We've discussed the Weapon Systems Acquisition Reform Act (WSARA) (P.L. 111-23) before, notably **here** and **here**. You can find a nice summary of the recent law **over here**.

Section 202 of WSARA requires the Secretary of Defense to (among other actions) "ensure fair and objective `make-buy' decisions by prime contractors on major defense acquisition programs." According to Senator Levin's analysis, this requirement was driven by a July 2008 Defense Science Board report that " consolidation in the defense industry has substantially reduced innovation in the defense industry and created incentives for major contractors to maximize profitability on established programs rather than seeking to improve performance."

The requirement assumes that prime contractors would rather vertically integrate that subcontract work to outside entities. It also assumes that competition—or the threat of competition—will spur defense contractors at all tiers in the program supply chain to better performance.
Of particular note, this Section of the law assumes that "government oversight of [contractor] make-or-buy decisions" will "maximize competition t hroughout the life of a program," including maximizing competition a lower tiers in the supply chain.

While you cogitate on those dubious assumptions, we'll let you know that on February 24, 2010, the Defense Department published DFARS Case 2009-D014 implementing Section 202 of WSARA as an "interim rule with request for comments." Here is a link to the entire Federal Register **Notice** .

The interim rule notes that it is simply a change to "internal Government operating procedures," and thus should not significantly impact contractors. You may not agree with that assessment—but remember it applies only to acquisitions of "major defense acquisition programs" (MDAPs) as that phrase is defined at **10 U.S.C. 2430** .

Here are some highlights of the interim rule:

· Acquisition plans for MDAPs must include measures that "ensure competition at both the prime contract level and subcontract level (at such tier or tiers as are appropriate…."

· "Require prime contractors to give full and fair consideration to qualified sources other than the prime contractor for the development or construction of major subsystems and components of major weapon systems ."

· "Provide for Government surveillance of the process by which prime contractors consider such sources and determine whether to conduct such

development or construction in-house or through a subcontract ."

· "Provide for the assessment of the extent to which the prime contractor has given full and fair consideration to qualified sources in sourcing decisions as a part of past performance evaluations. "

A couple of quick comments on the foregoing. First, there is little or no basis to think that prime contractors aren't subbing-out work. The plain fact is that most MDAP prime contractors only self-perform about 10 to 20 percent of the program; the rest is subbed-out. (Granted, some of that "subcontracted effort" is going to other divisions of the prime.) Second, make-buy decisions are *already* reviewed during DCMA Contractor Purchasing System Reviews (CPSRs). In reality, then, these efforts aren't going to make much a difference. So who cares, right?

Well, what worries us is the language that seems to suggest that the government oversight can go beyond the prime contractor's efforts, and evaluate make-or-buy decisions at lower tiers in the program supply chain. It is possible that a second-tier, third-tier, or even lower tier's make/buy analysis could be subject to DCMA scrutiny. Why is that a problem?

First, the government has no privity of contract with those lower-tier contractors. In other words, the contracts are between the performing entity and its next higher-tier, and the government is not a party to that agreement and has precious few enforcement rights. For example, if a second-tier entity commits defective pricing, the government's remedy is at the prime contractor level, not at the tier where the actual violation occurred. If the prime wants to be made whole, then it has to take its subcontractor to court. So how does the Government get rights to the lower tier subcontractors with respect to implementing its oversight of the make/buy decisions, and what does it do if it doesn't like what it finds?

To be litigated, we assume.

Second, where does DCMA get the resources to implement the requirements of this public law ? The Commission on Wartime Contracting in Iraq and Afghanistan (about whom we've posted more than a few art icles) had this to say about the subject in its Special Report No. 1 ("Defense A gencies M ust I mprove T heir O versight of C ontractor B usiness S ystems to R educe Waste, F raud, and A buse ") :

There have been too few experts to conduct reviews and too few personnel to validate that contractor corrective action was properly implemented. … Another indication of personnel shortages is the small number of DCMA personnel devoted to contractor purchasing system reviews (CPSR). The number of personnel assigned to perform CPSR reviews has decreased from 102 in 1994 to 70 in 2002, to 14 in 2009. Contract transactions, on the other hand, have increased by 328 percent since fiscal year 2000. This steep decline in personnel, combined with the exponential increase in contracting activity, demonstrates a diminishing level of DCMA critical analysis of contractor purchasing systems.

So, with only 14 heads to perform CPSR reviews, DCMA is going to take on the added challenge of reviewing not only prime contractor make-or-buy decisions, but also the make/buy analyses of the lower tier subcontractors as well? Sure. No problem.

And the results of those analyses will be reported in the year 2220, if ever.

As readers know, we here at Apogee Consulting, Inc. are very much in favor of improved contract performance. We are also in favor of improved subcontractor management. And we believe that the defense industry can do a lot better than it currently does in both of those domains. Yet we are forced to question whether this aspect of WSARA will significantly address any shortfalls. We believe the odds are that this will simply become another bureaucratic report-writing exercise, diverting resources from where they are really needed.

If you agree with our assessment, perhaps you will let the Ms. Meredith Murphy of the DAR Council know by submitting your comments in accordance with the directions specified in the interim rule (link above).