

Legislation, Regulations, and Protest Decisions: New Developments in 2009



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Agenda

I. Recent Legislative Developments

- A. Legislative developments affecting government contractors
- B. Status of the Small Business Innovation Research Re-Authorization Bill

II. Recent Development in Compliance

- A. Tips on complying with the mandatory disclosure rules

III. Recent GAO Decisions

- A. Trends in GAO protests
- B. The Delex decision
- C. Other significant GAO decisions

I. Recent Legislative Developments

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 1 (see also S. 1, S. 336, and S. 350)	Obey (D-WI)	American Recovery and Reinvestment Act of 2009 - the economic stimulus spending bill	Appropriations	Introduced 1/26/09; passed House 1/28/09; passed Senate 2/10/09; cleared for White House 2/13/09; signed 2/17/09; P.L. 111-5
H. Res. 40	Tanner (D-TN)	Resolution -- amends House rules to require each standing committee or subcommittee to hold at least three hearings per year on the topic of waste, fraud, abuse or mismanagement		Introduced 1/9/09; passed House 1/14/09
H.R. 113	Fortenberry (R-NE)	Bill -- To provide for audits of programs, projects, and activities funded through earmarks	Oversight and Gov't Reform	Introduced 1/6/09
H.R. 124	Gallegly (R-CA)	Secure the Capitol Act -- To prohibit offices of the legislative branch from entering into a contract for the provision of goods or services within the Capitol Complex with any contractor who does not participate in the basic pilot program for employment eligibility verification.	House Administration	Introduced 1/6/09
H.R. 138	Gallegly (R-CA)	Bill -- To require federal contractors to participate in the basic pilot program for employment eligibility verification	Judiciary, Education and Labor	Introduced 1/6/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 553	Harman (D-CA)	Reducing Over-Classification Act of 2009 -- to require DHS to develop a strategy to avoid over-classification and promote disclosure	Homeland Security	Introduced 1/15/09; passed House 2/3/09 and sent to Senate 2/3/09
H.R. 572	Ellsworth (D-IN)	Contracting and Tax Accountability Act of 2009 -- would prohibit award in excess of the simplified acquisition threshold unless the prospective contractor or grantee certifies in writing to the awarding agency that the contractor or grantee has no seriously delinquent tax debt	Oversight & Gov't Reform	Introduced 1/15/09
H.R. 639	Eschoo (D-CA)	Security Clearance Oversight & Accountability Act - - requires audit to determine whether clearances are necessary for particular jobs	Oversight & Gov't Reform	Introduced 1/22/09
H.R. 885	Larson (D-CT)	2009 Improved Financial and Commodity Markets Oversight and Accountability Act - Would make IG position a presidential appointment subject to congressional approval; would provide IGs with subpoena power.		Passed by House 6/8/09
H.R. 946	Braley (D-IA)	Plain Language Act of 2009 -- to enhance citizen access to Gov't information and services by establishing that government documents issued to the public must be written clearly	Oversight & Gov't Reform	Introduced 2/10/09
H.R. 963	Price (D-NC)	Transparency and Accountability in Intelligence Contracting Act of 2009 -- to enhance transparency and accountability within the intelligence community for activities performed under Federal contracts	Intelligence, Armed Services, Judiciary	Introduced 2/10/09
H.R. 983	Sullivan (R-OK)	Gov't Neutrality in Contracting Act -- to preserve open competition and federal government neutrality towards the labor relations of federal government contractors on federal and federally funded construction projects	Oversight & Gov't Reform	Introduced 2/11/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 1008	Thompson (D-MS)	Intelligence Community Audit Act of 2009 -- to reaffirm and clarify the authority of the comptroller general to audit and evaluate the programs, activities, and financial transactions of the intelligence community	Intelligence; Oversight and Gov't Reform	Introduced 2/11/09
H.R. 1107	Conyers (D-MI)	Bill -- to codify certain provisions as part of Title 41 (substantially similar to H.R. 4779 in 110 th Congress)	Judiciary	Introduced 2/23/09; reported out 3/23/09
H.R. 1360	Sutton (D-OH)	Contractor Accountability Act -- would require federal agencies to publicly list federal contractors that are failing to meet their responsibilities after being awarded a contract	Oversight and Gov't Reform	Introduced 3/5/09
H.R. 1436	Cuellar (D-TX)	Gov't Efficiency, Effectiveness, and Accountability Act -- to provide for the evaluation of government programs for efficiency, effectiveness, and accountability	Oversight and Gov't Reform	Introduced 3/11/09
H.R. 1472	Blackburn (R-TN)	TARP and ARRA Reporting and Waste Prevention Act -- to establish reporting requirements each time funds from TARP or ARRA are received or redistributed, and to establish a waste, fraud, and abuse hotline for such funds	Financial Services; Oversight and Gov't Reform	Introduced 3/12/09
H.R. 1507	VanHollen (D-MD)	Whistleblower Protection Enhancement Act -- strengthens whistleblower protections for employees of government contractors who expose fraud, waste, and abuse	Oversight and Gov't Reform	Introduced 3/12/09; hrg. 4/30/09
H.R. 1537	Sestak (D-PA)	Bill -- to direct DOD to conduct studies regarding alternative models for acquisition and funding of technologies supporting network-centric operations	Armed Services	Introduced 3/16/09
H.R. 1538	Sestak (D-PA)	Bill -- to repeal the small business competitiveness demonstration program	Small Business	Introduced 3/16/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 1555	Brown-Waite (R-FL)	Border Control and Contractor Accountability Act - creates cause for suspension or debarment upon finding that contractor employed an unauthorized alien, or had knowledge of a subcontractor's employment of an unauthorized alien	Homeland Security; Oversight and Gov't Reform	Introduced 3/17/09
H.R. 1601	Sestak (D-PA)	Bill - would require DOD to train service members (pre-deployment) in contract and contractor management	Armed Services	Introduced 3/18/09
H.R. 1665	Cummings (D-MD)	Coast Guard Acquisition Reform Act of 2009 -- to strengthen the Coast Guard's acquisition management processes and prohibit use of private-sector LSIs	Transportation and Infrastructure	Introduced 3/23/09; approved by cmte 4/2/09
H.R. 1667	Abercrombie (D-HI)	War Profiteering Prevention Act of 2009 -- would provide for criminal penalties (10 years, \$1 million) against war profiteers	Judiciary	Introduced 3/23/09; hearing held 4/1/09
H.R. 1668	Brown-Waite (R-FL)	Border Control and Contractor Accountability Act - creates cause for suspension or debarment upon finding that contractor employed an unauthorized alien, or had knowledge of a subcontractor's employment of an unauthorized alien	Homeland Security	Introduced 3/23/09
H.R. 1748 See also S.386	Conyers (D-MI)	Fight Fraud Act of 2009 - to enhance investigation and prosecution of mortgage fraud	Judiciary	Introduced 3/26/09; reported out of cmte 5/4/09
H.R. 1788	Berman(D-CA)	False Claims Act Correction Act of 2009 -- a bill to amend the False Claims Act (more extensive than Grassley bill)	Judiciary	Introduced 3/30/09
