

Legislative Update – Changes That May Impact Your Contracts and Programs

Joe Martinez
McKenna Long & Aldridge LLP
jgmartinez@mckennalong.com
303.634.4371

Legislative and Regulatory Developments

- Responding to economic recession
 - American Recovery & Reinvestment Act
- Rising deficit
 - Program cuts
 - OMB cost saving requirements
- Continued perception of contractor abuses
 - Increased whistleblower protections
 - Expanded False Claims Act coverage

American Recovery Reinvestment & Act (ARRA)

- \$787 billion stimulus package
 - intended to assist in economic recovery
- Introduced various reporting requirements
 - quarterly reporting of jobs created or retained
 - prime contractors to report on subcontractors and vendors
 - unclear enforcement mechanisms – OMB guidance
 - October 2009 report source of criticism
 - compensation for 5 highest compensated officers
 - if 80% of revenue from federal awards and \$25 million in awards

ARRA (cont.)

- Increased compliance requirements
 - increased GAO and IG audit and subpoena powers
 - may interview contractor and subcontractor personnel
 - enhanced whistleblower protections
- ARRA favors award of fixed price, competitively awarded contracts
 - Enforcement uncertain

ARRA (cont.)

- Further considerations
 - majority of funding still not allocated
 - increased compliance issues
 - update flowdowns
 - ARRA procurement provisions may be rolled out to all federal procurements
 - “Non-Federal Employee Whistleblower Protection Act of 2009” – S. 1745.
 - FAR Council issued rule to provide GAO access to contractor personnel – 74 Fed. Reg. 52851

Program Cuts

- 2010 Department of Defense Authorization Act
 - Eliminates funding for several programs
 - Army Future Combat System
 - Air Force Combat Search & Rescue Helicopter
 - Marine Corps. “Marine One” replacement
 - No additional Air Force F-22s
 - Signals increased budget sensitivity
 - Terminations & increased cost controls

Future Acquisition Savings

- Emphasis on reform to produce budget reductions
- President Obama issues memorandum to agencies regarding procurement reform, (74 Fed. Reg. 9755 (March 4, 2009));
 - Guidance by July 1, 2009: identification of “wasteful, and inefficient” contracts and proposed corrective action
 - Guidance by Sept. 30, 2009: oversight of contract-type selection and outsourcing
- Anticipate new regulation to control costs and shift contract risk to contractors

Future Acquisition Savings (Cont.)

- Office of Management & Budget (OMB) Guidance
 - Contract reforms identified as budget savings measure
 - July 29, 2009 guidance
 - Administration targeting \$40 billion reduction in spending
 - 3.5% reduction in FY 2010 baseline contract spending
 - 3.5% reduction in FY 2011 baseline contract spending

Future Acquisition Savings (cont.)

- Means to achieve 7% reductions
 - termination of inefficient programs
 - increased negotiation to reach cost reductions
 - more strategic approach to contracting
 - use of technology in contract administration
 - re-engineering ineffective business processes

Future Acquisition Savings (cont.)

- High-risk contracting mechanisms
 - Cost-type, T&M, and Labor Hour contracts
 - non-competitively awarded contracts / single bidder contracts
- 10% reduction in high-risk contracting
 - based upon dollar value

Future Acquisition Savings (cont.)

- OMB October 27, 2009 Competition Guidance
 - Agencies to consider whether competition is being maximized
 - Asks agencies how they are mitigating the risks of high-risk contracting mechanisms
 - How will high-risk contracting mechanisms be transitioned to low-risk mechanisms
- Does not propose significant legislative or regulatory changes

Future Acquisition Savings (cont.)

- President Obama's FY 2010 budget request provides for DoD acquisition reform
 - Requirement that programs not proceed to the next step of acquisition cycle until maturity
 - Reform to lower cost and schedule risk
- Anticipate pressures on existing programs to improve performance

Future Acquisition Savings (cont.)

- House Armed Services Committee Creates Panel on Defense Acquisition Reform
 - Six month charter to investigate DoD acquisition reform. May be extended
 - Implement panel's recommendations in the FY 11 Defense Authorization Act
- Congressional commitment to match administration: reform DoD procurement

Future Acquisition Savings (cont.)

- Weapon Systems Acquisition Reform Act of 2009
 - Increased focus on DoD/Service systems engineering
 - Enhanced development testing capabilities
 - Technological maturity assessments
 - Focus on trade-offs between schedule, cost, and performance

Future Acquisition Savings (cont.)

- FY 2010 DoD Authorization
 - Increased sole-source justification requirements
 - applicable to contract values at or above \$20 million
 - Public notification of bundling of contracts
 - potential solicitation protest issue
 - Revised IT acquisition
 - greater user involvement
 - “evolutionary” approach

Contracting Reforms

- Proposals for increased whistleblower protections
- Greater GAO/IG access to contractor and subcontractor personnel
- Criminal sanctions for war profiteering
 - War Profiteering Prevention Act of 2009 (HR 1667)
- Elimination of arbitration for certain employment claims arising from performance of contract
 - proposed amendment to DoD Appropriations
 - UPDATE: Revised amendment included in final version of DoD Appropriations Bill

Contracting Reforms (cont.)

- CLEAN-UP Act of 2009 (HR 2736)
 - limit contracting of inherent government functions
- False Claims Act Correction Act (HR 1788)
 - extends statute of limitations
 - relaxes pleading requirements
 - allows false claims to be presented to any person, not just federal employee
 - reverses Supreme Court decision in Allison Engine

Additional Updates

- E-Verify
 - President Bush signed Executive Order requiring contractors and subcontractors to use e-verify
 - system to verify eligibility to work in U.S.
 - Final rule adopted by FAR council (73 Fed. Reg. 67651)
 - Trade groups have sued challenging rule
 - rule went into effect in September 2009
 - applies to contractors & subcontractors
- Additional proposals to require debarment for hiring of undocumented workers
 - Border Control and Contractor Accountability Act of 2009 (HR 1555)

Additional Updates (cont.)

- Continuing Resolutions
 - passed to continue operation of government when appropriations bills are not passed
 - allow agencies to continue spending at rates from prior fiscal year
 - raises concerns regarding funding of contracts
 - new awards, modifications, options
 - criminal penalties for violating appropriations
 - UPDATE: Status of appropriations bills is available at:
<http://thomas.loc.gov/home/approp/app10.html>

Final Thoughts

- Questions?
- Thank you!