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**FINAL EDITION**  
**October 2008**

Legislation & Regulations

**Contributed by Functional Director for Legislation & Regulations, Thomas M. Abbott, with assistance from Associates at McKenna Long & Aldridge LLP**

**Legislation**

**PRESIDENT SIGNS CONSOLIDATED SECURITY, DISASTER ASSISTANCE, AND CONTINUING APPROPRIATIONS ACT OF 2009**

On September 30, 2008, the President signed the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009. Section 537 of the Act extends the authority of the DHS to enter into “other transactions” through 2009. The DHS’s “other transaction” authority was initially granted in 2004 to allow the agency to more freely engage in research and prototype projects. The Act also institutes extensive new reporting requirements for several high profile acquisition programs, such as the Secure Boarder Initiative and the Coast Guard’s Deepwater fleet modernization program. Other noteworthy aspects of the Act include a provision requiring the Secretary of Homeland Security to link contract award fees to successful acquisition outcomes (which will be specified in terms of cost, schedule, and performance) (Section 533); a provision identifying the functions of the Federal Law Enforcement Training Center instructor staff as inherently governmental (Section 521); and a provision preventing the DHS from using any funds provided to it by the Act for the purpose of conducting A-76 competitions for services provided by government employees as of June 1, 2004 (Section 514). (Public Law 110-329).

**CONGRESS PASSES BILL TO EXTEND AND REAUTHORIZE THE DEFENSE PRODUCTION ACT OF 1950**

On September 24 and 25 respectively, the House and Senate passed the Defense Production Act Extension and Reauthorization of 2008. The bill was introduced on September 17, 2008, by Representative Gutierrez (D-IL), along with Representatives Spencer Bachus (R-AL) and Barney Frank (D-MA). The purpose of the bill is to extend and reauthorize the Defense Production Act (“DPA”) (Public Law 80-774) through September 30, 2009. The DPA is a Korean-War era statute that grants the President broad powers to manage the country’s military-industrial base. Among other things, the DPA permits the President to manage the civilian economy to ensure materials that are scarce or necessary to national security are available when needed. The DPA also provides the source of authority for the Defense Priorities and Allocation System.

## **CONGRESS PASSES THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2009**

On September 27, 2008, the National Defense Authorization Act for Fiscal Year 2009 (“NDAA”) was sent to the White House. Contained in the NDAA are several provisions directly relating to contract performance and oversight.

Included in the final version of the NDAA is an antifraud provision introduced by Senator Patrick Leahy (D-VT). The Leahy amendment (now Section 855 of the NDAA) modifies the Wartime Suspension of Limitations Act of 1942 (“WSLA”) (18 U.S.C. § 3287), which permits the government to investigate and prosecute contracting fraud for up to three years after the end of a war. Currently, the WSLA only applies when the United States has declared war. The Leahy amendment extends the WSLA’s coverage to situations where Congress has authorized the use of military force but has not formally declared war, such as Iraq and Afghanistan. The amendment also increases the period of time after the conflict that the government can investigate and prosecute contracting fraud from 3 to 5 years.

Section 872 of the NDAA calls for the creation of an “integrity and performance” database. This database would cover all government contractors with single contracts in excess of \$500,000. The database would contain a record of any proceeding (criminal, civil, or administrative) within the past 5 years, in connection with the award or performance of a Federal contract that results in one of the following dispositions: (1) a criminal conviction; (2) a finding of liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more; (3) in an administrative proceeding, a reimbursement of over \$100,000; or, (4) a disposition by consent or compromise, if the proceeding could have led to any of the aforementioned outcomes. Additionally, the database will contain information regarding any terminations for default, suspensions, debarments, or non-responsibility determinations. The NDAA also provides that “to the maximum extent practical,” the database should contain similar information regarding contracts with state governments. The database will only be available to government officials and Congress.

Section 841 of the NDAA calls for the creation of regulations regarding personal conflicts of interest. Specifically, the Section requires the Administrator for Federal Procurement Policy to develop a policy to prevent personal conflicts of interest by contractor employees performing acquisition-related functions for the government. Among other things, the policy will require contractors to develop oversight mechanisms to identify and prevent personal conflicts of interest.

