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Focus

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FEATURE COMMENT: The Defense Authorization Act For FY 2011—A Bounded Step Forward For Acquisition Reform

Congress has traditionally passed a defense authorization act every year. The annual bill is an important part of the work of the House and Senate Armed Services Committees. Title VIII of the annual bill typically includes a number of important procurement reform measures—indeed, in any given year, Title VIII is often the single most important legislative vehicle for procurement reform. This year proved no exception.

This year, however, the defense authorization bill was stalled for months, in large part because of controversy over the repeal of the "Don't Ask, Don't Tell" policy concerning homosexuality in the armed services, per 10 USCA § 654. The Senate bill originally included a provision to repeal that 1993 policy, but on Dec. 9, 2010, a cloture vote on that version of the bill failed in the Senate. Congress subsequently passed, and President Obama signed into law, separate legislation that is expected to lead to repeal of the "Don't Ask, Don't Tell" policy. See P.L. 111-321.

The authorizing committees, meanwhile, were concerned that no defense authorization bill would be passed, for the first time in many decades. See, e.g., "Blocking Defense Bill Over 'Don't Ask' May Diminish Armed Services Panels," A.F. Times, Dec. 20, 2010, at 10. The House and Senate leaders therefore introduced a streamlined bill, H.R. 6523, which Congress passed in short order in the last days of the 111th Congress. See, e.g., U.S. Senate Documents, News Release, "Senate Passes Ike Skelton National Defense Authorization Act for Fiscal Year 2011" (Dec. 22, 2010). The president signed the new defense authorization act, officially the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, on January 7. The legislation that became law includes, in Title VIII, fully 59 provisions addressing acquisition reform. This summary focuses on those provisions in Title VIII that are likely of most interest to the legal community.

Although Title VIII includes a relatively large number of reform provisions, as the summary below reflects—and as the bill's sponsors made clear—most of the more controversial elements were stripped out of the bill in order to ensure its rapid passage in the last days of the 111th Congress. See, e.g., Matthew Weigelt, "Obama Signs Defense Authorization Bill," Federal Computer Week, Jan. 7, 2011.

The more controversial provisions in the earlier versions of the bill included, for example, a provision in the House bill that could have curbed the products sold on a preferential basis by Federal Prison Industries (UNICOR), and another that would have required contractors to report bribery violations in certain foreign countries. See H. Rep. No. 111-491, 111th Cong., 2d Sess. 325, 336 (May 21, 2011) (on H.R. 5136, original bill). The bill reported out of the House Armed Services Committee also would have *required* contractors with facility clearances—even though not under foreign ownership—to establish Government security committees. Id. at 336. As is discussed below, that provision was softened in the final legislation.

In the Senate, the report that accompanied the earlier Senate bill, S. 3454, criticized the proposed organizational conflict of interest (OCI) rule published by the Defense Department pursuant to the Weapon Systems Acquisition Reform Act of 2009, P.L. 111-23. See 75 Fed. Reg. 20954 (April. 22, 2010). The Senate report complained that the draft rule would have left a loophole for systems engineers to participate in systems production. See S. Rep. No. 111-201, 111th Cong., 2d Sess. 171 (June 4, 2010).

The final OCI rule published by the Defense Department narrowed that exception, however, see 75 Fed. Reg. 81908, 81912 (Dec. 29, 2010), and the final legislation was silent on this issue.

Protests of Task and Delivery Orders—GAO Jurisdiction over Defense Department Orders Extended—Section 825 of the new legislation extended, until Sept. 30, 2016, the jurisdiction of the Government Accountability Office to hear protests regarding orders worth over $10 million issued under standing indefinite-delivery, indefinite-quantity contracts, per 10 USCA § 2304c(e). That jurisdiction had been set to expire. Because the new legislation reaches only protests of *Defense Department* orders under Title 10, however, GAO's jurisdiction to hear protests regarding *civilian* agency orders, per 41 USCA § 253j, will expire in May 2011 unless Congress takes further action.

