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THE GOVERNMENT CONTRACTS UPDATE

PROPOSED RULE WOULD EXPAND FAR PROVISION GOVERNING PERSONAL CONFLICTS OF INTEREST

The FAR Council has published a proposed rule that would amend the Federal Acquisition Regulation ("FAR") to expand the scope of contractor employees covered by personal conflict of interest rules. The proposed rule implements section 829 of the National Defense Authorization Act for Fiscal Year 2013, which required the Secretary of Defense to review existing rules pertaining to personal conflicts of interest for contractor employees, issued under section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. In particular, section 829 instructed the Secretary of Defense to determine whether existing rules should be extended to non-acquisition functions closely associated with inherently governmental functions, personal services contracts, and/or contracts for staff augmentation services.

At present, contractors must identify and prevent personal conflicts of interest only with respect to certain "covered employees"—those "who perform[] an acquisition function closely associated with inherently governmental functions." As proposed, the new rule would expand the definition of covered employees to include employees who perform any "function closely associated with inherently governmental functions," even if that function is unrelated to acquisitions, as well as employees performing under personal services contracts. FAR 7.503 lists examples of functions that are considered to be either inherently or not inherently governmental. Covered employees are also prohibited from using for personal gain any nonpublic information that they access through their contract work. As with the existing rule, the proposed rule would not apply to acquisitions at or below the simplified acquisition threshold or to commercial item acquisitions.

Criticism of the proposed rule has been swift. Some have questioned whether the rule overreaches the statutory mandate of section 829, which pertains only to the Secretary of Defense and DOD contracting, and contemplates only revisions to the Defense Federal Acquisition Regulation Supplement ("DFARS") "to the extent necessary to achieve" extensions to existing rules that the Secretary of Defense deems necessary. Comments on the proposed rule are due on June 2, 2014.

OBAMA ANNOUNCES NEW POLICIES ON CONTRACTOR PAY DATA

On April 8, 2014, President Obama announced two initiatives aimed at establishing equal pay for women and minorities. First, the President issued an Executive Order entitled "Non-Retaliation for Disclosure of Compensation Information," which prohibits contractors from terminating or otherwise discriminating against any employee or job applicant "because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant." The Executive Order explains that "[w]hen employees are prohibited from inquiring about, disclosing, or discussing their compensation with fellow workers, compensation discrimination is much more difficult to discover and remediate, and more likely to persist." It adds that explicit and implicit restrictions on pay information among contractor employees "tend[] to

diminish market efficiency and decrease the likelihood that the most qualified and productive workers are hired at the market efficient price." The Secretary of Labor is charged with proposing implementing regulations by September 15, 2014.

Second, the President released a memorandum directing the Secretary of Labor to propose, by August 6, 2014, a new rule requiring federal contractors and subcontractors to submit employee pay data to the Department of Labor ("DOL"), broken down by gender and race. The memorandum specifies that, "[t]o the extent feasible," the Secretary should "avoid new record-keeping requirements and rely on existing reporting frameworks to collect the" data. It adds that DOL should focus its enforcement efforts on "entities for which reported data suggest potential discrepancies in worker compensation."

Questions remain about how these policies will be implemented, including whether they will apply to all contracts regardless of price threshold; whether they will apply to all contractor employees or only those working on federal contracts; how frequently data reporting will need to be made; and whether the regulations issued under the Executive Order will go beyond existing interpretations of section 7 of the National Labor Relations Act that protect workers' ability to discuss their pay.

NEW DOD POLICY REQUIRES CONTRACTING OFFICERS TO DETERMINE FAIR AND REASONABLE PRICING IN GSA FSS ORDERS

In a memorandum dated March 13, 2014, Richard Ginman, the Director of Defense Procurement and Acquisition Policy, announced that DOD contracting officers now must determine independently that prices and rates offered under General Services Administration ("GSA") Federal Supply Schedules ("FSS") are fair and reasonable. This announcement institutes a class deviation to FAR 8.404(d), which states that "GSA has already determined" FSS prices and rates "to be fair and reasonable." The new policy applies to individual orders under FSS, blanket purchase agreements ("BPA") under FSS, and orders under BPAs. It will be incorporated into the DFARS.

Commentators have expressed concern that the new policy will undercut the convenience and efficiency intended by the FSS program, adding further paperwork, duplication, and burden to the procurement process.

DOD ISSUES INTERIM FINAL RULE REGARDING CLEARED U.S. CONTRACTORS SUBJECT TO FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE

On April 9, 2014, DOD issued an interim final rule addressing U.S. industrial security policies and procedures regarding safeguarding classified information in the context of U.S. contractors subject to foreign ownership, control, or influence ("FOCI"). A U.S. contractor is considered to be under FOCI "whenever a foreign interest has the power, direct or indirect . . . , to direct or decide matters affecting the management or operations of the company in a manner that may result in unauthorized access to classified information or may adversely affect the performance of classified contracts."

