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Legislation & Regulations

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**Legislation**

**SENATE INTRODUCES BILL TO PROVIDE IN PERSONAM JURISDICTION AGAINST CONTRACTORS PERFORMING ABROAD IN CIVIL ACTIONS INVOLVING SERIOUS INJURIES TO MEMBERS OF THE ARMED FORCES**

On March 4, 2009, Senator McCaskill (D-MO) introduced a bill in the Senate, co-sponsored by Senator Martinez (R-FL), that would provide in personam jurisdiction in civil actions against contractors performing federal contracts abroad with respect to serious bodily injuries of service members and contractor employees that are U.S. citizens. The “Lieutenant Colonel Dominic ‘Rocky’ Baragona Justice for American Heroes Harmed by Contractors Act” would direct the Director of the Office of Management and Budget to amend the Federal Acquisition Regulation (“FAR”) to include a requirement for all contracts for work to be performed outside the U.S. that the contractor must consent to in personam jurisdiction by U.S. Federal courts with respect to suits alleging serious bodily injury of a member of the Armed Forces, civilian Federal employee or citizen employee performing work for the U.S. Government. The proposed legislation defines “serious bodily injury” as injury involving death or risk of death, extreme pain, obvious disfigurement, or impairment of the function of a bodily member, organ, or mental faculty. The proposed legislation would also require foreign contractors performing on a contract of greater than \$5,000,000 that do not maintain a U.S. office to designate an agent located in the U.S. for service of process for such suits. The bill would also require consent to in personam jurisdiction for suits initiated by the U.S. Government alleging wrongdoing associated with the performance of the contract in question. Finally, it would mandate debarment or suspension of contractors that evade service of process for suits brought by the United States in connection with the contractor’s performance of a contract with the U.S. Government. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs, of which Sen. McCaskill (D-MO) is a member.. (S. 526)

**HOUSE INTRODUCES BILL TO REQUIRE AN ANNUAL REPORT ON CONTRACT OVERSIGHT BY FEDERAL DEPARTMENTS AND AGENCIES**

On March 5, 2009, Representative Sutton (D-OH) introduced a bill, “Contractor Accountability Act,” in the House that would require the head of each Federal department or agency to provide an annual report to Congress certifying that its department or agency had exercised oversight over all contracts and contractors under its purview. The required reports

would encompass all contracts and subcontracts greater than the simplified acquisition threshold, and be made publicly available. In addition to certifying oversight, departments and agencies would produce a list of contractors found to have not fulfilled their obligations. Under the bill, the General Accountability Office would be charged with oversight of the reporting process and would issue its own report every two years assessing departments and agencies' compliance with the new reporting requirements. The bill was referred to the House Oversight and Government Reform Committee. (H.R. 1360)

### **HOUSE INTRODUCES BILL TO DIRECT SECRETARY OF DEFENSE TO STUDY ALTERNATIVE MODELS FOR ACQUISITION AND FUNDING OF TECHNOLOGIES SUPPORTING NETWORK-CENTRIC OPERATIONS**

On March 16, 2009, Representative Sestak (D-PA) introduced a bill in the House that would direct the Secretary of Defense and Joint Chiefs of Staff to engage in independent studies investigating the constraints currently affecting the acquisition of technologies supporting network-centric operations. The proposed legislation directs each study to develop a system for understanding data transport, processing, storage, data collection, and dissemination of information, and to propose various organizational models for the acquisition and management of such technologies. The bill was referred to the House Committee on Armed Services. (H.R. 1537)

### **HOUSE INTRODUCES BILL TO DEBAR OR SUSPEND FEDERAL CONTRACTORS FOR UNLAWFUL EMPLOYMENT OF ALIENS**

On March 17, 2009, Representative Brown-Waite (R-FL) introduced a bill in the House that would require the head of an Executive agency to debar or suspend for three years any contractor found to have directly employed an alien not authorized for such employment by virtue of immigration status. The "Border Control and Contractor Accountability Act of 2009" would require the same consequences for contractors who had knowledge that a subcontractor was employing an unauthorized alien, and in both scenarios directs the agency head to terminate the contract in question, unless the contractor agrees to terminate the employment of the unauthorized alien. The proposed legislation also directs the Secretary of the Department of Homeland Security ("DHS") to establish the position of Small Business Administration Liaison within U.S. Immigration and Customs Enforcement. The bill was referred to the House Subcommittee on Management, Investigations, and Oversight. (H.R. 1555)