H.R. 1802	Tiahrt (R-KS)	Commission on the Accountability and Review of Federal Agencies Act -- to establish a commission to review federal agencies and programs and make recommendations for elimination or realignment of duplicative, wasteful or outdated functions	Oversight and Gov't Reform	Introduced 3/30/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 1830	Tauscher (D-CA)	Weapon Systems Acquisition Reform Act of 2009 -- to improve DOD organization and procedures for the acquisition of major weapons systems (companion bill to S. 454)	Armed Services	Introduced 3/31/09
H.R. 1874	Schakowsky (D-IL)	Patriot Corporation of America Act of 2009 -- a bill to provide federal contracting preferences for, and a reduction in the rate of income tax imposed on, Patriot corporations	Ways and Means, Oversight and Gov't Reform	Introduced 4/2/09
H.R. 1910	Connolly (D-VA)	Chief Technology Officer Act of 2009 -- a bill to create an office of the chief technology officer within the executive office of the president	Ways and Means, Oversight and Gov't Reform	Introduced 4/2/09
H.R. 1911	Connolly (D-VA)	Transparency and Accountability in State and Local Contracting Act -- a bill to amend the American Recovery and Reinvestment Act of 2009 to require funding to help award recipients defray the costs of data collection requirements initiated pursuant to the act	Ways and Means, Oversight and Gov't Reform	Introduced 4/2/09
H.R. 1983	Conyers (D-MI)	Bill --codification bill to enact certain laws relating to small business as title 53, U.S. Code, 'Small Business'	Judiciary	Introduced 4/21/09
H.R. 2028	Johnson (R-TX)	New Employee Verification Act of 2009 -- to create a new mandatory national employee verification process for U.S. citizens and immigrants to eventually replace the government's E-Verify program	Judiciary; Education and Labor; Rules; Ways and Means	Introduced 4/22/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 2101 See also S. 454	Skelton (D-MO)	Weapons Acquisition System Reform Through Enhancing Armed Services Technical Knowledge and Oversight Act (WASTE TKO) -- bill to promote reform and independence in the oversight of weapons system acquisition by the Defense Department	Armed Services	Introduced 4/27/09; mark up 5/7/09; reported out of cmte 5/12/09; passed by House, 5/13/09; 5/20 & 5/21 Conference & clear for president; signed into law 5/22/09 (P.L. 111-023)
H.R. 2177	Price (D-NC)	Transparency Accountability in Security Contracting Act of 2009 -- to require accountability for personnel performing private security functions under federal contracts	Armed Services; Foreign Affairs; Oversight and Govt Reform	Introduced 4/29/09
H.R. 2182	Towns (D-NY)	The Enhanced Oversight of State and Local Economic Recovery Act - amends the ARRA to allow state and local govts to use the GSA FSS program for ARRA-funded projects; builds on the Cooperative Purchasing Program (P. L. No. 107-347) opening GSA Schedule 70 to state and local govts.		Approved by House on voice vote 5/19/09
H.R. 2189	Wilson (R-SC)	Gov't Charge Card Abuse Prevention Act of 2009 -- to prevent abuse of government charge cards	Oversight and Gov't Reform; Armed Services	Introduced 4/30/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 2349	Ryan (D-OH)	A bill to provide personal jurisdiction in civil actions against contractors of the U.S. government performing contracts abroad with respect to serious bodily injuries of members of the armed forces, civilian employees of the U.S. government, and U.S. citizen employees of companies performing work for the U.S. government in connection with contractor activities	Oversight and Gov't Reform	Introduced 5/12/09
H.R. 2415	Adler (D-NJ)	A bill to require the federal government to use purchases of goods or services through the federal supply schedules for the purpose of meeting certain contracting goals for participation by small business concerns owned and controlled by service-disabled veterans	Oversight and Gov't Reform	Introduced 5/14/09
H.R. 2416	Adler (D-NJ)	A bill to require VA to use purchases of goods or services through the federal supply schedules for the purpose of meeting certain contracting goals for participation by small business concerns owned and controlled by veterans, including veterans with service-connected disabilities	Veterans' Affairs and Oversight and Gov't Reform	Introduced 5/14/09
H.R. 2461	Sandlin (D-SD)	Veterans Small Business Verification Act -- A bill to amend Title 38, United States Code, to clarify the responsibility of the secretary of Veterans Affairs to verify the veteran status of the owners of small business concerns listed in the database maintained by the secretary	Veterans' Affairs	Introduced 5/18/09
H.R. 2521	DeLauro (D-CT)	Title -- to establish a Nat'l Infrastructure Development Bank for investment and financing for infrastructure projects	Energy & Commerce; Transportation & Infrastructure; Financial Services	Introduced 5/20/09
H.R. 2568	Johnson (D-GA)	The Fairness and Transparency in Contracting Act of 2009 - would impose 5-year debarment on a company that fraudulently misrepresents itself as a small businesses for purposes of obtaining a federal contract.	Small Business; Oversight and Gov't Reform	Introduced 5/21/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 2646	Towns (D-NY)	Gov't Accountability Office Improvement Act of 2009 -- A bill to amend title 31, U.S. Code, to enhance the oversight authorities of the Comptroller General	Oversight and Gov't Reform	Introduced 6/2/09
H.R. 2647		FY 2010 DOD Authorization Bill - Draft acquisition provisions would increase services contract oversight, strengthen the acquisition workforce, reduce reliance on contractors for critical acquisition functions, and streamline major automated information system program reporting requirements. Provisions include requirements to return award/incentive fees and barring bids for future contracts when a firm's action "leads to a service member or civilian employee's death or severe injury"; review of "revolving door" policies with respect to officials who leave DOD to work in the defense industry; expand debarment and suspension rules to restrict debarred contractors from receiving subcontracts of any size on federal projects; and requiring a review of how serious contractor performance deficiencies are addressed in cases "where DOD is overly dependent on a contractor." In addition, DOD would be required to publicize the reasons for bundling multiple contracts into a large single contract; ensure that "product support integrator" function is performed in-house for contracts involving the sustainment of major weapons systems. Renews for 2 years authority to use simplified acquisition procedures for commercial items under \$5m; speeds up the process for acquiring new IT systems; for service contracting, examine DOD's ability to establish clear requirements, measure performance, "develop the right kind of contracting expertise," and manage service contracts.	Armed Services	Introduced 6/21/09; passed by committee 6/18/09; passed by House 6/25/09; in conference
H.R. 2650	Oberstar (D-MN)	Coast Guard Modernization Act of 2009 -- A bill to amend title 14, U.S. Code, to modernize the leadership of the Coast Guard, to modernize the administration of marine safety by the Coast Guard	Transportation and Infrastructure	Introduced 6/2/09
