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CLIENT ADVISORY

GOVERNMENT CONTRACTING REFORM: SENATE PROPOSES NEW RESTRICTIONS AND OPPORTUNITIES

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INTRODUCTION

On November 7, the Senate unanimously passed S. 680, its version of the Accountability in Government Contracting Act of 2007. The House passed H.R. 1362, the Accountability in Contracting Act of 2007 in March. Both bills would increase transparency and competition in federal procurement, though the Senate bill is more comprehensive and broader in scope. The bills are currently in conference and it is unclear how differences will be resolved. However, reform appears certain and contractors should be familiar with the anticipated changes.

NEW RESTRICTIONS ON NON-COMPETITIVE CONTRACTS

Both bills create time limits on non-competitive or sole-source contracts unless the head of the relevant agency identifies "exceptional circumstances" (Senate version) or concludes that "the Government would be seriously injured" (House version). Non-competitive contracts by civilian and defense agencies are limited to a 270-day duration for contracts valued over the simplified acquisition threshold (41 U.S.C. §403, currently $100,000) in the Senate version, and a one year duration for contracts valued over $1 million in the House version. Once time expires, those contracts must be awarded under competitive procedures. The House version further requires that civilian and defense agencies take efforts to minimize sole source contracting, generally.

Both bills require that justification and approval ("J&A") documents for any non-competitive contracts be made publicly available. The Senate version requires that they be posted on FedBizOpps, while the House version requires posting on federal agency websites and the Federal Procurement Data System. The House version also calls for notice to Congress if any noncompetitive contracts are awarded to foreign-owned companies based in any country identified by the State Department as sponsoring terrorism. Such public disclosure provides for transparency, but will also increase the likelihood of bid protests challenging the sole source awards.

The Senate version additionally forbids any task or delivery order contract for services for more than $100 million to be assigned to any single contractor without a finding of necessity by the relevant agency head. For those contracts, the agency

must also report to Congress within 30 days and post J&A documents on FedBizOpps.

NEW RESTRICTIONS ON COST-REIMBURSEMENT CONTRACTS

The Senate bill mandates amendments to the Federal Acquisition Regulation ("FAR"), outlining the proper use of cost-reimbursement contracting. The new regulations would be required to address when such contracts are appropriate and what findings are necessary to support the decision. Of course, FAR part 16.3 already addresses the subject of Cost-Reimbursement contracts and limitations on their use; thus, Congress presumably seeks greater detail from the administration for the use of flexibly priced contracts. Agency Inspectors General would conduct annual reviews of cost-reimbursement contracting decisions. The less detailed House provision states that civilian and defense agencies with contracts valued over $1 billion should maximize fixed-price contracting "to the fullest extent practicable." Whereas the Senate bill seeks guidelines, the House bill affirmatively requires the Government to avoid cost type contracts. The House version lacks appreciation for the different risk sharing inherent between fixed price and cost type contracts and the implications a shift toward fixed price contracts will have on contract prices.

CONFLICTS OF INTEREST

The Senate bill also addresses the subject of organizational and personal conflicts of interest. Currently, the FAR addresses the subject of conflicts of interest at FAR part 9.5 and requires procuring agencies to include an appropriate contract clause to address OCIs and mitigation of conflicts. Some agency FAR supplements contain OCI contract clauses. The Senate bill seeks more detail in the restrictions on OCIs and personal conflicts of interest and recommends a standard clause to be used for all agencies.

AWARD FEES

There is a perception that procurement agencies issue full incentive and award fees to contractors simply for meeting contract requirements, rather than exceeding basic performance standards. This is evident in the Senate bill's proscription to "ensure that no award fee be paid for contractor performance that is judged to be below satisfactory performance or performance that does not meet the basic requirements of the contract." The Senate bill seeks to establish specific requirements for the issuance of award fees and those authorized to grant such fees.

OUTSOURCING

The subject of outsourcing and the controversial A-76 program rears its head again in the Senate bill. The Senate bill would require the Administrator for Federal Procurement Policy to issue guidance ensuring that federal employees perform inherently governmental work under OMB Circular A-76. This direction may be a back-door approach to securing work in-house rather than outsourcing. The outcome will depend on whether or how the administration would define "inherently governmental work."

NEW RESTRICTIONS ON INTERAGENCY ACQUISITIONS

The Senate bill alone targets abuse of interagency contracts and assisted acquisition services. S. 680 requires the Office of Management and Budget ("OMB") to issue guidance for use of interagency acquisitions, to include language regarding when those contracts are inappropriate. The FAR would be amended to require written agreements between the agencies and business case analyses justifying multi-agency contracts. The same section of the Senate version requires federal supply schedule ("FSS") contracts and indefinite delivery, indefinite quantity ("IDIQ") contracts to be reviewed to eliminate any that are unnecessary.

OTHER PROVISIONS

S. 680 would:

- Eliminate the one-year limitation on interest due on late payments to contractors.
- Mandate new FAR regulations to guide the use of tiered evaluations, including a prohibition on their use unless the contracting officer has done market

research and determines and justifies why they are necessary in a written file.

- Allow protests against delivery or task orders if orders are outside the scope of the original contract or beyond a threshold value ($5 million, or $25 million with an agency finding).

H.R. 1362 would:

- Require quarterly disclosure to Congress of any contractor overcharges of $10 million or more, pursuant to mandatory audits. This has no counterpart in the Senate bill and does not consider the ramifications of public disclosure of audit reports that have no authoritative effect and only contain recommendations about alleged unallowable costs.

We hope that you find this brief summary helpful. If you would like more information, or assistance in addressing or commenting on the issues raised in this advisory, please feel free to contact:

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