### **HOUSE INTRODUCES BILL TO REQUIRE CONTRACT MANAGEMENT TRAINING FOR SERVICE MEMBERS PRIOR TO DEPLOYMENT**

On March 18, 2009, Representative Sestak (D-PA) introduced a bill in the House that would require U.S. service members to be trained in the management of contracts and contractors before deployment. Under existing legislation the Department of Defense ("DoD") already must provide contract management training for personnel slated for contract-related work (Pub. L. No. 110-181, § 849). The proposed legislation would expand these training requirements to mandate that all service members receive a "basic overview" training on contract

matters, including provisions of the FAR, Department of Defense Directive 5000.1, and policies on ethics and conflicts of interest. Service members with “direct responsibility for decisions regarding contracting,” meanwhile, would be required to receive additional training on cost analysis principles and methods for evaluating alternative proposals. The bill was referred to the House Committee on Armed Services. (H.R. 1601)

### **HOUSE INTRODUCES BILL TO PROHIBIT COAST GUARD FROM USING LEAD SYSTEMS INTEGRATORS**

On March 23, 2009, Representative Cummings (D-MD) introduced a bill in the House that would prohibit the U.S. Coast Guard from using lead systems integrators (“LSI”). The “Coast Guard Acquisition Reform Act of 2009” mandates that the Commandant of the Coast Guard “may not use a private sector entity as a lead systems integrator for an acquisition contract awarded or delivery order or task order issued” more than 180 days after enactment of the legislation. Though the bill affords some exceptions to the prohibition, it imposes a hard deadline of September 30, 2011, after which no exceptions could be made in order to use an LSI, except to complete the National Distress and Response System Modernization Program. The proposed legislation also directs the Commandant to “establish mature and stable operational requirements” for acquisition programs, and to implement mechanisms to consider “trade-offs among performance, cost, schedule, and risk.” The bill was referred to the House Committee on Transportation and Infrastructure. (H.R. 1665)

### **HOUSE INTRODUCES BILL AUTHORIZING CRIMINAL SANCTIONS FOR WAR PROFITEERING**

On March 23, 2009, Representative Abercrombie (D-HI) introduced a bill in the House that would authorize criminal penalties for contractors convicted of war profiteering and fraud. The War Profiteering Prevention Act of 2009 would authorize imprisonment for up to 20 year, and fines of up to \$1 million for contractors who knowingly attempt to defraud the federal government. The proposed bill would also allow for the forfeiture of property obtained as a result of war profiteering and extend federal jurisdiction to cover such offenses even if the company is not located in the United States. The bill was referred to the House Committee on the Judiciary. (H.R. 1667)

## **Regulations**

### **DOD, GSA, AND NASA ADOPT FINAL RULE IMPLEMENTING SMALL BUSINESS ASSOCIATION SIZE RECERTIFICATION RULE**

The Civilian Agency Acquisition Council and the Defense Acquisition Council adopted a rule implementing a 2006 small business size recertification rule into the FAR requirements.

The final rule incorporates a rule issued by the Small Business Administration in 2006 (71 Fed. Reg. 66434, 11/15/06), which requires small businesses with federal contracts to re-certify their size before beginning a sixth contract year, before options are exercised extending a contract beyond the fifth year, or after any contractor merger, acquisition, or novation. Under the prior standard a small business size determination was made at the formation of a contract and typically remained valid through its duration. The final rule becomes effective April 20, 2009. (74 Fed. Reg. 11821, 3/19/09)

#### **DOD, GSA, AND NASA ADOPT FINAL RULE REVISING LIST OF DESIGNATED COUNTRIES UNDER THE TRADE AGREEMENTS ACT OF 1979**

The Civilian Agency Acquisition Council and the Defense Acquisition Council adopted a rule removing Liberia and Cape Verde from the list of Least Developed Countries that are “designated countries” under the Trade Agreements Act of 1979. The final rule amends the FAR to update the definitions of “designated country” and “least developed country,” as used at FAR 25.0003, 52.225-5, and 52.225-11. The final rule became effective March 19, 2009. (74 Fed. Reg. 11828, 3/19/09)

#### **DOD, GSA, AND NASA ADOPT INTERIM RULE CLARIFYING SUBMISSION OF COST OR PRICING DATA ON NON-COMMERCIAL MODIFICATIONS OF COMMERCIAL ITEMS**