H.R. 2682	Duncan (R-TN)	Freedom from Gov't Competition Act of 2009 -- A bill to require that the federal government procure from the private sector the goods and services necessary for the operations and management of certain government agencies	Oversight and Gov't Reform	Introduced 6/3/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 2736	Sarbanes (D-MD)	CLEAN-UP Act --A bill to ensure efficient performance of agency functions	Oversight and Gov't Reform	Introduced 6/4/09
H.R. 2747	Halvorson (D-IL)	Rural Technology Development and Outreach Act - A bill to amend the Small Business Act to improve outreach and support activities and to increase award recipients from rural areas with respect the Small Business Innovation Research Program and the Small Business Technology Transfer Program	Small Business; Science and Technology	Introduced 6/8/09
H.R. 2767	Graves (R-MO)	Investing in Tomorrow's Technology Act - A bill to amend the Small Business Act to extend and improve the SBIR Program and the SBTB Program	Small Business; Science and Technology	Introduced 6/9/09
H.R. 2769	Bright (D-AL)	Commercializing Small Business Research and Development Act - A bill to amend the Small Business Act to promote the commercialization of certain small business research and development projects	Small Business; Science and Technology	Introduced 6/9/09
H.R. 2772	Schock (R-IL)	SBIR and STTR Enhancement Act - A bill amend the Small Business Act to enhance the SBIR Program and the SBTB Program	Small Business; Science and Technology	Introduced 6/9/09
H.R. 2822	Johnson (D-GA)	Public Corruption Prosecution Improvements Act - A bill to help federal prosecutors and investigators combat public corruption by strengthening and clarifying the law	Judiciary	Introduced 6/11/09
H.R. 2825	Shea-Porter (D-NH)	Safety in Defense Contracting Act - For contracts over \$5m, would require debarment from contracting with DOD any company found to have jeopardized the health or safety of government employees, or found guilty of contract fraud	Armed Services	Introduced 6/11/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
H.R. 2900	King (R-IA) and Mack (R-FL)	Davis-Bacon Repeal Act -- to repeal Davis-Bacon Act wage and reporting requirements from future federal government construction contracts	Education and Labor	Introduced 6/16/09
H.R. 2965	Altmire (D-PA)	SBIR/STTR Reauthorization Act of 2009	Small Business, Science and Technology	Introduced 6/19/09; passed House 7/8/09; passed Senate 7/13/09; in conference
H.R. 3284	Sherman	A bill to prohibit the heads of executive agencies from entering into or renewing procurement contracts with persons who export certain computer or telecommunications technologies to Iran	Oversight and Govt. Reform	Introduced 7/21/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
S. 1 (see also H.R. 1 and S. 350)	Reid (D-NV)	American Recovery and Reinvestment Act of 2009 -- the economic stimulus spending bill	Appropriations	Introduced 1/6/08; passed Senate 2/10/09; Introduced 1/26/09; passed House 1/28/09; cleared for White House 2/13/09; signed 2/17/09; P.L. 111-5
S. 90	Vitter (R-LA)	Gov't Neutrality in Contracting Act -- To preserve open competition and federal government neutrality towards the labor relations of federal government contractors on federal and federally funded construction projects	Homeland Security and Gov't Affairs	Introduced 1/6/09
S. 162	Feingold (D-WI)	Fiscal Discipline, Earmark Reform and Accountability Act of 2009 -- to provide greater accountability of federal spending by curtailing earmarks	Rules and Administration	Introduced 1/6/09
S. 177	Feingold (D-WI)	Strengthening Our Economy Through Small Business Innovation Act of 2009 -- To extend the Small Business Innovation Research and Small Business Technology Transfer programs; to increase the allocation of federal agency grants for those programs; and to add water, energy, transportation, and domestic security related research to the list of topics deserving special consideration	Small Business and Entrepreneurship	Introduced 1/8/09
S. 260	Dorgan (D-ND)	Bill -- to amend the Internal Revenue Code to provide for the taxation of income of controlled foreign corporations attributable to imported property.	Finance	Introduced 1/15/09
S. 265 (see also H.R. 572)	McCaskill (D-MO)	Contracting and Tax Accountability Act of 2009 -- a bill to prohibit award of a contract to contractor that has seriously delinquent tax debts	Homeland Security & Gov't Affairs	Introduced 1/15/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
S. 336	Inouye (D-HI)	American Recovery and Reinvestment Act of 2009 -- supplemental appropriations for FY09; establishes the Recovery Accountability and Transparency Board to provide oversight and transparency of expenditures made under the economic stimulus program.		Introduced 1/27/09
S. 372	Akaka (D-HI) Collins (R-ME)	Whistleblower Protection Bill -- Federal employees, including employees of TSA would receive enhanced protections from retaliation for reporting waste, fraud, or abuse	Homeland Security & Gov't Affairs	Introduced 2/3/09
S. 385	Akaka (D-HI)	Intelligence Community Audit Act of 2009 -- a bill to reaffirm and clarify the authority of the Comptroller General to audit and evaluate the programs, activities and financial transactions of the intelligence community	Intelligence	Introduced 2/5/09
S. 386 See also HR 1748	Leahy (D-VT)	Fraud Enforcement and Recovery Act of 2009 (FERA) -- addresses financial institution and mortgage fraud, Section 4 substantially revises the False Claims Act (see also S. 458)	Judiciary	Introduced 2/5/09; reported out by cmte 3/5/09; approved by Senate 92-4, 4/28/09; passed by House 5/6/09, passed by Senate 5/14/09, signed by the president 5/20/09 (Pub. L. No. 111-21)
S. 412	Inhofe (R-OK)	FEMA Act of 2009 -- to establish the Federal Emergency Management Agency as an independent agency	Homeland Security and Gov't Affairs	Introduced and referred to committee 2/11/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
S. 454	Levin (D-MI) and McCain (R-AZ)	Weapon Systems Acquisition Reform Act of 2009 - to increase oversight and accountability in the defense acquisition system	Armed Services	Introduced 2/24/09; approved by cmte as revised 4/2/09; passed Senate 5/7/09; unanimously approved by the Senate 5/20/09 and the House 5/21/09; signed by the president 5/22/09; (P.L. 111-023)
S. 458	Grassley (R-IA)	False Claims Clarification Act of 2009 -- to amend and update the federal Civil False Claims Act	Judiciary	Introduced 2/24/09
S. 474	Grassley (R-IA)	Congressional Whistleblower Protection Act of 2009 -- brings Congress within the Whistleblower Protection Act of 1989	Homeland Security and Gov't Affairs	Introduced 2/25/09
S. 526	McCaskill (D-MO)	Rocky Baragona Justice for American Heroes Harmed by Contractors Act -- to require all federal contracts to include a clause establishing U.S. federal court jurisdiction for contracts performed abroad with respect to serious bodily injuries of members of the armed forces, civilian employees of the government, and U.S. citizen employees of companies performing work for the government in connection with contractor activities	Homeland Security and Govt Affairs	Introduced 3/5/09
S. 612	Leahy (D-VT)	OPEN FOIA Act -- to require legislation that contains exemptions to FOIA to state the exemption explicitly in the text of the legislation	Judiciary	Introduced 3/17/09; passed Senate by unanimous consent (6/17/09)