Although the interim final rule offers more comprehensive guidance in this area, it does not reflect a change in existing policy that the United States benefits from the prospect of introducing foreign investment and technology into the defense industrial base, provided certain fundamental protections are in place. The interim final rule largely codifies practices and procedures that DOD has developed in recent years and includes a number of clarifications relating to FOCI determinations, FOCI mitigation, and National Interest Determinations. While the interim final rule endeavors to clarify and make more consistent FOCI requirements and procedures, it also preserves

DOD components' "discretionary authority" to require any security procedure or restriction determined necessary to protect classified information and performance on classified contracts.

Comments on the interim final rule are due on June 9, 2014, and it is expected that there may be additional follow-on guidance and DOD rulemakings addressing FOCI matters and facility clearances. We reported in detail on the interim final rule in an April 15, 2014 E-Alert, *DoD Issues Interim Final Rule Regarding Procedures for Cleared Contractors Under Foreign Ownership, Control, or Influence*.

FTC AND DOJ ISSUE POLICY STATEMENT ON CYBERSECURITY INFORMATION SHARING

On April 10, 2014, the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") issued a policy statement concluding "that properly designed sharing of cyber threat information should not raise antitrust concerns." The policy statement acknowledges that companies are already "sharing technical cyber threat information," including "threat signatures, indicators, and alerts," and lays out the FTC's and DOJ's "analytical framework" for determining whether information sharing raises potential antitrust issues. That framework first questions the purpose for a company's sharing of cyber threat information, while recognizing that "this sharing is virtually always likely to be done in an effort to protect networks and the information stored on those networks, and to deter cyber-attacks." Next, it examines "the nature of the cyber threat information to be shared among the private parties." Finally, the framework inquires "whether the exchange is likely to harm competition."

According to the policy statement, neither the FTC nor DOJ "believe[s] that antitrust is—or should be—a roadblock to legitimate cybersecurity information sharing." In particular, cybersecurity information sharing avoids the usual antitrust concerns because "[c]yber threat information typically is very technical in nature and very different from the sharing of competitively sensitive information such as current or future prices and output or business plans."

The policy statement comes over a decade after DOJ's October 2000 business review letter addressing antitrust enforcement intentions regarding a private nonprofit company's proposed cybersecurity information sharing. That letter indicated that the DOJ had no intention to pursue any antitrust enforcement action in response to the company's information sharing plan. The recent policy statement recognizes that this business review letter "remains the Agencies' current analysis that properly designed sharing of cybersecurity threat information is not likely to raise antitrust concerns," and observes that, "[a]lthough the nature, complexity, and number of threats have changed since the [DOJ] issued the [2000] letter, the legal analysis in the letter remains very current."

CASE DIGESTS

The Government Accountability Office ("GAO") and the Court of Federal Claims ("COFC") each recently released decisions reminding agencies that they cannot dispose of protests by using settlement agreements to exchange contract awards for protest withdrawals. The decisions also are instructive to protesters and protester counsel. For one thing, before entering into a settlement agreement and agreeing to withdraw a protest based on that agreement, protesters should ensure, to the greatest extent possible, that the agency actually has a legal, non-protestable basis on which it can take the action that underlies the settlement. Additionally, awardees who believe that an agency has taken unreasonable, unnecessary, or overbroad corrective action should consider protesting that action prior to recompeting for an award they have already won.

GAO Rejects Noncompetitive Award Promised in Exchange for Dropped Protest (*Coulson Aviation (USA) Inc.*, B.409356.2 *et al.* (Comp. Gen. Mar. 31, 2014))

On March 31, 2014, GAO sustained a protest of the U.S. Forest Service's ("Forest Service") noncompetitive award of a contract for "next generation (NextGen) large airtanker services" to Neptune Aviation Services, Inc. ("Neptune"). Although the Forest Service purported to justify the contract as a sole-source award under 41 U.S.C. § 3304(a)(3)(A), GAO agreed with the protestors that the award actually was offered in exchange for Neptune dropping an earlier bid protest—an invalid basis for a noncompetitive award—and could not otherwise be justified under the applicable statutes and regulations.

The genesis of this protest was a tangle of awards, corrective action, and protests arising out of a November 2011 request for proposals for NextGen large airtanker services for wild land firefighting support. Award originally was made to four contractors, including Neptune, but the Forest Service took corrective action after two unsuccessful offerors protested. In early May 2013, when Neptune learned that it failed to win an award following the Forest Service's corrective action, it informed the contracting officer that it intended to protest "unless an 'acceptable solution' could be worked out."

Neptune filed a protest at GAO on May 16, 2013, which initiated a period of "significant communications" between the Forest Service and Neptune. Following negotiations, Neptune and the Forest Service executed a settlement agreement providing that Neptune would receive a noncompetitive award of a NextGen contract under FAR 6.302-3—the "industrial mobilization" exception to "full and open competition"—in exchange for Neptune dropping its pending protest. The justification and approval ("J&A") supporting the award to Neptune contemplated a contract value of $141 million; however, if all available aircrafts were ordered under the actual award, the contract's actual value could have risen to $500 million.

