of an offeror's qualifications where there is any indication that the offeror may not meet the requirements of the Act or where the offeror has not previously had a supply contract covered by the Act from that procurement office. As previously noted, an offeror can qualify as a manufacturer or as a regular dealer.

### Manufacturer

FAR 22.601 states that a manufacturer owns, operates, or maintains a factory or establishment that produces on the premises the contract supplies. A manufacturer can be an established manufacturer with a plant, equipment, and personnel that can manufacture the supplies needed on its premises; or a "newly entering" firm that has obtained written, legally binding commitments and made arrangements for plant, equipment, and personnel so as to be able to manufacture the supplies on its premises.

It is not enough to be able to use, rent or share the manufacturing facilities of another on a time and material or as-needed basis. For example, a deed in the name of the offeror, or a lease agreement for the exclusive and unrestricted use of the space, in the offeror's name, with a term long enough for the offeror to perform the contract, would be satisfactory evidence of manufacturing facilities. On the other hand, a letter of intent for space or equipment, vendor quotes for such, or an affidavit that a sale has occurred, would not be sufficient evidence in the eyes of DOL, 41 CFR § 50-206-51.

Activities such as engineering, planning, design, inspection, quality control, testing, marking, packaging, and repackaging and shipping are not "manufacturing," even in combination. Assembly operations, however, may be enough to make a firm a manufacturer if it performs substantial or significant assembly of end items on its premises using machines, tools, and workers; or if it possesses the facilities to produce on its premises a significant portion of the required component parts, even if it only assembles parts under the contract.

### Regular Dealer

In the case of a "regular dealer," a firm must own, operate, or maintain a store, warehouse, or other establishment in which supplies of the general character set forth in the specifications and required by the contract are bought, kept in stock, and sold to the public in the usual course of business. A stock of display or sample items does not qualify, nor does one maintained just to comply with the Act. Additionally, sales have to be made regularly from stock on a recurring basis and to members of the public, not just to Government agencies, as a usual part of the business. Unlike the manufacturer category, the regular dealer must be an established business, not a start-up operation. The NOAA protester cited its sale of a single system to an acquaintance to support its claim to being an established business that made regular sales to the public.

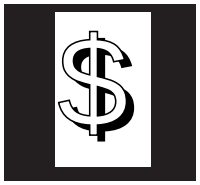
### Information Systems Integrator

The recent change in this area relates to an additional subcategory added to "regular dealer" for certain ADP contracts, effective August 17, 1992, 57 F.R. 31566. The revised defini-

tion was approved for inclusion in the FAR on January 29, 1993. The new subcategory is entitled "information systems integrator."

"Information systems integrator" is defined as:

> a person or firm that owns, operates or maintains an established business which is engaged in contracting to provide fully operational information processing systems, comprised of 'Federal information processing resources' ["FIPR"] as defined in 41 CFR 201-4.001, that meet the contracting agency's designated information processing needs and program objectives stated in terms of functional, performance, and/or design requirements.



An "information systems integrator" may only qualify as a regular dealer as to certain contracts. The contracts must meet the following criteria: (1) the agency solicits to acquire a fully operational information processing system; (2) the purchase description and system specifications are not expressed in a form so restrictive that only a specific make or model of a product, or a particular feature of a product peculiar to one manufacturer, would meet the Government's needs, but rather are expressed in terms which delineate functional, performance or design requirements provided they constitute the best statement of agency needs in a particular procurement; (3) the contractor assumes the responsibility for designing, delivering, implementing, and testing (and where required by the contract), maintaining a fully operational information processing system that meets the agency's designated specifications; and (4) the contractor bears the risk of, and is responsible to the agency for correcting, any system deficiencies or component failures regardless of the manufacturer of the component or components involved.

The regulation goes on to state that an information systems integrator will, in accordance with the contract, perform substantially all of the following functions: (1) analyze the agency's requirements and needs; (2) assess currently-available technological offerings and identify/evaluate alternative systems designs; (3) determine the composition of the system; (4) select and deliver the FIPR; (5) customize, modify or configure components (hardware, software, and supporting equipment) if necessary to satisfy inter-connectibility and compatibility requirements and the agency's specialized information processing needs; and (6) assemble, install, test, implement, and render operational the final information processing system. It is not enough for a vendor to perform these functions. They must be contract requirements for this definition to apply..