Technical Data Rights—The new act addressed technical data rights in several regards:

- Under § 801 of the authorization act, the Defense Department may make a disclosure of technical data to a *litigation support contractor*, though that contractor (which may include an expert or technical consultant) must assure the Defense Department, by agreement, that the technical data will be protected and will not be used to compete for future contracts.
- Section 824 calls for the secretary of defense to issue guidance ensuring the *Government's access to technical data* produced at the Government's expense, to "promote competition and ensure that the United States is not required to pay more than once for the same technical data." Joint Explanatory Statement of the Committees on Armed Services of the U.S. Senate and House of Representatives on H.R. 6523, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, at 68, available at *armed-services.senate.gov/Special%20Interest%20Item/FINAL%20MASTER%20CONFERENCE%202010.pdf.* Proposed rules to revise obligations regarding technical data had been published, as proposed, at 75 Fed. Reg. 59412 (Sept. 27, 2010), and comments have been received on that proposal.

Report Requirements—The defense authorization act contains a number of independent requirements for Defense Department reports to Congress, including:

- A report on the acquisition process for *rapid fielding of capabilities in response to urgent operational needs* (§ 804). The new legislation frames, in very general terms, what the report should address in order to enhance the Defense Department's ability to field capabilities to respond to combat emergencies.
- A report on the Defense Department's *implementation of "green" acquisition policies, i.e.,* policies on acquiring sustainable products and services pursuant to EO 13514 (§ 842).
- A report on the *national security exception* (§ 844) to full-and-open competition under the Competition in Contracting Act, including a discussion of how, over the past five years, other uses of the exception have been considered in the Defense Department. See Joint Explanatory Statement, supra, at 73.
- A report on *potential new security requirements* to be imposed on contractors under the Defense Department's authority, such as a requirement for Government security committees, much like those used to monitor firms that are under foreign ownership or control (§ 845).
- A report on *contractor logistics support of contingency operations* (§ 848). The Defense Science Board is to assess, among other things, whether the correct types of contracts are being used for support, and whether the Defense Department should be relying on local nationals and third-country nationals for such logistics support.

Information Technology Systems Acquisition—In the wake of recent reports by the Defense Department and the Office of Management and Budget on information technology acquisition, see, e.g., "OMB, DOD Chart New IT Paths," 53 GC ¶ 2, the new legislation calls for several reforms:

- Section 805 of the legislation calls for a *new program to improve the planning and oversight of major automated information systems acquisitions*, and to ensure appropriate summary reporting to Congress. Notably, the legislation does *not* call for the type of IT "dashboard" (an online summary of programs' progress) or "TechStat reviews" (focused briefings, especially on failing programs) that have been championed by Vivek Kundra, the federal chief information officer in OMB. See Vivek Kundra, U.S. Chief Information Officer, *25 Point Implementation Plan to Reform Federal*

Information Technology Management (Dec. 9, 2010), available at *cio.gov/documents/25-Point-Implementation-Plan-to-Reform-Federal%20IT.pdf*; see also "Administration Issues IT Procurement Strategy," 52 GC ¶ 391; U.S. Department of Defense, *A New Approach for Delivering Information Technology Capabilities in the Department of Defense (November 2010), dap.dau.mil/policy/Lists/Policy_Documents/Attachments/3255/OSD13744-10-804Report ToCongress.pdf.*

- The legislation (§ 806) would also allow the Defense Department *new discretion to control "supply chain risk"—the risk of sabotage or surveillance by an adversary*—in procuring IT systems or supplies used in national security (including, per 44 USCA § 3542(b), intelligence, command and control, integral parts of major weapon systems, and cryptography). When there is such a "supply chain risk," the legislation will allow the Defense Department *not* to disclose the reason: (a) a vendor is excluded from a competition because it failed to meet qualification requirements, per 10 USCA § 2319; (b) a vendor fails to meet an evaluation criterion because of such a risk; or (c) a subcontractor is excluded because of such risks of sabotage or surveillance. The law also shields these decisions from bid protests, at GAO or before the U.S. Court of Federal Claims. This broad authority to exclude sources because of perceived security risks may mean, in practice, that a vendor could be excluded from a procurement, based on a perceived risk to national security, without being told why it was being excluded or being allowed to challenge that exclusion through a protest.