The NDAA also includes calls for the development of policies or guidance regarding technical data rights for non-FAR agreements, personal service contracting within the DOD, and the appropriateness of the use of cost-reimbursement contracts (Section 822, 831 and 864, respectively). Other noteworthy aspects of the NDAA include a request that the CAS Board review CAS’s inapplicability to contracts or subcontracts performed overseas and to determine whether the applicability of CAS to such contracts would be desirable (Section 823); a “sense of Congress” that it should be within the sole discretion of the commander of the relevant combat command to determine whether the performance by a contractor of a given activity in an area of combat operations is appropriate (Section 832); the creation of “steering boards” to assess the desirability of proposed changes to major defense acquisition programs (Section 814); and a call

for a report and accompanying guidelines regarding preventing abuse of interagency contracts (Section 865). (S. 3001).

## **Regulations**

### **THE DOD, GSA, AND NASA ADOPT FINAL RULES RELATING TO FAC 2005-27**

The DOD, GSA, and NASA have adopted a series of final rules implementing changes proposed in FAC 2005-57. Among the modifications implemented by these rules is the changing of the name of the DOD's "Office of Small and Disadvantaged Business Utilization" to the "Office of Small Business Programs;" the requirement that all entities operating businesses (including vending machines) on premises owned by the United States be capable of accepting and dispensing \$1 coins; the amending of the prescription for the use of the clauses for the Environmental Protection Agency-designated products and toxic chemical release reporting; and the clarification of FAR 28.106-4 and 52.228-12, both relating to prospective subcontractor requests for bonds, so as to not apply to commercial items. The rules also implement the Local Community Recovery Act, which authorizes set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. Finally, under FAC 2005-27, the mandate for the use of simplified acquisitions procedures for commercial items under \$5.5 million (or \$11 million pursuant to FAR 13.500(e)) is extended to January 1, 2010, and the blanket waiver threshold for small dollar value purchases from Federal Prison Industries is increased to \$3,000. (73 Fed. Reg. 53995, 9/17/08).

### **THE DOD, GSA, AND NASA ADOPT FINAL RULE AMENDING FAR POLICIES AND PROCEDURES REGARDING CONTRACT DEBT**

The DOD, GSA, and NASA have adopted a final rule revising and restructuring FAR Subpart 32.6, which addresses contract debt. Among the changes instituted by this rule is a shift in how contract debt is defined, by identifying what constitutes contract debt rather than how such debt may arise. Also included in these revisions is a more complete articulation of the contracting officer's duties regarding contract debt, including identification, collection, and liquidation. (73 Fed. Reg. 53997, 9/17/08).

### **THE DOD, GSA, AND NASA ADOPT INTERIM RULE REGARDING ENHANCED COMPETITION FOR TASK AND DELIVERY ORDERS**

The DOD, GSA, and NASA have adopted an interim rule implementing Section 843 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). Section 843 seeks to enhance competition for task and delivery order awards. The interim rule prohibits task or delivery orders valued at over \$100 million from being awarded to a single source unless the agency head determines in writing that (1) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work; (2) the

contract provides only for firm-fixed price task or delivery orders; (3) only one source is qualified and capable of performing the work at a reasonable price to the government; or, (4) it is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

The interim rule also provides for “enhanced competition” for contracts over \$5 million. Specifically, the interim rule states that all awardees are to be given a fair opportunity to be considered for each order, including, at a minimum, a notice of the order with a clear statement of requirements, a reasonable response period, disclosure of significant evaluation factors and subfactors, and, where award is made on a best value basis, a statement documenting the basis for award and the relative importance of quality and price or cost factors.

Finally, the interim rule authorizes protests of task or delivery orders at the GAO on the grounds that (1) the order increases the scope, period, or maximum value of the contract under which the order is issued or (2) as a matter of right for orders exceeding \$10 million. Interested parties should submit comments before November 17, 2008. (73 Fed. Reg. 54008, 9/17/08).

#### **THE DOD, GSA, AND NASA ADOPT INTERIM RULE AMENDING THE CAS THRESHOLD TO BE CONSISTENT WITH THE TRUTH IN NEGOTIATIONS ACT THRESHOLD**

The DOD, GSA, and NASA have adopted an interim rule implementing Section 822 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163). Section 822 requires that the CAS applicability threshold be the same as the threshold for TINA compliance. Consequently, this rule revises the CAS threshold from \$500,000 to \$650,000. Interested parties should submit comments before November 17, 2008. (73 Fed. Reg. 54011, 9/17/08).

