

# CRS Report for Congress

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## Services Acquisition Reform Act of 2003: Selected Provisions

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### Summary

The Services Acquisition Reform Act (SARA) of 2003 (H.R. 1837) was introduced by Congressman Tom Davis, for himself and for Congressman Duncan Hunter, on April 29, 2003. Subsequent to being reported out of committee, portions of H.R. 1837 were incorporated into H.R. 1588 (see footnote 1 below). If enacted, this bill would, among other things, establish an acquisition workforce training fund, provide agency heads authority to appoint individuals directly to acquisition positions, allow Federal Prison Industries products and services to be subjected to competition, grant “other transaction” authority to agencies, amend certain procurement provisions of the Homeland Security Act (P.L. 107-296), prohibit the use of competitive sourcing targets unless they were based on considered research and analysis, and require public disclosure of information about contracts awarded under other than full and open competition for the reconstruction of Iraq.

### Introduction

The Services Acquisition Reform Act (SARA) of 2003 (H.R. 1837) was introduced by Congressman Tom Davis, for himself and for Congressman Duncan Hunter, on April 29, 2003. The House Government Reform Committee held a hearing on April 30, 2003, and proceeded to mark-up on May 7, 2003. By a vote of 22 to 18, the bill, as amended, was ordered reported.<sup>1</sup>

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<sup>1</sup> Subsequent to H.R. 1837 reported out of committee, portions of it were incorporated into H.R. 1588. Notably, H.R. 1588 includes provisions dealing with acquisition workforce training and recruitment, chief acquisition officers, statutory and regulatory review, protests, architectural and engineering services, telecommuting for federal contractors, contract incentives, commercial items, “other transactions” authority, adjustments to the simplified acquisition threshold, competitive sourcing targets, and the public disclosure of noncompetitive contracts awarded for the reconstruction of Iraq. On May 14, 2003, the House Committee on Armed Services ordered H.R. 1588 to be reported.

## Selected Provisions

### Acquisition Workforce Training

Section 102 would amend 41 U.S.C. 433 by adding language, to the paragraph on education and training, that would require the establishment of an acquisition workforce training fund. This provision would establish a fund to be used to support the training of the acquisition workforce of executive agencies, except the Department of Defense (DOD). Five percent of the fees agencies collect under certain contracts would be deposited in the fund, which would be managed by the Administrator of General Services through the Federal Acquisition Institute (FAI).

Given the complexity of acquisition procedures, the dynamic nature of the field, and the continuing need for qualified personnel, proponents argue a training fund could aid in developing and maintaining the federal government's capability in this area. Possible implications include expanding the scope of FAI's offerings, supplementing agency funds used for acquisition training,<sup>2</sup> or developing new types or methods of training.

### Direct Appointment to Acquisition Positions

Section 104 would allow agency heads, upon determining that a personnel shortage exists for certain acquisition positions, to recruit and appoint directly highly qualified individuals. A highly qualified individual is identified, in Section 104, as someone who holds a bachelor's degree; a law degree; or a master's or equivalent degree in business administration, public administration, or systems engineering; or has significant experience with commercial acquisition processes and terms. Program implementation would follow policies prescribed by the Office of Personnel Management (OPM). The Office for Federal Procurement Policy (OFPP) would submit a report to Congress by March 31, 2007, and no one could be appointed to a position under this section after September 30, 2007.

By allowing agency heads to bypass the procedures usually used for recruiting and hiring federal government employees, Section 104 could enable agencies to hire people relatively quickly. Thus, direct appointment authority could help an agency address an urgent need while ensuring that it does not lose a candidate who might not be willing to undergo the normal hiring process, which is viewed as time-consuming.

On the other hand, a direct appointment process might not include the usual safeguards or constraints, some of which are designed to foster diversity, and would not be based on competitive procedures. Additionally, there is no indication that direct hire authority would improve upon the traditional hiring process with respect to identifying and hiring "highly qualified" candidates (i.e., candidates who possess certain academic degrees or experience, as mentioned above). These criteria also could be incorporated in a traditional job announcement.

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<sup>2</sup> Under 41 U.S.C. 433(h), agency heads are required to request, and maintain, funds dedicated to the education and training of acquisition personnel. This paragraph also allows the head of an executive agency to provide tuition reimbursement for personnel serving in acquisition positions.