Three of the awardees following the corrective action protested the sole-source award to Neptune. GAO sustained the protest, observing initially that "[a] settlement agreement promising award of a contract on a sole-source basis in exchange for abandoning ongoing litigation, such as a bid protest, is not a permissible basis for restricting competition and excluding potential offerors." Despite the Forest Service's claim that the sole-source award "was necessary to maintain Neptune as a vital source of large airtankers," GAO found no evidence in the J&A suggesting that Neptune needed the sole-source award to continue to provide these services. And although the J&A revealed that the Forest Service was in need of additional large airtanker services beyond those then under contract, it failed to tie that need to Neptune specifically and demonstrate why Neptune alone had to supply those services.

COFC Rejects Proposed "Corrective Action" Taken Based on a Settlement Agreement Entered into in Exchange for a Dropped Protest (*WHR Group, Inc. v. United States,* No. 13-515 C (Fed. Cl. Apr. 8, 2014))

On April 8, 2014, the COFC issued a decision ending the saga that was the Federal Bureau of Investigation's ("FBI") $425 million procurement for employee relocation and moving services. Prior to the issuance of the solicitation at issue, Brookfield Relocation Inc. ("Brookfield") was the sole incumbent contractor providing the required services. In January 2013, the FBI issued a solicitation seeking to award up to four blanket purchase agreements ("BPAs"), using a lowest-price/technically-acceptable valuation scheme, to procure the work being done by Brookfield. In March 2013, the FBI awarded BPAs to the offerors with the three lowest prices out of a group of seven technically-acceptable bidders.

Brookfield, the sixth lowest–priced offeror, filed a protest at GAO alleging that the FBI committed a variety of evaluation errors. Following an outcome-prediction in which GAO suggested it likely would sustain Brookfield's protest, the FBI announced that it would take corrective action. Instead of following GAO's suggestion to reevaluate offeror proposals, the FBI instead entered into a settlement agreement with Brookfield that included, among other things, the award of a fourth BPA to Brookfield (despite being rated sixth out of seven offerors); an agreement that the FBI and Brookfield would move to dismiss any protest of the award to Brookfield; and an assurance that, if any such motions to dismiss failed, the FBI would cancel the initial awards, revise the solicitation, and allow offerors to submit new bids.

Upon the FBI's announcement of its "corrective action," two protests were filed at GAO, including one by the fourth-rated offeror arguing that a discretionary award to the sixth-rated offeror to settle a protest was improper and that award instead had to be made to the "next-in-line" offeror. After GAO declined to dismiss the protest, the FBI announced its intention, consistent with its settlement agreement with Brookfield, to take new "corrective action" by cancelling all four BPA awards and restarting the procurement process. In its internal justification, the FBI stated that the sole basis for its corrective action was "to resolve the [fourth rated-offeror's] protest." Based on the FBI's announced corrective action, GAO dismissed the protest.

The next day, one of the original three BPA awardees filed notice with the COFC that it would challenge the FBI's most recent corrective action. Subsequently, the FBI supplemented its internal justification by adding four more reasons (beyond the resolution of the GAO protest) supporting its corrective action. In a thorough decision, the Court (Judge Block) rejected all of the FBI's purported justifications and, in the process, essentially denied Brookfield's initial protest regarding FBI evaluation errors. The Court also determined that the FBI's proposed corrective action was unreasonable, as it was not targeted at any specific evaluation issue.

The Court concluded by observing that,

> if the FBI's "corrective action" in this case were not enjoined, it would signify that the government's power to take "corrective action" is nigh unlimited. The requirement that corrective action be "targeted" or "rationally related" to an existing defect in the initial procurement is essential to the integrity of the procurement system. In this case, it is clear that the "corrective action" was not targeted or rationally related to any actual defect and it is therefore crucial to the public interest that the FBI's "corrective action" be enjoined.

The Court then ordered the FBI to honor its original three BPA awards and to disengage from its reliance on Brookfield as quickly as possible.

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

Alan Pemberton	+1.202.662.5642	apemberton@cov.com
Robert Nichols	+1.202.662.5328	rnichols@cov.com
Susan Cassidy	+1.202.662.5348	scassidy@cov.com
Jennifer Plitsch	+1.202.662.5611	jplitsch@cov.com
Steve Shaw	+1.202.662.5343	sshaw@cov.com
Brian Walsh	+1.202.662.5980	bwalsh@cov.com
Scott Freling	+1.202.662.5244	sfreling@cov.com
Anuj Vohra	+1.202.662.5362	avohra@cov.com
Jade Totman	+1.202.662.5556	jtotman@cov.com
Heather Finstuen	+1.202.662.5823	hfinstuen@cov.com
Kayleigh Scalzo	+1.202.662.5133	kscalzo@cov.com