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E-ALERT | Government Contracts

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THE GOVERNMENT CONTRACTS UPDATE

Covington & Burling LLP's Government Contracts practice regularly delivers an update on major news, notes, and trends relevant to government contractors.

THE FY 2014 NATIONAL DEFENSE AUTHORIZATION ACT

On June 14, 2013, the House of Representatives passed its version of the FY 2014 National Defense Authorization Act ("NDAA") (H.R. 1960), proposing to allocate $637.9 billion—$50 billion above the sequestration caps imposed by the Budget Control Act of 2011—to the Department of Defense ("DOD") for FY 2014. The bill includes various provisions from the House Armed Services' Committee version, which are described in our June 7, 2013 e-alert. Among other things, the bill includes a $763,209 cap on the recovery of executive compensation on cost-type contracts (President Obama's budget office has called for a $400,000 cap), an allowance for the recovery of costs associated for the use of counterfeit parts upon a showing that the parts were obtained from an original or authorized dealer, and criticism of DOD's overuse of lowest-price, technically acceptable competitions.

The House version of the NDAA also incorporates the Federal Information Technology Acquisition Reform Act ("FITARA") (H.R. 1232), which would require contracting agencies to appoint a Chief Information Officer with enhanced budget and personnel authority over IT Investments, and which would create a new center within the Office of Management and Budget with which agencies would have the option of consulting during the procurement of IT services. We previously reported on FITARA last year, after the original draft of the Act was publicly circulated in September 2012. In response to industry concerns, this latest version of FITARA replaced problematic language that appeared to provide a preference for open-source software with language that clearly affirms the Government's commitment to technology neutrality in IT acquisitions. The House version of the NDAA also includes two amendments advanced by the House Small Business Committee. The first would exempt contracts that are subject to the Small Business Act's limitations on subcontracting from section 802 of the FY 2013 NDAA, which requires agency contracting officers to consider the feasibility of contracting directly with the subcontractor when the prime plans to subcontract more than 70% of the total cost of the work. The second would allow prime contractors to include all subcontracting dollars beyond the first tier toward meeting the Government's 35.9% small business subcontracting goal.

The Obama administration has threatened to veto the House version of the NDAA, stating that it reduces DOD's ability to reduce overhead and increase efficiency, and based upon the administration's disagreement with, among other things, provisions in the bill that would keep open the detention facility at Guantanamo Bay, cut the Pentagon's green energy program, and inadequately cap contractors' recovery of executive compensation costs. On June 14, 2013, the Senate Armed Services Committee also released its version of the FY 2014 NDAA. A floor vote on that version has not yet been scheduled. The President is not expected to sign a final version of the FY 2014 NDAA until the end of the year.

OTHER RECENT DEVELOPMENTS

Proposed FAR Amendment

In an effort to increase transparency and accountability in federal spending, the Federal Acquisition Regulatory Council ("FAR Council") has proposed a new rule, FAR Case 2012-023, that would amend the Federal Acquisition Regulation ("FAR") to create a universal "procurement instrument identification" ("PIID") for government contracts across federal agencies. The new system would replace the current system, in which "agencies and contracting offices within agencies have PIIDs of varying lengths, which may or may not contain spaces or hyphens." The lack of uniformity in the current system makes the transmission of data amongst federal agencies difficult and inefficient, and raises concerns about data validity. (The current PIID system is codified at FAR 4.16, and is the result of a July 2011 rulemaking.) The proposed rule would require unique, uniform PIIDs to be assigned to solicitations and contract actions at both the agency and office level, and, according to the FAR Council, "will promote achievement of rigorous accountability of procurement dollars and process and compliance to regulatory and statutory acquisition requirements." The PIID proposal follows a 2011 recommendation by the Government Accountability and Transparency Board calling for a centralized system by which to track and oversee spending on government contracts. Interested parties are invited to submit comments on the proposed rule on or before August 5, 2013.

Proposed Medicare & Medicaid Anti-Fraud Legislation

On June 10, 2013, both houses of Congress introduced the Preventing and Reducing Improper Medicare and Medicaid Expenditures ("PRIME") Act (H.R. 2305; S. 1123), which is intended to reduce fraud, waste, and abuse in both the Medicare and Medicaid programs. The proposed legislation includes numerous measures to strengthen the Government's anti-fraud efforts, including:

- Requiring the Centers for Medicare and Medicaid Services ("CMS") to implement stronger fraud and waste prevention strategies in Medicare and Medicaid—for example, by providing financial and other incentives to Medicare administrative contractors—so that the Government need not "chase down" improper payments after they have already been made.
- Directing CMS to increase rewards for citizen reports of improper billing under Medicare and extend the incentives to Medicaid. (This would be in addition to CMS' recent proposed increase of the amount paid for whistleblower information leading to Medicare fraud convictions, from $1,000 to $9.9 million.)
- Creating stiffer penalties for the illegal distribution of a Medicare, Medicaid, or Children's Health Insurance Program beneficiary identification or billing privileges. Individuals convicted of engaging in such an activity would face up to 10 years in prison and a $500,000 fine.
- Improving information sharing between the federal government and the states, which jointly operate Medicaid.

The House version of the PRIME Act has been referred to committee. Its passage is uncertain; a bill of the same name was introduced in the House in 2011, but failed to get out of committee.