## Federal Prison Industries

Part 8 of the *Federal Acquisition Regulation* (FAR) provides guidance concerning required sources of certain supplies and services. Federal Prison Industries, Inc. (FPI), also known as Unicor, is third on a list of required sources that are listed in descending order of priority.<sup>3</sup> An agency may purchase supplies from some other source, but, before it can do so, the agency must receive clearance from FPI. Under certain circumstances, such as a need for immediate delivery or performance, a clearance is not required.<sup>4</sup>

Section 215, which would add a new section to Title 41, Chapter 4, Subchapter IV, would give civilian agencies the same flexibility that the Department of Defense<sup>5</sup> has to use market research to determine whether FPI products are comparable to products available from the private sector in terms of price, quality, and time of delivery. An agency would not be required to purchase any FPI product or service that was not comparable, in terms of price, quality, and time of delivery, to items found in the private sector. Section 215 also would prohibit review of a market research determination pursuant to 18 U.S.C. 4124(b), would not require contractors to use FPI as a subcontractor or supplier, and would permit an agency to decline entering into a contract with FPI if an inmate worker would have access to classified, sensitive, or personal information.

Support for FPI, and its objective of training and employing federal prisoners,<sup>6</sup> and a preference on the part of agencies for products and services that are reasonably priced, of good quality, and delivered in a timely fashion, are two important aspects of federal procurement. This section appears to be an effort to address both. If enacted, it might be useful to examine the outcomes and consequences of implementation within a year or two of implementation.

### “Other Transactions” Authority

Section 501 would amend 41 U.S.C. 251, et. seq., by adding language that would give civilian departments and agencies the authority to enter into “other transactions” (OT) for prototype projects and research. The Secretary of Defense, the secretaries of the

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<sup>3</sup> 48 CFR 8.002(a)(1).

<sup>4</sup> 48 CFR 8.605 and 8.606.

<sup>5</sup> Under 10 U.S.C. 2410n (P.L. 107-107, Sec. 811; 115 Stat. 1012), the Department of Defense is not required to obtain clearance. Instead, DOD is required to conduct market research before purchasing any product from FPI. If the results of market research show that an FPI product “is not comparable in price, quality, and time of delivery to products available from the private sector,” then DOD contracting officers are required to use competitive procedures in purchasing a product.

<sup>6</sup> “FPI provides training and employment for prisoners confined in Federal penal and correctional institutions through the sale of its supplies and services to Government agencies.” (48 CFR 8.601(b).)

three military departments, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration (NASA) already have this authority.<sup>7</sup>

“Other transactions” are defined by what they are not: they are not contracts, cooperative agreements, or grants. An excerpt from an article on the Defense Department’s use of OT authority explains when this type of transaction would be desirable:

Because an “other transaction” is not a procurement contract, cooperative agreement, or grant, it is not subject to the laws, regulations, and other requirements governing such traditional contracting mechanisms .... This authority enables DOD to enter into R&D [research and development] agreements with commercial companies that refuse or are unable to enter into traditional government cost-reimbursement contracts, grants, or cooperative agreements.<sup>8</sup>

Under H.R. 1837, as ordered reported, executive agencies that “engage in basic research, applied research, advanced research, and development projects” that are integral to the agency’s research and development efforts and that could be used “to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack” would be allowed to exercise OT authority subject to authorization by OMB.

A significant cited advantage of entering into other transactions is gaining access to, or acquiring, technology, research, or prototypes which would not be available otherwise to the federal government. One drawback to the use of OT authority, however, is a possible loss or reduction in visibility of these types of transactions, which could limit opportunities for conducting oversight in a timely manner. Mitigating this potential problem is the section’s requirement for executive agencies to submit annual reports, per 10 U.S.C. 2371(h), to the Senate Committee on Governmental Affairs and the House Committee on Government Reform. Additionally, OMB would be required to prescribe regulations for carrying out this section.

## **Amendments to the Homeland Security Act**

In addition to clarifying some of the language found in Subtitle F, Federal Emergency Procurement Flexibility, of the Homeland Security Act of 2002,<sup>9</sup> Section 502 would make two substantive changes in the subtitle. Under Subtitle F, government agencies have expanded procurement authorities<sup>10</sup> for the purchase of property or services that aid in facilitating “defense against or recovery from terrorism or nuclear, biological,

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<sup>7</sup> 10 U.S.C. 2371; P.L. 107-296, Sec. 831; 42 U.S.C. 2473.

<sup>8</sup> Richard N. Kuyath, “The Untapped Potential of the Department of Defense’s ‘Other Transaction’ Authority,” *Public Contract Journal*, summer 1995, vol. 24, no. 4, pp. 522-523.

<sup>9</sup> P.L. 107-296; 116 Stat. 2224.