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
S. 615	Collins (D-ME)	Bill -- to provide additional personnel authorities for the Special Inspector General for Afghanistan Reconstruction	Homeland Security and Gov't Affairs	Introduced 3/17/09; approved by Senate by unanimous consent, 4/30/09; passed by the House 6/15/09 and cleared for White House; presented to president 6/24/09
S. 629	Collins (D-ME)	Part-Time Reemployment of Annuitants Act of 2009-- to facilitate the part-time reemployment of annuitants	Homeland Security and Gov't Affairs	Introduced and reported out of cmte 5/20/09
S. 778	Rockefeller (D-WV)	Bill -- to establish cybersecurity regulations for government and private sector, and to establish an Office of National Cybersecurity Advisor	Homeland Security and Gov't Affairs	Introduced 4/1/09
S. 800	Snowe (R-ME)	Bill -- a bill to require the president to update and modify the website recovery.gov	Homeland Security and Gov't Affairs	Introduced 4/2/09
S. 872	Voinovich (R-OH)	Effective Homeland Security Management Act of 2009 -- to establish a deputy secretary of Homeland Security for management	Homeland Security and Gov't Affairs	Introduced 4/23/09
S. 875	Specter (D-PA)	Presidential Signing Statements Act of 2009 -- to regulate the judicial use of presidential signing statements in the interpretation of Acts of Congress	Judiciary	Introduced 4/23/09