Changes to Industrial Base Initiatives—The legislation made a number of changes to procurement policies intended to preserve the U.S. industrial base:

- Section 822 *repeals the requirement* that certain small arms, including the M16 series rifle, be purchased only from firms in the *small arms production industrial base*, per 10 USCA § 2473. That industrial base had been defined to include only three domestic manufacturers, and § 818 of P.L. 111-84, the FY 2010 defense authorization act had suggested that the base needed to be reviewed. See H. Rep. No. 111-288, 111th Cong., 1st Sess. (Oct. 7, 2009). The new law eliminates the statutory requirement entirely.
- The new legislation (§ 827) creates permanent authority for the *Defense Acquisition Challenge Program*, described at *cto.acqcenter.com/osd/portal.nsf*, and launches a pilot program to expand opportunities for new entrants to propose cheaper alternatives to existing programs (other than major defense acquisition programs).
- Section 891 calls on the Defense Department to take innovative measures to *expand the defense industrial base*, to include additional small businesses and nontraditional defense contractors.

Specialty Metals, Rare Earth Materials and the Strategic Materials Protection Board—Specialty metals continued to play a large role in this year's defense authorization bill, and rare earth materials emerged as an important issue, as well. As part of a deepening focus on these rare materials, Congress directed changes to the Strategic Materials Protection Board, the board that oversees U.S. strategy regarding strategic materials.

- Under § 829, the legislation redirects the Strategic Materials Protection Board, which was established per 10 USCA § 187. The board is, by statute, to assess best strategies for accessing "materials critical to national security." The new legislation does two things regarding that mission. First, the new statute amends the board's mission, to call for the board to develop a strategy to "ensure a secure supply of materials" (new statute), rather than a strategy "to ensure the domestic availability of materials" (old). This suggests that *non-domestic* sources could also be considered. At the same time, however, the new statute fixes a definition of "materials critical to national security" that seems too broad, for it includes all materials "upon which the production or sustainment of military equipment is dependent," and "the supply of which could be restricted by actions or events outside the control of the Government." On its face, that definition could, it seems, sweep up everything from steel to rubber to rubber bands—for all are materials upon which military equipment *does* depend, and the supply of which *could* be restricted by actions outside the Government's control.

  To make sense of the term, therefore, the board presumably can look to its own more nuanced analysis, which was reflected in its

2008 report, *Report of Meeting: Department of Defense Strategic Materials Protection Board, Held on Dec. 12, 2008, www.acq.osd.mil/ip/docs/report_from_2nd_mtg_of_smpb_12-2008.pdf*. There, for example, the board said that material is not "critical to national security" unless, among other things, the Defense Department dominates the market for the material. This approach may have been based on the assumption that the U.S. should impose a domestic preference regarding a strategic material only where the Defense Department does, in fact, dominate the market—for where the Department does not dominate the market, an attempt to ensure security of supply through a domestic preference may prove entirely futile, as the market may collapse regardless of the preference afforded by the Department.

The board's 2008 report also included a relatively narrow definition of "security of supply." Under the board's definition, "security of supply" means that there must be a "significant and unacceptable risk of supply disruption due to vulnerable U.S. or qualified non-U.S. suppliers." Id. at 6. For foreign trade purposes, that narrow definition is an important bulwark against misuse of the "security of supply" principle to discriminate in international trade. The European Union's new defense procurement directive itself recognizes "security of supply" as a ground for discrimination. See, e.g., Marc Gabriel and Katharina Weiner, "The European Defence Procurement Directive: Toward Liberalization and Harmonization of the European Defense Market," 45 Proc. Law. 1 (2010). So that U.S. exporters do not suffer new discrimination in Europe, it will be important that the U.S. set a good example—that U.S. policy follow a considered path, such as that suggested by the board, and that the U.S. not abuse the principle of security of supply.

- Section 823 of the new legislation called for a Defense Department *review of the term "produce,"* as used in the Defense Federal Acquisition Regulation Supplement *with regard to specialty metals*, to reconcile that definition with the requirements of the governing statute, 10 USCA § 2533b. When a final rule for specialty metals was published on June 29, 2009, the Defense Department explained the background to this controversy, and noted that "produced" might mean more than mere "melting," though that was the traditional reading of the term. 74 Fed. Reg. 37626, 37630 (2009). The House committee report that accompanied the original House bill, H.R. 5136, proposed to clarify the definition of "produce" "to mean 'melted, or processed in a manner that results in physical or chemical property changes that are the equivalent of melting.' " See H. Rep. No. 111-491, 111th Cong., 2d Sess. 332 (May 21, 2010). The final legislation, as noted, called for a review of the issue by the Defense Department.
- The new legislation (§ 843) also calls for a Defense Department assessment of the use of *rare earth materials* in defense equipment, with an eye to determining whether the rare earth materials under study (1) are critical to defense equipment, and (2) are subject to interruption of supply, based on events outside the Government's control. Per the discussion above, this is much the same test that is to be applied, under the new authorization act, to determine if materials generally are "critical to national security"—in other words, the new legislation positions rare earth materials as another class of materials that, in time, may come to be protected by domestic preferences (or other Government measures).