<sup>10</sup> Subtitle F increases the simplified acquisition and micropurchase thresholds; allows agency heads to deem any item or service to be a commercial item and to use simplified acquisition procedures for the purchase of commercial items in excess of \$5 million; waives certain small business threshold requirements; requires the Comptroller General to prepare a report on the use of procurement authorities; and requires agencies to conduct market research on an ongoing basis in order to identify new entrants into the federal marketplace. (P.L. 107-296, Sec. 853-858.)

chemical, or radiological attack.”<sup>11</sup> Under Section 852 of the Homeland Security Act, these authorities can be used for a one-year period that began on the date of enactment (November 25, 2002). Section 502 of H.R. 1837 would remove the sunset provision. Section 502 also would shift the deadline for a General Accounting Office (GAO) report on procurement authorities from March 31, 2004 to March 31, 2006.

## **Competitive Sourcing Targets**

Section 506(a) would prohibit the Office of Management and Budget (OMB) from establishing, applying, or enforcing any numerical goal, target, or quota for competing or converting, under OMB Circular A-76, the work of federal employees, unless the goal, target, or quota were based upon considered research and sound analysis. Section 506(b) states that the prohibition should not affect the implementation of the Government Performance and Results Act (GPRA) of 1993<sup>12</sup> or prevent any agency from conducting public-private competitions or carrying out direct conversions. This section would make permanent the current prohibition established in the Treasury and General Government Appropriations for FY2003.<sup>13</sup>

Section 506 could apply to targets established by OMB in 2001. In a memorandum issued on March 9, 2001, OMB directed agencies to compete or convert a minimum of 5% of the full-time equivalents (FTEs) listed on their Federal Activities and Inventory Reform (FAIR) Act inventories.<sup>14</sup> OMB correspondence to agencies in June 2001 advised agency heads that the competition/conversion target for FY2003 was an additional 10%.<sup>15</sup> It does not appear that OMB has provided “considered research and sound analysis” in support of its targets.

Until OMB provides the research and analysis it used to develop its targets of 5% and 10%, agencies might not be required to submit to OMB their plans for conducting public-private competitions or consult with OMB about these plans. Regarding A-76 studies that are in progress, agencies might have the latitude to determine whether to complete or postpone all or some of the studies.

## **Noncompetitive Procurements – Iraq Reconstruction**

If enacted, Section 507 would require the head of an agency that awards a contract for the repair, maintenance, or construction of infrastructure in Iraq to publish a notice,

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<sup>11</sup> P.L. 107-296, Sec. 852.

<sup>12</sup> 107 Stat. 285.

<sup>13</sup> P.L. 108-7; Feb. 20, 2003; 117 Stat. 11, at 474. The language is in Sec. 647, Division J of the Consolidated Appropriations Resolution, 2003.

<sup>14</sup> U.S. Office of Management and Budget, “Performance Goals and Management Initiatives for the FY 2002 Budget,” memorandum M-01-15, March 9, 2001, p. 1.

<sup>15</sup> Information provided, electronically, by the Office of Federal Procurement Policy, Jan. 14, 2003.

in the *Federal Register* or *Commerce Business Daily*,<sup>16</sup> within 30 days of entering into a contract. For any contracts awarded after October 1, 2002, and prior to the enactment of H.R. 1837, public disclosure of information would be required within 30 days of the date of enactment. The disclosure notice would contain the dollar amount, and a brief description of, the contract, as well the agency's justification and approval documents and a discussion of the agency's actions in identifying and soliciting offers from potential contractors. Section 507 would allow an agency head to withhold any documents that were classified. If any such documents were withheld, the head of the agency would provide unredacted versions to the chairmen and ranking members of the Senate Committee on Governmental Affairs, the House Committee on Government Reform, the Senate and House Committees on Appropriations, and any other committees which the head of the agency determines has jurisdiction over the activities of the agency to which the information relates. The requirement to publicize information in the *Federal Register* would expire on September 30, 2013.

Section 507 would require the disclosure of information, within 30 days of award, which could be used for oversight purposes, while avoiding any delay in the awarding of contracts. It would apply to contracts for the "repair, maintenance, or construction of infrastructure" in Iraq. If interpreted narrowly, this section might not apply to solicitations similar to those issued by U.S. Agency for International Development for, e.g., public health, personnel support, and local governance.

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<sup>16</sup> The *Commerce Business Daily* was discontinued in January 2002. *Federal Business Opportunities* [<http://www.fedbizopps.gov>] is the exclusive source of information about governmentwide procurement opportunities that exceed \$25,000.