Procurement-Related Legislation 111th Congress (2009)

Bill Number	Chief Sponsor	Purpose	Committee	Status
S. 920	Carper (D-DE)	IT Investment Oversight Enhancement and Waste Prevention Act of 2009 -- to amend section 11317 of title 40, U.S. Code, to improve the transparency of the status of information technology investments, to require greater accountability for cost overruns on federal information technology investment projects, to improve the processes agencies implement to manage technology investments, and to reward excellence in information technology acquisition.	Homeland Security and Gov't Affairs	Introduced 4/28/09
S. 924	Mikulski (D-MD)	Clean Up Act -- to ensure efficient performance of agency functions	Homeland Security and Gov't Affairs	Introduced 4/29/09
S. 926	Cornyn (R-TX)	U.S. Authorization and Sunset Commission Act of 2009 -- to provide for the continuing review of unauthorized federal programs and agencies and to establish a bipartisan commission for the purpose of improving oversight and eliminating government spending	Homeland Security and Gov't Affairs	Introduced 4/29/09
S. 942	Grassley (R-IA)	Gov't Charge Card Abuse Prevention Act of 2009 -- to prevent the abuse of government charge cards	Homeland Security and Gov't Affairs	Introduced 4/30/09
S. 976	Grassley (R-IA)	Bill - to clarify impact of Paperwork Reduction Act on the work of inspectors general - bill to provide that certain provisions of subchapter I of chapter 35 of title 44, U.S. Code, relating to federal information policy, shall not apply to the collection of information during any investigation, audit, inspection, evaluation, or other review conducted by any federal office of inspector general	Homeland Security and Gov't Affairs	Introduced 5/5/09
S. 1054	Inouye (HI)	Supplemental Appropriations Act, 2009 -- A bill making FY 2009 supplemental appropriations for DOD	Appropriations	Introduced 5/14/09
S. 1233	Landrieu (DLA)	SBIR/STTR Reauthorization Act of 2009	Small Business	Introduced 6/10/09; see now H.R. 2965

Current Status of the SBIR Program

- On March 19, 2009, Congress reached a compromise to extend the SBIR Program for the second time by agreeing to extend the previous continuing resolution P.L. 110-235 from March 20, 2009 to July 31, 2009
- The SBIR Program would have ended on July 31, 2009 unless Congress re-authorized it
- On July 31, 2009, President Obama signed into law a temporary extension of the SBIR program, (S. 1513, P.L. 111-43), until September 30, 2009

II. Recent Developments in Compliance

New Compliance Rules

- Two New Rules
- Final Rule: Code of Conduct/Ethics/Hotline (FAR Case 2006-007)
 - On November 23, 2007, the Civilian Agency Acquisition and Defense Acquisitions Regulations Councils issued a final rule requiring a contractor code of business ethics and conduct and display of Inspector General Hotline Posters.
 - The rule went into effect December 24, 2007.
 - The rule requires contractors to have a code of ethics and conduct that:
 - Is suitable to the size of the company;
 - Facilitates timely discovery/disclosure of improper conduct; and
 - Ensures corrective measures are in place and carried out.