Suspension & Debarment

In our February 21, 2013 e-alert, we reported on Representative Darrell Issa's (R-Calif.) discussion draft of the "Stop Unworthy Spending" ("SUSPEND") Act, which would have consolidated the suspension and debarment offices of 41 separate civilian agencies into a single centralized board. That proposed legislation received significant criticism at the time, including from Covington's own Senior of Counsel Steven Shaw, who warned that the Act's proposed consolidation would result in reduced agency leverage in obtaining concessions and reforms from contractors in the face of alleged wrongdoing, and would add significant bureaucratic hurdles to the suspension and debarment process. On June 12, 2013, Rep. Issa's House Oversight Committee heard testimony from suspension and debarment practitioners who argued that reform legislation could introduce consistency and transparency into the suspension and debarment of government contractors by writing existing agency best practices into law and standardizing procedures across federal agencies so that the level of formality and predictability in a suspension and debarment proceeding does not vary significantly. Representative Issa has promised to introduce revised suspension and debarment reform legislation "very shortly."

Cybersecurity

On June 14, 2013, the Department of Homeland Security's ("DHS") Office of the Inspector General ("IG") released an audit report finding that DHS's Office of Cybersecurity and Communications' Federal Network Resilience Unit ("CS&C") lacked both long- and medium-term cybersecurity goals to help agencies comply with the Federal Information Management Act ("FISMA"). The report explained that without such goals, DHS cannot determine whether various cybersecurity initiatives are effective in strengthening the Government's cybersecurity posture. The report also found that DHS did not have an effective system in place to ensure that contractors hired to administer the agency's information security reporting system, "CyberScope," received proper security training, nor did it maintain adequate records to confirm that such training for those contractors had taken place. The IG report explained that without adequate training, "CyberScope contractors may not have received the appropriate skills or knowledge to properly administer and secure the systems against potential cyberthreats." In response, DHS Deputy Secretary Suzanne Spalding stated that DHS is developing written policies to ensure that CyberScope administrators receive adequate training. This IG report follows increased scrutiny by Congress and other IGs of government contractors generally, and with regard to cybersecurity in particular. Agencies, including DHS, are facing tremendous pressure to strengthen their cybersecurity platforms and impose uniform standards on contractors.

CASE DIGEST

CICA Stay Does Not Apply During Pendency Of Corrective Action (*Solutions by Design Alliant Joint Venture LLC v. United States*, No. 13-331C (Fed. Cl. June 6, 2013))

A recent order by Judge Eric G. Bruggink held that the Competition in Contracting Act's ("CICA") automatic stay of contract performance ends when the Government Accountability Office ("GAO") dismisses a protest as a result of an agency's announced corrective action, even if the agency does not terminate the challenged contract award. On March 5, 2013, Solutions by Design ("Solutions") filed a timely protest at the GAO of the General Service Administration's ("GSA") award of a task order to AAC, Inc. ("AAC"), triggering the automatic CICA stay. On April 25, 2013, during the pendency of that protest, GSA announced that it would voluntarily take corrective action by re-evaluating offeror proposals, which would result in the issuance of a new source selection decision. GAO thus dismissed the protest as academic. On May 2, 2009, GSA notified AAC that as a result of the dismissal, the CICA stay had been lifted and AAC could commence performance on the originally-

awarded contract, notwithstanding the ongoing corrective action. On May 9, 2013, Solutions filed a new GAO protest, arguing that GSA's notice to proceed amounted to a new contract, and requesting confirmation from GSA that it was staying performance as a result of the new protest. GSA refused, explaining that its notice to proceed to AAC was not a new contract award, and therefore Solutions' most recent protest did not trigger a new CICA stay. Solutions challenged GSA's non-compliance with the CICA stay at the Court of Federal Claims. The Court ruled in favor of GSA, holding that because the agency never voided the initially-awarded task order, there was no new award decision. As a result, Solutions' new protest was in fact another challenge to the February award, and therefore untimely for purposes of the CICA stay. The Court acknowledged some confusion resulting from GSA's announced corrective action in April, noting that "GSA perhaps should have clarified with GAO whether it assumed that GSA would immediately void the initial award," but still concluded that the Court was "not prepared to treat [GSA's] failure to do so as a *de facto* cancellation of the award." Judge Bruggink's ruling suggests that when an agency proposes corrective action, a protestor should confirm the exact scope and impact of that action before GAO dismisses the protest. If the corrective action will not result in the termination of the initial contract award, the protestor should consider seeking immediate injunctive relief at the Court of Federal Claims.

No Tucker Act Jurisdiction Over Blanket Purchase Agreements (*Crewzers Fire Crew Transport, Inc. v. United States*, No. 11-607C (Fed. Cl. May 31, 2013))

A recent decision by Judge Susan G. Braden held that the Court of Federal Claims lacks jurisdiction over a claim that the Government has breached a Blanket Purchase Agreement ("BPA"). Plaintiff Crewzers was awarded a BPA by the U.S. Forest Service in March 2011 for the supply, upon request, of "crew carrier buses" to assist in fighting forest fires. In September 2011, the Forest Service terminated the BPA for cause as a result of Crewzers' alleged failure to supply the appropriate buses. Crewzers filed suit in the Court of Federal Claims, alleging breach of contract. The Court dismissed the lawsuit for lack of jurisdiction. In so doing, it explained that the BPA's express terms did not guarantee that the Government would place any orders for buses, and that upon the placement of any such order, Crewzers was obligated to supply the requested item only to the extent that it was willing and able to do so at the time. Accordingly, the Court concluded that the BPA itself was not a contract, but "merely a framework for future contracts that only creates a contractual obligation with regard to accepted orders." Still, the Court's decision suggests that the Court would possess jurisdiction over disputes concerning indefinite-delivery/indefinite-quantity contracts that guarantee a minimum amount of business.

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