#### **THE DOD ADOPTS INTERIM RULES PERMITTING THE LIMITATION OF COMPETITION REQUIREMENTS FOR PRODUCTS OR SERVICES ACQUIRED IN SUPPORT OF OPERATIONS IN IRAQ AND AFGHANISTAN**

The DOD has adopted an interim rule implementing Sections 886 and 892 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). Section 886 permits the DOD to provide preference for, or limit competition to, Iraqi or Afghan sources when acquiring products or services in support of military operations in Iraq and Afghanistan. Section 892 limits Section 886’s applicability in the area of small arms purchases. Specifically, Section 892 mandates full and open competition to the maximum extent possible in this area and prohibits responsible U.S. manufacturers from being excluded from such acquisitions due to Section 866. Interested parties should submit comments before November 14, 2008. (73 Fed. Reg. 53151, 9/15/08).

## **THE DOD PROPOSES RULE TO UPDATE AND REORGANIZE DFARS SUBPARTS RELATING TO GOVERNMENT PROPERTY**

The DOD has issued a proposed rule, which updates and reorganizes DFARS Subparts 245.1, 245.3, and 245.5. These changes will make the DFARS consistent with the FAR, which was updated regarding management of Government property in the possession of contractors in May 2007 (72 Fed Reg. 27364 (5/15/07)). While the majority of the changes included in this rule simply update and reorganize the existing DFARS provisions, the proposed rule does increase, from \$25,000 to \$100,000, the dollar threshold for requiring descriptive information on Government property for which a contractor requests non-Government use. Interested parties should submit comments before November 24, 2008. 73 Fed. Reg. 55008 (9/24/08).

## **THE GSA ADOPTS INTERIM RULE PERMITTING STATE AND LOCAL GOVERNMENTS TO PURCHASE SECURITY AND LAW ENFORCEMENT RELATED GOODS FROM THE FEDERAL SUPPLY SCHEDULES**

The GSA has adopted an interim rule, amending the GSAM, to implement the Local Preparedness Acquisition Act (Public Law 110-248). This interim rule authorizes state and local purchasing from Schedule 84 of the Federal Supply Schedule in selected areas relating to security and law enforcement goods and associated services. Interested parties should submit comments before November 18, 2008. (73 Fed. Reg. 54334, 9/19/08).

## **THE OMB ISSUES ADVANCED NOTICE OF PROPOSED RULEMAKING TO HARMONIZE CAS 412 AND 413 WITH THE PENSION PROTECTION ACT OF 2006**

The OMB has issued advanced notice of a proposed rulemaking and requested comments regarding efforts to harmonize CAS with the Pension Protection Act (PPA) (Public Law 109-280). Currently, CAS values pension plan assets as a “going-concern” while the PPA uses a liquidation value. In the notice, the OMB reiterated its belief that pension valuation should reflect the long-term worth of the pension plan as a going-concern rather than only the plan’s present liquid value. At the same time, the OMB recognized that contract cost accounting for a going concern must, nevertheless, address the risk associated with inadequate funding of a plan’s settlement liability. As a result, the OMB proposed the implementation of a minimum liability requirement based on the accrued benefits, valued based on corporate bond rates.

The notice also proposed the shortening of the amortization period for actuarial gains and losses to 10 years from its present 15 years; the revision of the assignable cost limitation so that it does not apply until the actuarial value of the assets equals or exceeds 125% of the actuarial accrued liability plus normal costs; and a five-year transition period for contractors to implement the new procedures. Interested parties should submit comments before November 3, 2008. (73 Fed. Reg. 51261, 9/2/08).

**THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ISSUES FINAL RULE  
DEFINING CONTRACTORS' ROLE IN MEDICAID INTEGRITY PROGRAM**

The Department of Health and Human Services has issued a final rule regarding the use of contractors in the Medicaid Integrity Program. The rule states that contractors are to review actions of providers of goods and services under Medicaid, audit claims for payment, identify overpayments, and educate providers regarding payment integrity and quality of service. The rule also provides guidance on contractor eligibility, contract award, and conflicts of interest. According to the final rule, services will be obtained under three IDIQ contracts, two of which have already been awarded. 73 Fed. Reg. 55765 (9/26/08).

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