New Compliance Rules

- The rule requires insertion of the clause requiring business ethics and conduct programs (FAR 52.203-13) in all contracts, except those:
 - for commercial items
 - to be performed entirely outside of the United States
 - \$5,000,000 or less
 - to be performed in *less than* 120 days
- The rule requires insertion of the clause requiring display of Hotline Posters (FAR 52.203-14) in all contracts, except those:
 - \$5,000,000 or less, unless the agency establishes a lesser amount.

New Compliance Rules

- FAR 52.203-13 requires that:
 - Contractors must:
 - have a written code of business ethics and conduct;
 - provide a copy of the code to each employee engaged in performance of the contract;
 - promote compliance with the company's code of business ethics and conduct;
 - establish an ongoing business ethics and business conduct awareness program;** and
 - establish an internal control program.**

**** These provisions do not apply to small businesses.**

New Compliance Rules

- FAR 52.203-14 requires:
 - The contractor to “prominently display in common work areas within business segments performing work under the contract and at contract work sites:”
 - An agency fraud hotline poster;
 - An electronic version of the poster, if the company maintains fraud information hotline information on its website;
 - If the contractor’s business ethics and conduct awareness program includes a company fraud hotline poster, then it need not display agency posters.

The Mandatory Disclosure Clause

- Mandatory Self-Reporting (FAR Case 2007-006)
 - On November 14, 2007, the Government proposed a sweeping rule requiring mandatory self-reporting; final rule issued on November 12, 2008
 - Under the rule, which became final and effective on December 12, 2008, clause 52.203-13 requires that:
 - A contractor must notify the IG and Contracting Officer if it has *credible evidence* to believe there has been a violation of certain *Federal criminal laws* or of the civil False Claims Act in conjunction with a government contract

The Mandatory Disclosure Clause

- Mandatory Self-Reporting (FAR Case 2007-006)
(continued)
 - A contractor can be suspended or debarred for knowing failure to timely disclose procurement-related federal criminal violations; violations of civil False claims Act, or significant overpayments
 - Disclosure requirement applies to all covered contracts (greater than \$5m and longer than 120 days, INCLUDING commercial item contracts, contracts to be performed overseas, and small business contracts)

Implementing Mandatory Disclosure

- Identifying Reportable Conduct
 - Contractor must have minimum internal control systems for disclosure
 - Small businesses and commercial item contracts are exempt from “minimum control” requirements, but not from disclosure obligations
 - Contractor must obtain information regarding Potentially Reportable Events (PREs)

Implementing Mandatory Disclosure

- Identifying Reportable Conduct (continued)
 - The following questions should be asked when establishing and evaluating an internal control system:
 - Does the entity have a Code of Conduct?
 - Does the entity have a hotline?
 - Does the entity have a Compliance Officer?
 - What other reporting mechanisms are in place?
 - What training is conducted regarding business ethics and internal reporting?

Guidance On Implementing Disclosure Rules

- Identifying Reportable Conduct (continued)
 - What happens to reports of PREs?
 - Are the investigation results, corrective actions and recommendations documented?
 - How does the entity ensure that instances of non-compliance are reported?
 - To whom are they reported?
 - How does the entity ensure that PREs are elevated to an appropriate person?
 - Would existing controls support a determination of lack of credible evidence and non-disclosure to the Government?

Implementing Mandatory Disclosure

- Determining When a Disclosure is Required
 - Is the potential violation covered under disclosure rules?
 - Does “credible evidence” of a violation exist?
 - The definition would appear to be met if the contractor makes a rational, good faith judgment whether or not the evidence, considering the source and surrounding circumstances, supports a belief that a violation has occurred

Implementing Mandatory Disclosure

- Guidance Relevant to Disclosures
 - FOIA Markings
 - Disclosure information should be marked proprietary, confidential and exempt from disclosure under trade secrets exemption (b)(4) of FOIA to minimize risk of disclosure under FOIA
 - Attorney-Client Privilege
 - Although attorney-client or work product privileges are not waived, legal counsel should be consulted to determine whether and how a disclosure can be made without waiving privileges
 - Disclaimer
 - A disclosure does not necessarily mean that a violation has occurred, and a disclosure should include a disclaimer that the disclosure does not constitute an admission of a violation

Implementing Mandatory Disclosure

- Guidance Relevant to Disclosures (continued)
 - In seeking information contractors should respect legitimate rights of employees
 - Disclosure rules do not require any officer, director, owner or employee of the company to waive his/her attorney-client privilege or Fifth Amendment rights

