



## Government Contracts Advisory

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### ***Clean Contracting Act of 2008***

The recently enacted National Defense Authorization Act for Fiscal Year 2009 includes the "Clean Contracting Act of 2008" ("the Act"). The Act, for the most part, extends to civilian agencies procurement laws enacted in recent years that had previously been unique to the Department of Defense ("DOD"). It focuses on enhanced competition and efficiency. Summarized below are some of the pertinent provisions of the Act.

#### **Section 862. Limitation on Length of Certain Non-Competitive Contracts**

This provision limits the duration of any sole source contracts which civilian agencies may award based on unusual and compelling circumstances to one year. If the requirement still exists at the end of the first year, the agency must award a new contract using full and open competition, which will substantially limit the usefulness of this type of sole source contracting.

#### **Section 863. Requirements for Purchase of Property and Services Pursuant to Multiple Award Contracts**

This provision imposes certain competition requirements on agencies purchasing property or services through multiple award contract vehicles. Contracting officers handling such procurements will be required to provide fair notice of the requirement to *all* contractors under the multiple award contract. Further, all contractors must have a fair opportunity to make an offer, and to have that offer fairly considered. Notice may be provided to fewer than all contractors if notice is provided to as many contractors as practicable, and at least three qualified contractors submit an offer. If less than three offers are received, the contracting officer must determine, in writing, that no additional qualified contractors could be identified. Finally, notice of award of sole source task or delivery orders placed against multiple award contracts must be published on FedBizOpps within 14 days of the order being placed, but no such requirement is set for competitive orders. While this provision will greatly increase the transparency of contracting activity under multiple award schedule contracts, ensuring much greater competition, it will also increase the administrative burdens of using multiple award vehicles. Allowing all contract holders to bid on every task order, particularly for programs like General Services Administration's ("GSA") Federal Supply Schedules program, is likely to multiply many times over the amount of work needed to issue task orders.

The requirement for competition under multiple award contracts originated in the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107), applying only to DOD. This new provision applies to all executive agencies and repeals the DOD-only requirement as redundant.

#### **Section 864. Regulations on the Use of Cost-Reimbursement Contracts**

There is a growing belief in Congress that cost-reimbursement contracts are awarded too frequently and without proper consideration of the option to use a fixed price contract. This provision requires the Office of Management and Budget ("OMB") to publish new Federal Acquisition Regulation ("FAR") guidance describing when and under what circumstances cost reimbursement contracts are appropriate. Congress is seeking an annual report for each of the next five years from OMB on the number and value of cost reimbursement contracts awarded, and the efficacy of the newly required guidance.

#### **Section 866. Limitation on Tiering of Subcontractors**

The National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) mandated the

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elimination of 'tiering' of contracts, seeking to minimize what Congress perceives as excessive use of contractor tiers that add no or negligible value to contract performance. The resulting Defense Federal Acquisition Regulation Supplement ("DFARS") clause, 252.215-7004, focused on limiting the addition of excess pass-through charges of higher-tier contractors' indirect costs and profits on charges for the work of subcontractors, where the higher-tier contractor adds no or negligible value to the subcontractor's work. Under the Act's new provision, this requirement will be extended to all agencies through a FAR amendment. DOD, however, will continue to follow the DFARS.

#### **Section 867. Linking of Award and Incentive Fees to Acquisition Outcomes**

Congressional hearings have identified circumstances where Congress believes that award and incentive fees were inappropriately awarded to contractors, including situations where unsatisfactory performance still earned award fees and incentive measures bore little relation to completion of contract objectives. This provision requires the FAR to be amended to instruct the civilian agencies on the appropriate use of award and incentive fees. The regulations shall ensure that award fees are clearly linked to acquisition outcomes such as program cost, schedule, and performance; ensure that no award fees are paid if the contractor does not deliver satisfactory performance; establish percentages of award fee available for performance that is good or expected versus excellent or superior; and provide specific direction when award fees not earned in one award fee period can be rolled over to another award fee period. Agencies will also collect data to evaluate the effectiveness of award fees. The National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) imposed a similar requirement on DOD.

#### **Section 868. Minimizing Abuse of Commercial Services Item Authority**

Congress has grown increasingly concerned about the level of analysis that goes into the award of commercial services contracts, particularly where commercial sales experience can provide only limited insight regarding the pricing of contractor services. For example, where the services are not identical to a contractor's own commercial services but rather merely "of a type" offered and sold in the commercial marketplace. Again expanding a DOD-unique procurement rule to civilian agencies, this provision requires contracting officers to determine in writing that a contract price is reasonable when purchasing a service that is "of a type" offered and sold in substantial quantities in the commercial marketplace. In support of this determination, it provides that contracting officers may seek information on the prices commercial customers paid for the same or similar items, and in some cases, even the contractor's labor costs, material costs, and overhead rates. The latter authority appears to contravene prior law regarding access to cost or pricing data regarding commercial items. The practical impact of seeking this type of data from companies that do not collect such data may limit the usefulness of this provision.

#### **Section 869. Acquisition Workforce Development Strategic Plan**

Congress is directing executive agencies, other than DOD, to develop a 5 year "Acquisition Workforce Development Strategic Plan" to increase the size of the acquisition workforce. This provision is trying to encourage more proactive planning in expected retirements in the acquisition community over the next decade. The plan must be developed in the next year, and describe a sustainable funding model to address hiring, training and retaining an appropriately sized and skilled acquisition workforce. Congress expects the plan will recommend a 25 percent growth of the acquisition workforce over the next five years.

#### **Section 871. Access of Government Accountability Office to Contractor Employees**

This House-originated provision authorizes the Government Accountability Office ("GAO") to interview current contractor employees regarding contracts being reviewed. This authority applies to contractors who have contracts with both the DOD and civilian agencies. This is a major departure for GAO's audit authority, which as a matter of law, has long been limited to audits of books and records and did not extend to interviews of personnel (although contractors often provide such access voluntarily).

#### **Section 872. Database for Federal Agency Contract and Grant Officers and Suspension and Debarment Officials**

This section requires contracting officers to document in a database their review and assessment of information relating to offeror integrity and past performance. This database will contain information related to criminal, civil and administrative proceedings against contractors where the contractor is found at fault and liable for damages. In addition, each federal suspension and debarment and administrative agreement resolving in a debarment or suspension procedure will be included. Contractors will have an opportunity to submit comments in response to data contained in the database and will be required to submit required information and update the information on a semiannual basis. This provision has been the subject of considerable discussion before its passage because of the potential for abuse and error

inherent in such a reporting requirement. The final provision, at least, ensures that contractors will have the ability to respond to any information contained in the database.

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