

## E-ALERT | Government Contracts

December 20, 2012

### THE GOVERNMENT CONTRACTS UPDATE

On a semi-monthly basis, Covington & Burling LLP's Government Contracts practice delivers its update of major news, notes, and trends relevant to government contractors

#### CONFERENCE COMMITTEE FILES FY 2013 NDAA CONFERENCE REPORT

On December 18, the conference committee appointed to reconcile the House and Senate versions of the FY 2013 National Defense Authorization Act (NDAA) filed its report. A reconciled version of the NDAA is expected to soon pass the House and Senate and be signed by the President. We will provide a detailed analysis of contracting-related amendments that survived in the conference report in the next edition of The Government Contracts Update.

#### HOUSE PASSES IMPROPER PAYMENTS ELIMINATION AND RECOVERY IMPROVEMENT ACT (H.R. 4053)

Last week, the House unanimously passed H.R. 4053, a bill sponsored by Rep. Edolphus Towns (D-New York) that would require additional efforts by federal agencies to identify, recover, and prevent improper payments under federal contracts. The bill attempts to build on a similar law enacted two years ago, the Improper Payments Elimination and Recovery Act of 2010 (Public Law 111-204). Among other provisions, this new bill would:

- require the Office of Management and Budget (OMB) to identify annually a list of high-priority federal programs warranting greater levels of oversight, and work with the agencies responsible for those programs to establish targets for reducing improper payments associated with the programs;
- require federal agencies to more aggressively review eligibility before making payments and awards; and
- establish a "do-not-pay" initiative requiring agencies to verify eligibility by consulting existing databases, including the Excluded Parties List System (now a part of the System for Awards Management), the Treasury's Debt Check Database, and the Social Security Administration's Death Master File, as well as any other government databases designated by OMB (after public notice and opportunity to comment) that substantially assist in preventing improper payments.

A companion bill sponsored by Sen. Tom Carper (D-Delaware) passed the Senate on August 2. The legislation is expected to be signed into law after minor differences between the House and Senate versions are reconciled. Although the extent to which this new legislation will substantively affect existing law is unclear, it reflects the government's focus on tightening its fiscal belt and identifying areas of potential waste in government contracting.

## OMB ISSUES INTERNAL GUIDANCE DIRECTING AGENCIES TO PREPARE FOR SEQUESTRATION

Earlier this month, OMB issued internal guidance directing federal agencies to begin planning for sequestration. It has also requested additional information to help it finalize contingency plans in the event that Congress and the President fail to reach an agreement before the January 2 deadline. The White House emphasized that OMB's guidance does not reflect any change in commitment to strike a budget deal that would avoid sequestration. Notably, OMB's guidance to contractors does not seem to have changed since its September 28, 2012 [Memorandum](#) advising contractors that, in the event of sequestration, certain liability and litigation costs associated with WARN Act compliance might qualify as allowable costs covered by the contracting agency, if otherwise reasonable and allocable.

## RECENT CASES

### Federal Circuit Extends *Blue & Gold* Waiver Doctrine (*Comint Systems Corporation v. United States*, No. 2012-5039 (Fed. Cir. Dec. 7, 2012))

The Federal Circuit has again considered the nuances of when bid protests challenging the terms of solicitations must be filed in the Court of Federal Claims. In a 2007 decision, *Blue & Gold Fleet, L.P. v. United States*, the Federal Circuit held that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." On December 7, the Federal Circuit extended this doctrine, holding that a challenge to a solicitation based on an alleged error occurring after the close of the bidding process is waived if the protesting party had the opportunity to bring it before the award but failed to do so.

In this case, Comint protested the award of a \$500 million ID/IQ contract for IT services by the Department of Defense's Washington Headquarters Service (WHS). Five months after the bid submission deadline, WHS amended the solicitation to alter the evaluation process. But later, in a post-award protest, Comint argued that WHS's late amendment changed the solicitation so substantially that WHS was obligated to either cancel the solicitation or permit offerors to submit revised proposals. The Federal Circuit, however, held that Comint failed to preserve its objections by failing to protest within the 2.5 months between the issuance of the amendment and the award of the contract. The Federal Circuit emphasized that the waiver rule applies only in cases where the contractor had "adequate time" to bring a pre-award challenge; if doing so is "not practicable," the contractor still may bring a post-award challenge.