Implementing Mandatory Disclosure

- “Timely Disclosure” and “Look Back” Requirements
 - “Timely Disclosure”
 - The regulations require a “timely disclosure”, but no statute or regulation prescribes the maximum time that may pass prior to effecting such a disclosure
 - What is considered “timely” will depend on the facts, the complexity of the legal issues and the effort involved to determine “credible evidence”
 - In some cases, early reporting may be advisable where allegations suggest a substantial problem
 - Good lines of communication with government officials, including agency IGs are advisable to permit informal communication about potential disclosures

Implementing Mandatory Disclosure

- “Timely Disclosure” and “Look Back” Requirements
 - “Look Back”
 - The revised suspension and debarment regulations include a “look back” provision requiring contractors to disclose violations to an existing contract that occurred *prior* to the date of the rule
 - The obligation exists until three years after final payment on any government contract
 - This rule may impact contracts that are aged but not closed out
 - Many contractors have already made mandatory disclosures under the “Look Back” provision

Implementing Mandatory Disclosure

- Determining Form and Content of Disclosures and to Whom Disclosures Should Be Made
 - The IGs for GSA, NASA and DOD have each posted a disclosure form on their respective websites
 - The forms identify certain required basic information, including:
 - The official submitting the disclosure
 - The contractor
 - The affected contract
 - Amount of loss
 - Corrective action taken

Implementing Mandatory Disclosure

- “Full Cooperation”
 - FAR 52.203-13 requires contractors to provide full cooperation with any government agencies responsible for audits, investigations, or corrective actions
 - The final rule commentary identifies government’s expectations with regard to “full cooperation:”
 - Contractors are expected to cooperate with the government investigation
 - Contractors are expected not to block government auditors and investigators’ access to information found in documents or through its employees in furtherance of a contract fraud or corruption investigation

Implementing Mandatory Disclosure

- “Full Cooperation” (continued)
 - Contractors are expected to encourage employees both to make themselves available and to cooperate with the government investigation
 - Contractors are expected to encourage employees to cooperate with reasonable government requests for documents
 - Contractors are expected not to ignore or offer little attention to detail in responding to auditor or investigator requests or subpoenas for documents or information

Implementing Disclosure Rules

- “Full Cooperation” (continued)
 - Contractors’ cooperation is expected to begin essentially at the same time as the organization is officially notified of a criminal investigation
 - Contractors’ cooperation is expected to include the disclosure of information sufficient for law enforcement personnel to identify (a) the nature and extent of the offense and (b) the individual(s) responsible for the criminal conduct

Implementing Mandatory Disclosure

- Disclosures Regarding Subcontractors and Agents
 - Rules require prime contractors to timely disclose “credible evidence” of potential violations of subcontractors or agents
 - **Best Practices for Implementing Subcontractor and Agent Provisions**
 - Companies must determine whether new rules are applicable to them, in light of expanded scope of coverage under new rule
 - Companies subject to the new rules should review its code of conduct and ethics to ensure it complies with the requirements of the new rules, particularly in terms of training programs and internal control systems
 - Contractors may wish to provide written notice of the new rules to their subcontractors, particularly providers of commercial items who may not be familiar with these requirements

Implementing Mandatory Disclosure

- Disclosures Regarding Subcontractors and Agents
 - **Best Practices (continued)**
 - Contractors will need to develop a system for verifying their subcontractor's codes of business conduct
 - Contractors will need to evaluate to which of their subcontractors they should provide their training, if any. Such training may be particularly appropriate in situations where subcontractor personnel are performing on the prime contractor's or government's site. Contractors should also consider whether subcontractors who, because of their status as a small business or a commercial item supplier, may be exempt from the requirement to have a training program
 - Contractors will need to ensure that FAR clause 52.203-13 is flowed down in all future subcontracts

III. Recent Developments at GAO

Bid Protest Trends

- Bid Protest Trends
 - In 2008, GAO received 1,563 bid protests:
 - GAO closed 1,581 cases, including 1,506 protests
 - 291 protests were decided on the merits
 - 60 protests were sustained for a sustain rate of 21%
 - The effectiveness rate (protester received some form of relief) was 42%
 - ADR was used in 78 cases
 - The ADR success rate was 78%
 - GAO held hearings in 32 cases (6%)

Bid Protests Trends at DOD

- Bid Protest Trends For the Department of Defense
 - GAO's review of DOD protests from 2004 to 2008 suggests a downward trend in the rate of DOD protest filings
 - The last five years reflect a relatively low number of DOD bid protest filed in terms of historical trends
 - GAO disagrees with disincentivizing protests, noting that:
 - the protest process is effective identifying “frivolous” protests
 - the current protest process benefits the procurement system by identifying procurement irregularities
 - Imposing penalties on protesters could have a chilling effect on the participation of contractors in the protest process and federal procurement as a whole

