



Government Contracts Advisory

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Department of Defense Authorization Act for Fiscal Year 2009

Each year the DOD Authorization Act includes a number of provisions which may significantly impact government contractors. The National Defense Authorization Act for Fiscal Year 2009 (S. 3001) is no exception. There are almost 50 new provisions under the title, "Acquisition Policy, Acquisition Management, and Related Matters."

This Alert highlights some of those provisions. Additional Alerts identifying provisions of interest will follow.

Iraq and Afghanistan

Section 852. Comprehensive Audit of Spare Parts Purchases and Depot Overhaul and Maintenance of Equipment for Operations in Iraq and Afghanistan

--This section would require the Army, Navy and Air Force audit agencies to conduct audits of defense contracts and subcontracts, and task and delivery orders for (a) depot overhaul and maintenance of equipment for the military in Iraq and Afghanistan, and (b) spare parts for military equipment used in Iraq and Afghanistan.

These agencies would also be required to audit DOD in-house overhaul and maintenance of this military equipment. The service audit agencies would also be required to develop a comprehensive audit plan in order to conduct the above described series of audits.

Section 853. Additional Matters Required to be Reported by Contractors Performing Security Functions in Areas of Combat Operations

--This section would expand the categories of incidents that must be reported by private security contractors operating in combat areas. Under this section, contractors would be required to report incidents in which a weapon is discharged against personnel performing private security functions (or personnel believe a weapon was discharged) or whenever active, non-lethal countermeasures (other than the discharge of a weapon) are employed by those performing private security functions in response to a perceived immediate threat.

Section 854. Additional Contractor Requirements and Responsibilities Relating to Alleged Crimes By or Against Contractor Personnel in Iraq and Afghanistan

--Section 861 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) required the Secretary of Defense, the Secretary of State, and the Administrator of the Agency for International Development to enter into a memorandum of understanding (MOU) relating to contracts in Iraq and Afghanistan. That section specified matters to be addressed in the MOU.

Section 854 would require the MOU to cover additional matters, including (1) mechanisms to ensure that contractors are required to report offenses committed by or against contractor personnel to investigative authorities; (2) responsibility for providing victim and witness protection and assistance; and (3) a new requirement that contractors provide all their personnel information about how and where to report offense and where to seek assistance. These new requirements must be included in each contract in Iraq and Afghanistan that is awarded at least 180 days after the date of enactment of the law. A report is also required.

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Section 855. Suspension of Statutes of Limitation When Congress Authorizes the Use of Military Force--Section 3287 of Title 18, United States Code, provides that when the United States is at war, the statute of limitations in cases of acquisition related fraud against the United States are suspended until three years after the termination of hostilities as proclaimed by the President or resolution of Congress. Section 855 would amend that section to provide for the suspension of the applicable statute of limitations in cases in which "Congress has enacted a specific authorization for the use of the Armed Forces" as described in the War Powers Resolution (50 USC 1544(b)), in addition to cases in which the United States is fighting a declared war. In addition, statutes of limitation would be suspended until five years following the termination of hostilities, instead of three.

Contractor Ethics/Compliance Requirements

Section 841. Contractor Conflicts of Interest--Government contractors, whose employees perform acquisition functions closely associated with inherently governmental functions, must develop and put in place procedures to identify and prevent personal conflicts of interest for those contractor employees performing such functions. Such functions include the development, award, and administration of Government contracts.

A policy must be developed and issued within the next 270 days by the Office of Federal Procurement Policy ("OFPP") which will define "personal conflict of interest," but in essence the policy would prohibit a contractor employee using access to non-public government information for personal gain. OFPP must issue a clause for inclusion in new solicitations, contracts, and task orders requiring contractors to screen employees who perform acquisition functions closely associated with inherently government functions for potential conflicts of interest, maintain oversight to verify compliance with personal conflict of interest rules, report employee violation of the prohibition to the contracting officer, and take appropriate disciplinary actions against employees who breach the rule.

The new clause will take effect within 300 days of enactment of the Act, which will be approximately August 2009.

Section 842. Information for Department of Defense Contractor Employees on Their Whistleblower Rights--The Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) increased whistleblower protections for contractor employees. Such protections are spelled out in Part 3.9 of the Federal Acquisition Regulation ("FAR"). This provision requires defense contractors to provide all employees, in writing, of their whistleblower rights and protections under the FAR.

It is not clear whether each employee must be notified individually or as a group (through posters, internal website, etc.) or with what frequency.

Section 868. Minimizing Abuses of Commercial Services Item Authority--Congress continues to be wary of the commercial item authority when it comes to commercial services. Under this new change, the contracting officer must determine in writing that the offeror has submitted sufficient information to determine, through price evaluation, the reasonableness of the offered price for the service if the offered services are not offered and sold competitively in substantial quantities in the commercial marketplace, but are "of a type" offered and sold competitively in substantial quantities in the commercial marketplace. To make the required determination, the contracting officer may request relevant information such as labor costs, material costs, and overhead rates.

Section 871. Access of Government Accountability Office to contractor employees--This House originated provision was adopted by the Senate with only a technical clarification. The provision authorizes the Government Accountability Office to interview current employees. This authority applies to contractors who have contracts with both the DoD and civilian agencies.

Section 872. Database for Federal Agency Contract and Grant Officers and Suspension and Debarment Officials--This section requires contracting officers to document their review and assessment of information, in a database, relating to the offeror's integrity and past performance. The

database will contain information related to criminal, civil and administrative proceedings against the contractor where the contractor is found at fault and liable for damages. Also each federal suspension and debarment and administrative agreement resolving a debarment or suspension procedure will be listed in a database. Contractors will have an opportunity to submit comments to data contained in the database.

Contractors will be required to submit the required information and update the information on a semiannual basis.

1. It is expected that the President will sign the bill today, September 30, 2008.

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