

WAXMAN ATTEMPTS TO PLUG TRUCK-SIZED LOOPHOLE FOR THEFT

Remember that truck-sized loophole for theft the Bush Administration created? The one that takes a rule that says contractors have to reveal contracting fraud, and adds a loophole for anyone doing business outside the US? Well, Waxman is on it:

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.

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.” This rule requires contractors to have a code of ethics and 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."

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. [my emphasis]

I'm most intrigued by the addressees of Waxman's letter—it includes several people whom he has tussled with before:

- Secretary of Defense Gates
- Attorney General Mukasey
- National Aeronautics and Space (NASA) Administrator Griffin
- Office of Management and Budget (OMB) Director Nussle
- General Services Administration (GSA) Administrator Doan

Of course, Doan is working with the certitude that if she does—or did—anything to stick this loophole in the rule, she still won't be fired. She was busted for violating the Hatch Act already, of course, but President Bush pointedly ignored those violations, which would normally require her termination.

Any bets on the culprit?