Energy Savings Performance Contracts—Section 828 of the new legislation established notice and competition requirements for task or delivery orders issued by agencies under Energy Savings Performance Contracts (ESPCs). These contracts are intended to achieve energy and cost savings for federal agencies, and may extend up to 25 years. Under these contracts, the contractor is to incur the costs of implementing energy savings measures, including the costs of audits, equipment acquisition and installation, and training, in exchange for a share of any energy savings resulting from implementation of these measures. 42 USCA § 8287. See generally David R. Frenkil, "Energy Saving Performance Contracts: Assessing Whether to 'Retrofit' an Effective Contracting Vehicle for Improving Energy Efficiency in Federal Government Facilities," 39 Pub. Cont. L.J. 331 (2010).

Private Security Contractors—Subtitle D of the new legislation includes a number of provisions aimed at controlling private security contractors.

Among other things, those provisions will allow the Defense Department to incorporate industry standards into those set for private security contractors (§ 833), and will make it easier for the Department to take adverse action against a contractor that has jeopardized the health or safety of Government personnel (§ 834).

Improve Acquisition Act—Subtitle F of the new legislation is the Improve Acquisition Act of 2010. This subtitle grew out of an initiative of the House Armed Services Committee, on March 17, 2009, to appoint a panel on defense acquisition reform from among members of the committee, to carry out a comprehensive review of the defense acquisition system. The committee's goal was to improve responsiveness and rigor in Defense Department spending. The committee supported the Implementing Management for Performance and Related Reforms to Obtain Value in Every Acquisition Act of 2010 (IMPROVE Acquisition Act of 2010), H.R. 5013, which originally passed the House by an overwhelming majority (417-3) on April 28, 2010. As incorporated in the final defense authorization act (§ 861 et seq.), the Improve Acquisition Act provides, among other things, as follows:

- The legislation codifies the responsibility of the undersecretary of defense for acquisition, technology, and logistics for the management of the defense acquisition system (§ 2546 of the incorporated bill).
- The new legislation also calls for performance assessments of the defense acquisition system, and for stated performance goals (§ 2548).
- The legislation requires the Defense Department to improve its acquisition workforce through a variety of means, including aggressive use of flexible hiring authority to retain senior acquisition experts (§ 871).
- The legislation (§ 872) affords the secretary of defense the authority to launch a pilot program to assess proposals for reforming the acquisition workforce.
- The new authorization act calls for training and recertification of the acquisition workforce (§ 874), and for strengthened training for those in the information technology acquisition workforce (§ 875). The act also requires a review of the curriculum of the Defense Acquisition University to ensure that it meets the training needs of acquisition professionals (§ 877).

Contractor Business Systems—Section 893 of the new legislation calls for the Defense Department to develop improvements to contractor business systems, including accounting, estimating, purchasing, earned value management, material management, and property management systems. That initiative, however, may have already been overtaken, at least in part, by a rulemaking process that will require improved contractor business systems. The rulemaking, launched with a proposed rule in January 2010, 75 Fed. Reg. 2457 (Jan. 15, 2010), is well underway, with publication of a revised proposed rule in early December. See 75 Fed. Reg. 75550 (Dec. 3, 2010) and 75 Fed. Reg. 76692 (Dec. 9, 2010) (extending comment period to Jan. 11, 2011). Potential inconsistencies exist between the legislative and rulemaking efforts, notably as to the permissible level of payment retention allowed the Government to enforce sound business systems.

Conclusion—Taken in sum, the defense authorization act for FY 2011 promises much more in broad, systemic change, and actually makes relatively little granular change to the underlying law. That said, several provisions—including, importantly, the extension of the bid protest jurisdiction—will have a direct impact on the procurement law community. While initial indications are that the new 112th Congress will not be focusing extensively on procurement matters, previous years have shown that even when not expected, the defense authorization bill can become a vehicle for substantial change.

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