



Government Contracts Advisory

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Chairman Waxman's "Clean Contracting Act of 2008" Included in the House Version National Defense Authorization Act for Fiscal Year 2009

Congressman Henry Waxman (D-CA), Chairman of the House Oversight and Government Reform Committee, capitalized on the floor debate over the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (H.R. 5658), by offering as an amendment to the defense bill, the "Clean Contracting Act of 2008 (the Act)." The legislative provisions in the Act would limit current contracting authority, mandate policy changes to the Federal Acquisition Regulation (FAR), and require numerous government reports. By attaching the Act to the defense bill, Chairman Waxman now has a legislative vehicle that will likely proceed through the legislative process and ultimately to the President's desk.

The various titles of the Act, such as "Anti-Fraud Provisions" and "Curbing Abuse-Prone Contracts," reflect Chairman Waxman's perception of government contracting. These provisions are intended to limit fraud, waste, and abuse. Industry should pay attention and understand not only new prohibitions and substantive requirements, but also new government reporting requirements. Such provisions often portend the direction of future legislation.

Section 4402 of the Act would require a FAR provision be enacted within six months, mandating notification of fraud or overpayments. Last Fall, the government proposed a new regulation regarding contractor's code of business ethics to include mandating disclosure of violations of law, (FAR Case 2007-0006). The provision in the Act specifically states that the FAR should be amended pursuant to FAR Case 2007-0006, or any follow-on FAR case requiring timely notification of Federal criminal law or overpayment. The mandatory nature of this provision surpasses the current rulemaking process whereby the Office of Management and Budget (OMB) proposes the rule and evaluates industry. Another controversial provision would authorize the Government Accountability Office's (GAO) Comptroller General to interview contractor employees. Currently, GAO is authorized to examine records only.

The Act also contains the title, "Enhanced Contract Transparency." Section 4502, of this title would require the Administrator of General Services to maintain a database on federal and state criminal, civilian or administrative proceedings where the contractor is found to be at fault. This would also include all federal suspensions and debarments and administrative agreements entered into involving a suspension or debarment. The database would be accessible to all federal agencies and information available to the public as a FOIA request. Contracting officials would be required to review the database prior to contract award. The requirement for such a database within DoD is contained in section 831 of the Senate version of the NDAA (S. 3001). However, S. 3001, would not authorize public disclosure of the database.

Under section 4201, the title, "Curbing Abuse-Prone Contracts" includes a requirement for new regulations to minimize the inappropriate use of cost-reimbursement contracts. These new regulations would define circumstances when cost reimbursement contracts are appropriate. Agencies would need to submit a list of all cost reimbursement contracts to OMB. For contracts over \$10 million the agency

CONTACTS

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

Mary Ellen Fraser
202.496.7387

would need to explain why the contract should not be converted to a fixed price. The agency would also need to certify that an appropriate number of trained acquisition personnel have been assigned oversight responsibility. A separate provision under this title would further limit DoD's use of lead system integrators (LSIs). Last year, Congress passed restrictions on the use of LSIs. The proposed provision, would further limit the use of LSIs. First, the new provision would prohibit new contracts for LSIs after October 1, 2010, even to those contractors previously awarded LSI functions. Any determinations to award an LSI beyond demonstration level would require a written determination by the head of the agency, a notice to the House and Senate Government Affairs committees explaining that doing so would be in the best interest of the agency, and a 45-day wait period before contract award. Currently, such determinations are necessary for LSI contracts beyond Low Rate Initial Production (LRIP) and there is no wait period for contract awards after the Congressional notice.

Also included in the Act is Section 4102 titled, "Enhanced Competition." This would limit sole source awarded contracts, based on urging and compelling requirements, to 270 days. There would be an additional requirement for all agencies to implement a plan to minimize the use of sole source contracts, and a GAO review of such plans.

Other provisions of the Act would expand DoD contracting rules to all government agencies. For example, the requirement for contracting officers to determine in writing that there is sufficient information to evaluate the price of commercial services when such services are not sold in substantial quantities to the commercial marketplace would expand government-wide. The requirement for competition for individual procurements under multiple award contracts would also expand to all government agencies, as well as regulations linking award and incentive fees to acquisition outcomes.

These provisions, in general, could be quite onerous to industry. Without intervention, passage of these provisions, or something similar, is likely.

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