Protest Cases: The Delex Decision

- One of the most far-reaching and widely discussed 2009 cases at GAO is *Delex Systems, Inc.*, B-400403 (Oct., 8, 2008) (*Delex*)
- In *Delex*, GAO exercised its recently expanded jurisdiction over task order protests and sustained a protest against a Navy task order solicitation
- The solicitation was for a large, multi-award, indefinite delivery, indefinite quantity (“IDIQ”) contract
- The protester claimed the solicitation failed to comply with the Rule of Two required by FAR 19.502-2(b)

The Delex Decision

- FAR 19.502-2(b) requires agencies to set aside certain contracts valued at over \$100,000 when there is a “reasonable expectation that at least two or more responsible small businesses can perform the work”
- Prior to *Delex*, agencies had largely ignored this requirement
- In *Delex*, GAO found that the Rule of Two applied to multiple award IDIQ task and delivery orders and concluded that because two or more small businesses could have performed the work, the Navy’s failure to set aside the requirement was improper

Implications of the Delex Decision

- In *Delex*, GAO rejected the Navy's arguments that CICA and the Federal Acquisition Streamlining Act (FASA) exempted agencies from FAR 19.502-2(b) because these two Acts require a fair opportunity to compete for all offerors
- GAO found no *express* exemption from the Rule of Two in those Acts
- Rather, GAO found that the Rule of Two is authorized by the Small Business Act which GAO determined has equal stature with those two Acts
- Thus, one of the most significant effects of the *Delex* decision will be that this largely ignored requirement will now lead to many more small business set asides under multiple award IDIQ contracts

GSA's Reaction to *Delex*

- GSA, however, immediately issued a Memorandum announcing that GSA “does not agree with GAO’s decision in this matter”
- David Drabkin, who issued the Memorandum, was really stating his belief that *Delex* did not apply to GSA Schedule task orders
- At first blush this simply looked like a clash of procurement “Titans”
- However, GSA has a very good basis for determining that the Rule of Two does not Apply to GSA Schedule task orders

GSA's Reaction to *Delex*

- FAR Part 8 authorize GSA's Schedules
- FAR Part 8.404(a) authorizing the Schedules clearly states that “[p]arts 13, (except 13.303-2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202-1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedule contracts...
- Thus, GSA's authorization for its schedules *does* contain the type of express exemption from the Rule of Two that GAO determined in *Delex* did not exist under CICA, FASA, or Part 16 of the FAR

GSA's Reaction to *Delex*

- GSA is probably correct – *Delex* does not and will not be found to apply to GSA task orders
- That fact and finding may lead to more GSA Schedule contracting in the future as agencies seek to work around the Rule of Two, if they attempt to do so
- One of the biggest potential outcomes of *Delex* may be its application to large GWAC contracts – Eagle, Alliant, STARS, Seaport, and so forth
- A question also remains whether FAR 19.502-2(b) and the Rule of Two requires a *total* or partial setaside

Future Implications of *Delex*

- Many agencies seem to be setting aside partial multiple award contracts (“MACs”) for small business
- A question remains whether this approach will satisfy GAO
- So far, we have not seen a dramatic increase in *Delex* type decisions flowing from GAO
- Since October of 2008, few decisions further explaining the reach and implications of *Delex* have been issued
- The future of *Delex* remains to be written

Other Protests at GAO

- ***Tfab Manufacturing, B-401190, June 18, 2009***
 - In *Tfab*, the solicitation included the Limitations on Subcontracting (LOS) clause, FAR 52.219-14
 - The solicitation stated that offerors must meet the requirements under the LOS clause for *both* the services *and* the supply portions of work under the contract
 - The protester argued that it was improper for the solicitation to apply the LOS clause to both the supply and services portions of the contract

Implications of the Tfab Case

- GAO agreed with the protester and sustained the protest, holding that the LOS clause is applied to entire contracts, rather than portions of contracts, and that agencies must choose whether the clause applies to either the services or supply portion of the contract
- Whether a contract is for services or supplies, when it calls for both, requires an assessment of which component involves the predominant dollars under the contract
- This is very helpful guidance for the contractors trying to comply with the LOS clause – contractors and subcontractors are now assured that component contract parts do not get separate treatment under the LOS clause and can plan procurements accordingly

Other Protests at GAO

- ***L-3 Services, Inc., B-400134, September 3, 2009***
 - Bid protest allegations raised all three types of OCI:
 - Unequal Access to Information
 - Biased Ground Rules
 - Impaired Objectivity
 - Sustained on Unequal Access to Information and Biased Ground Rules grounds; denied on Impaired Objectivity
 - Remedy
 - Awardee's subcontractor was excluded from the competition
 - GAO ordered the Agency to investigate to determine whether awardee had to be excluded
 - If the Awardee could remain in the competition, the Agency had to accept revised proposals from all offerors

Implications of the L-3 OCI Case

- L-3 continues GAO's pattern of strict scrutiny of OCIs
- GAO found two organizational conflicts of interest in the same set of facts – both regarding a subcontractor
 - Offerors are on notice to be very careful in evaluating the OCIs that may be raised by subcontractors
- Recommended Relief – potential exclusion of the Agency's chosen offeror – is a relatively aggressive remedy for GAO

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