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THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FY09'S CLEAN CONTRACTING ACT MANDATES SIGNIFICANT CHANGES IN FEDERAL ACQUISITIONS

On October 14, 2008, President Bush signed the National Defense Authorization Act for Fiscal Year 2009 (S. 3001) ("NDAA"). The NDAA included the Clean Contracting Act ("CCA" or "Act"), which includes many provisions that will effect government contractors and agencies. NDAA §§ 861 et seq.

Background: In recent years, procurement practices conducted to support high-profile efforts, such as the war in Iraq or the response to and recovery from Hurricane Katrina, received heavy criticism and intense scrutiny from both the media and Congress. Complaints over contracts and contractors revolved around deficiencies in the competition framework, the use of ill-suited contracting vehicles that were prone to abuse, as well as alleged fraudulent business practices on the part of contractors.

In this climate, Congress enacted the CCA to consolidate various federal contracting provisions in a comprehensive reform measure. The Act seeks to: 1) enhance competition standards; 2) limit the use of contracting vehicles that Congress believes are prone to abuse; 3) improve the federal acquisition workforce; 4) strengthen anti-fraud efforts; and 5) increase transparency. Some of the more significant provisions of the CCA are summarized below.

- **Enhancing Competition:** Due to complaints arising from Hurricane Katrina that contracts awarded under emergency provisions avoided usual competition requirements, Section 862 of the CCA limits the duration of no-bid contracts awarded during emergencies to one year.
 - Section 863 also seeks to improve competition on multiple award contracts. Specifically, Section 863 provides that procurement regulations be amended to require that purchases under a multiple award contract that exceed the simplified acquisition threshold "be made on a competitive basis." NDAA § 863(b)(1). "On a competitive basis" in turn means, that there be "fair notice of the intent to make the purchase," and that all contractors have a fair opportunity to respond to such notice. *Id.* at § 863(b)(2).
 - Further, the CCA also requires acquisition regulations be amended to require public notice of all sole source task or

delivery orders in excess of the simplified acquisition threshold within fourteen days of such order being placed. Id. at § 863(c)(1).

- **Limiting Contracts Prone to Abuse:** Complaints over abusive contracts often centered on cost-reimbursement type contracts, whereby a contractor is believed to have little incentive to keep performance costs down.
 - As a result, Section 864 of the CCA requires revisions to the Federal Acquisition Regulation (“FAR”) to address the use of cost-reimbursement type contracts. These would include guidance: describing when cost-reimbursement type contracts are suitable; the acquisition plan finding necessary to support the use of a cost-reimbursement type contract; and the administrative resources necessary to award and oversee cost-reimbursement type contracts. Within a year of these regulatory changes, the Inspector General will review these changes and report on them in its semi-annual report to Congress.
 - Section 866 also requires the FAR be amended to restrict the excessive use of subcontractors, or tiering of subcontracts, that “adds no, or negligible, value” on cost-reimbursement type contracts and task or delivery orders in excess of the simplified acquisition threshold.
 - The CCA further attempts to link incentive fees to contractor performance. Specifically, Section 867 provides that the FAR be amended to provide for the appropriate use of incentive fees, which shall include establishing guidance on judging contractors’ performance, for determining the percentage of the available award fee, and ensuring “that no award fee may be paid for contractor performance that is judged to be below satisfactory performance.” Notably, Section 867 does not apply to the Department of Defense.
 - Through Section 868, the CCA also addresses increasing complaints and concerns over alleged abuse of the commercial acquisition authority. To accomplish this, the CCA requires amendment to the FAR that will ensure that services, not themselves “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,” can be treated as commercial items if the contracting officer determines that the offeror can demonstrate price reasonableness. (Emphasis added).
- **Improving the Acquisition Workforce:** In response to criticisms that the federal acquisition workforce is overworked and undertrained, the CCA authorizes the development of an Acquisition Workforce Development Strategic Plan for the civilian workforce.
 - This plan will seek to increase the civilian acquisition workforce by developing a funding strategy for hiring, retaining and training an appropriately sized workforce.
 - Section 870 also seeks to support the acquisition workforce by

authorizing the establishment of a contingency contracting corps to facilitate rapid contracting in the event of a national emergency.

- **Anti-Fraud Efforts:** In order to strengthen the government's anti-fraud efforts, Section 871 of the CCA gives the Government Accountability Office ("GAO") the ability to interview contractor employees regarding federal contract work.
- **Increased Transparency:** As part of the CCA's transparency efforts, Section 872 authorizes the creation of a database to maintain information relating to the integrity and performance of contractors.
 - This database will include: information relating to civil, criminal and administrative proceedings against contractors; information relating to a contractor being terminated for default; suspension and debarment actions against contractors; administrative agreements to resolve suspension and debarment actions; and non-responsibility findings. Notably, this database apparently will only be available to acquisition officials and members of Congress.
 - Section 874 also seeks to increase transparency by improving the federal procurement data system. Specifically, Section 874 enhances the transparency of multiple-award and interagency contracts by requiring additional reporting to the existing federal procurement database.

Practitioner Tips: The CCA mandates numerous changes to acquisition policy and regulations. Many of these changes may well serve to improve the federal procurement process and workforce. Several of the CCA's provisions, however, present substantial risks and new requirements for federal contractors. Specifically:

- Section 863, which seeks to improve competition on multiple award contracts, may result in undue delay and additional procedural hurdles for federal agencies to award contracts to previously vetted, qualified contractors.
- Section 871's authorization to allow GAO to interview contractor employees raises a number of issues as to whether contractors will be required to make such employees available, what repercussions could be imposed if a contractor refuses to allow its employees to speak with GAO or employees independently decline to submit to interviews, and whether such statements will be binding on their employer.
- Section 872 presents significant concerns as this database looks to expand upon the information available to acquisition officials, but does not outline how such information should be interpreted or used (i.e., would administrative agreements to resolve a suspension or debarment action be viewed positively or negatively). Further, it is unclear what type of information will be available in this database and whether a contractor will have any ability to review, object, or rebut such information. The possibility of inclusion in this expanded database may serve as disincentive for Contractors that might otherwise be inclined to settle rather than contest debarments and other adverse government actions.

Upcoming Events

On November 6th, **Peter Riesen** will be speaking to the Northern Virginia Chapter of the NCMA on the topic of Small Business Mentor/Protégé Agreements.

If you would like more information about this event, please contact Peter Reisen at 703.760.1981 or pariesen@venable.com.

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