### GAO Withdraws in Dispute Over VA's Use of FSS Procedures (*Kingdomware Technologies – Reconsideration*, B-407232.2 (Comp. Gen. Dec. 13, 2012))

In the [November 26](#) and [December 10, 2012](#) editions of The Government Contracts Update, we reported on a dispute between the GAO and Department of Veterans Affairs (VA) regarding set-asides for service-disabled veteran-owned small businesses (SDVOSB) or veteran-owned small businesses (VOSB). GAO had ruled in several recent bid protests that the VA violated the Veterans Benefits, Health Care and Information Technology Act by procuring through the Federal Supply Schedule (FSS) without considering whether to set aside the procurement for SDVOSBs or VOSBs. Recently, however, the Court of Federal Claims (COFC) sided with the VA. Now, GAO has conceded that, in light of the VA's position and COFC's recent decision, GAO will no longer consider protests on this issue. As such, barring congressional action or a change of heart by the VA, SDVOSB or VOSB protesters will face a difficult time obtaining relief on this issue.

## OTHER NOTEWORTHY ITEMS

### White House Announces Federal Contract Spending Fell by \$20 Billion in FY 2012

According to a recent White House [report](#), federal government contract spending dropped by \$20 billion, or 4 percent, in FY 2012, the largest one-year drop in U.S. history. The White House attributed the decline to (1) cuts in spending on management support services, such as IT systems development, program management, and engineering, and (2) implementation of strategic-sourcing initiatives that coordinate government purchasing across agencies and thereby bargain for lower prices. Federal contract spending had doubled between 2000 and 2008, growing by \$308 billion. Spending now has declined by \$35 billion, from its peak of \$550 billion in 2009. Based on White House statements, contractors can expect continued efforts to reduce spending on federal contracts.

### Sen. McCaskill Writes Army to Express Concern With Backlog of Suspension and Debarment Referrals

On December 7, Sen. Claire McCaskill (D-Missouri) and seven Senate colleagues sent a [letter](#) to the Secretary of the Army and the Chief of Staff of the Army expressing concern with the Army's delayed processing of suspension and debarment referrals from Afghanistan. The Senators cited a recent report by the Special Inspector General for Afghanistan Reconstruction (SIGAR) that found the Army's average time to process a debarment referral between June 2011 and June 2012 was 323 days. Their letter adds to pressure on the Army to be more aggressive in suspension and debarment cases referred by the SIGAR.

### Canada May Withdraw From the F-35 Joint Strike Fighter Program

Canada intends to reexamine its participation in the F-35 program after an independent audit report projected that it would cost the country almost \$46 billion over 42 years, far higher than originally anticipated. If Canada drops out, the cost of the program would proportionally increase for the other participants, including the United States, Australia, Denmark, Italy, the Netherlands, Norway, Turkey, and the United Kingdom. The U.S. Government, with its own budget concerns, may be pressured to reduce its purchases of F-35s. Statements by Canada's Minister and Deputy Minister of Public Works and Government Services addressing the matter may be found [here](#) and [here](#).

### USDA Proposes to Add Eight Product Categories for Biobased-Products Procurement Preference

We recently [reported](#) that, on November 19, 2012, the USDA issued a final rule designating twelve product categories within which biobased products will be afforded a Federal Procurement preference. Earlier this month, the USDA issued a notice of proposed rulemaking ([77 Fed. Reg. 72654](#)) to designate an additional eight product categories for this preference: aircraft and boat cleaners; automotive care products; engine crankcase oil; gasoline fuel additives; metal cleaners and corrosion removers; microbial cleaning products; paint removers; and water turbine bearing oils. Manufacturers can qualify for the procurement preference if their products meet the regulatory requirements, such as minimum biobased content requirements.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our government contracts group:

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