The Civilian Agency Council and Defense Acquisition Council published an interim rule amending the FAR to implement Section 814 of the National Defense Authorization Act (“NDAA”) for Fiscal Year 2008 (Pub. L. 110-181). Section 814 of the NDAA harmonizes the thresholds for cost or pricing data with respect to non-commercial modifications of commercial items and the Truth in Negotiation Act (“TINA”). The former threshold had been \$500,000, but going forward it is now fixed to match the TINA threshold, currently set at \$650,000. Section 814 also clarifies the time at which a cost or pricing data threshold evaluation should be made by inserting the phrase “at the time of contract award.” The interim rule became effective March 19, 2009. Comments on the interim rule are due on or before May 18, 2009. (74 Fed. Reg. 11826, 3/19/09)

#### **DOE ADOPTS FINAL RULE TO PROMOTE FEDERAL PROCUREMENT OF ENERGY-EFFICIENT PRODUCTS**

The Department of Energy (“DOE”) issued a final rule establishing guidelines for agencies with respect to the National Energy Conservation Policy Act (“NECPA”). The NECPA requires Federal agencies to procure ENERGY STAR qualified and Federal Energy Management Program (“FEMP”) designated production in procurements involving energy consuming products and systems. In response to comments, the final rule is revised to abandon reporting requirements initially proposed by DOE when the rule was proposed June 19, 2007 (72 Fed. Reg. 33696). The final rule amends 10 CFR part 436 to establish guidelines for agencies on compliance with section 553 of the NECPA. Under that section, an agency may only procure an energy consuming product that is not an ENERGY STAR qualified or FEMP designated if the

head of the agency certifies in writing that the product is not life-cycle cost-effective or that no appropriate ENERGY STAR qualified or FEMP designated product is reasonably available. The final rule will become effective April 13, 2009. (74 Fed. Reg. 10830, 3/13/09)

### **DOL ADOPTS FINAL RULE RESCINDING REQUIREMENT THAT CONTRACTORS NOTIFY EMPLOYEES OF THEIR RIGHT TO NOT JOIN A UNION**

The Department of Labor (“DOL”) adopted a final rule rescinding regulations that had required federal contractors and subcontractors to post workplace notices for employees informing them of their right to not join a union. The final rule rescinds the regulations found at 29 CFR part 470, which had implemented Executive Order 13201, signed by President George W. Bush in 2001, which was revoked January 30, 2009, when President Obama signed the superseding Executive Order 13496. Executive Order 13496 requires contractors and subcontractors to post notices informing employees of their right to unionize and collectively bargain. The final rule became effective March 30, 2009. (74 Fed. Reg. 14045, 3/30/09)

### **DHS PROPOSES RULE PROHIBITING DHS FROM AWARDING FEDERAL PROTECTIVE SERVICE CONTRACTS FOR GUARD SERVICES TO BUSINESSES OWNED OR OPERATED BY INDIVIDUALS CONVICTED OF CERTAIN FELONIES**

The Department of Homeland Security (“DHS”) issued a proposed rule to amend the Homeland Security Acquisition Regulation (“HSAR”) to prohibit DHS from awarding a Federal Protective Service contract for guard services to a business owned, controlled, or operated by an individual convicted of a “serious” felony. The proposed rule would implement provisions of the Federal Protective Service Guard Contracting Reform Act of 2008 (Pub. L. 110-356). Felonies would be considered “serious” if they “cast doubt on the integrity or business ethics” of a contractor or are “inconsistent with the mission of the Federal Protective Service.” Comments on the interim rule are due on or before April 17, 2009. (74 Fed. Reg. 11512, 3/18/09)

### **PRESIDENT ISSUES MEMORANDUM ON GOVERNMENT CONTRACTING**

On March 4, 2009, President Obama issued a Presidential Memorandum on Government Contracting, decrying cost overruns and calling for new guidance to ensure efficiency. The memorandum observes that spending on Government contracts has doubled since 2001, and that a GAO study of 95 major acquisition projects found overruns of 26 percent. It states that there “shall be a preference for fixed-price type contracts,” and that noncompetitive contracts shall only be used where fully justified and with taxpayer safeguards in place. The memorandum directs agency heads to develop and issue by July 1, 2009, Government-wide guidance to help agencies review contracts to identify waste and inefficiency. It further directs the same officials to develop and issue guidance by September 30, 2009, to govern the use of sole-source and other non-competitive contracts and clarify when governmental outsourcing for services is and is not appropriate. (74 Fed. Reg. 9755, 3/6/09)