This regulatory change was intended to benefit systems integrators, who did not manufacture systems, and found it difficult to meet the requirement to have an establishment in which computers were kept in stock and sold to the public in the usual course of business. Systems integrators usually don't keep computers in stock for individual sale. They design a complete system, buy what they need to install this system, and don't have a need generally to keep any computers in stock for individual sale.

It is important to note that this is a narrow exception, which by definition applies only to "information systems integrators" in connection with systems integration contracts. In the case of the GSBCA protester, the item being procured was a memory subsystem, not a fully operational information processing system, and only one or two of the six tasks listed above were required by the contract.

### Agents

While "bid brokering" is prescribed, FAR 22.607 allows a "regular dealer" or "manufacturer" to bid, negotiate, and contract through an authorized agent if the agency is disclosed and the agent acts and contracts in the name of the principal. Failure to describe in an offer that the offeror is acting as an agent to contract in the name of the principal may not be cured after the closing date for proposals, because this would constitute an improper transfer of a proposal. *WorldWide Parts, Inc.*, B-244793, 91-2 CPD ¶ 156. Additionally, brokers who sell foreign-made goods consigned directly to the Government do not need to qualify as regular dealers since the transaction is not under the Act. However, if the foreign-made goods are to be delivered to the Government by the agent, this exception does

not apply. *Mark Turulski*, B-245592, 92-1 CPD ¶ 65.

### Determinations of Eligibility

If a protest as to eligibility is brought under FAR 22.608-3, the Contracting Officer must promptly notify the apparently successful offeror and the protester in writing that relevant evidence can be submitted within 10 working days.

In all eligibility determinations including those induced by protest, the next step is the Contracting Officer's determination, based upon evidence submitted by the offeror, information from preaward surveys, other contracting offices, the responsible contract administration office, and such other factual evidence that may be necessary to determine whether the eligibility requirements have been met, including an on-site survey conducted for this purpose. Other factual evidence would include information from the protester in the case of a protest.

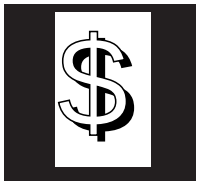
If the Contracting Officer determines that an apparently successful offeror that is not a small business is ineligible, the offeror is notified in writing that it does not meet the eligibility requirements for certain specified reasons.

If the determination is the result of a protest, both the protester and the offeror are notified, and either can have the determination reviewed. If the offeror is not a small business or if it is found eligible, the final determination is made by the Department of Labor. If a small business has been found ineligible, the determination is forwarded to the SBA Regional Office for review.

If the determination was not precipitated by a protest, the offeror is allowed to protest an adverse determination by submitting evidence of its eligibility within ten working days. If the evidence does not change the Contracting Officer's mind, the offeror's protest and all pertinent material is forwarded to the Department of Labor for a final determination, except in the case of a small business. If a small business is found ineligible, the determination is forwarded to the SBA regardless of whether or not the offeror has protested. The SBA may disagree with the Contracting Officer and issue a Certificate of Competency, FAR 19.601(c), or may agree and forward the case to the Department of Labor for final determination.

If an offeror's case is forwarded to the SBA for review, the Contracting Officer may not make award until receipt of a Determination of Eligibility (see FAR Subpart 19.6) from SBA or notice that SBA has forwarded the case to the Department of Labor. Any reason for urgency should be described in a statement to the SBA.

When either the Contracting Officer or the SBA forwards the case to the Department of Labor, the Contracting Officer may award before a final determination if he or she certifies in writing that the items to be acquired are urgently needed or that delay in award will result in substantial hardship to the Government.



Upon award, the Contracting Officer furnishes the awardee with DOL Publication WH-1313, Notice to Employees Working on Government Contracts.

Post award protests before contract completion are handled like preaward protests. After contract completion, no action will be taken on any protests received.

If the Contracting Officer finds that the awardee did not act in good faith in representing itself as a manufacturer or regular dealer of the offered supplies, he or she may immediately terminate the contract, purchase the supplies on the open market or enter into other contracts to obtain the supplies required under the original contract, and charge any additional cost to the contractor. If the contractor violates the stipulations of the Act, the Contracting Officer shall notify the DOL.

### Conclusion

While the Walsh-Healey provisions occupy only a tiny portion of a solicitation's text, they play a major role in protecting the Government, qualified companies, and American workers. Contracting personnel should maintain awareness of the Act throughout the procurement process to ensure that only qualified vendors receive government contracts.