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White House Announces $2 Billion Goal For Energy Savings Performance Contracts

As reported on Covington's Inside Energy & Environment blog, the White House recently announced a goal of acquiring $2 billion in energy efficiency upgrades at federal buildings over the next three years. This $2 billion goal is in addition to existing commitments that the Obama Administration made in 2011, under which $2.7 billion has already been committed to fund energy efficiency upgrades. The new goal, which was announced along with a series of other new energy efficiency and solar deployment initiatives (including the return of solar panels to the White House roof), is part of the Obama Administration's focus on developing a clean energy economy.

The White House intends to meet its new $2 billion goal through energy savings performance contracts ("ESPCs") under which the private sector finances the cost of upgrading a building in exchange for a portion of the cost savings resulting from the upgrades. In the past, agencies have used ESPCs to acquire a wide variety of energy-efficient upgrades, including more efficient windows, doors, and insulation; automated controls to actively manage energy use; and solar arrays and other green-energy generation capacity. The Department of Energy, the General Services Administration, and the Department of Defense ("DoD") have established indefinite-delivery, indefinite-quantity ESPCs, which provide a mechanism for agency buyers to contract in a more streamlined fashion. Recently introduced legislation, if enacted, would authorize DoD to expand the use of ESPCs to upgrade transportable vehicles, devices, and equipment, such as ships and deployable generators.

ESPCs have emerged as an important contracting tool since the late 1990s. They have the benefit of not requiring an initial federal capital investment and can avoid the use of appropriated funds altogether, although an agency may choose to finance a project with a mix of private and federal funds. ESPCs often allow federal agencies to benefit from the availability of private sector financing. In addition, federal agencies can take full advantage of the cost savings after the expiration of an ESPC's term, which is statutorily capped at twenty-five years.

The unique nature of ESPC contracting can present challenges and opportunities to contractors. For instance, many key terms that allocate risk under ESPCs are subject to negotiation. ESPCs may vary, for example, with respect to operation and maintenance requirements, as well as obligations relating to equipment repair and replacement. ESPCs may also vary with respect to risks associated with future modifications to a facility, which may be of particular concern due to the length of most ESPCs. And, as we discussed in a recent article in the BNA Federal Contracts Report, considerations such as these can become the source of dispute during contract performance, resulting in a claim under the Contract Disputes Act and the "Disputes" clause of the FAR.

In sum, the White House's recently announced goal of acquiring $2 billion in energy efficiency upgrades to federal buildings will likely lead to a number of new opportunities. However, contractors

should be aware of the unique nature of ESPCs, including the overall risk allocation, as they examine these new opportunities.

Continued Calls for the Reform of IT Contracting

Following up on our recent coverage of the House's passage of the Federal Information Technology Acquisition Reform Act ("FITARA"), the Senate Committee on Homeland Security and Government Affairs recently held a hearing on remedying efficiencies in IT contracting to assist the Senate in preparing its own version of FITARA.

During that hearing, the U.S. Chief Information Officer, Steven VanRoekel, recommended that the government emphasize "agile" software development, which allows for continual product modification in iterative cycles that take into account the successes and failures of each version of a product that is produced. VanRoekel indicated that the Administration intends to develop a "Tech FAR" guide that will highlight acquisition methods allowing for agile development, such as the use of a pay-for-service model. Other witnesses reiterated VanRoekel's call for agile development, and also recommended an increased use of commercially available products and services, as well as reliance on public-private partnerships to reduce costs and equally allocate risks between contractors and the government.

Coinciding with VanRoekel's testimony, however, the Government Accountability Office ("GAO") released a report finding that the Departments of Defense, Health and Human Services, Homeland Security, and Transportation have failed to implement key components of agile development, including the imposition of enforceable limits on the duration of IT projects, and the establishment of a clear, expected outcome for each project. Given the public challenges during the rollout of HealthCare.gov and concerns raised over the cost-efficiency of IT acquisitions, which was the subject of a separate hearing on the same day before the Senate Appropriations Financial Services and General Government Subcommittee, it appears likely that Members of Congress will continue to focus on reforming IT contracting for the immediate future.

Five-Year Moratorium on OFCCP Enforcement Activities Against Tricare Subcontractors Goes into Effect

As we discussed in a recent update, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") recently announced a five-year moratorium on the enforcement of affirmative action obligations for TRICARE subcontractors. This moratorium went into effect on May 7, 2014 with the issuance of a directive that sets forth the scope of OFCCP's non-enforcement policy. The directive confirms that OFCCP will not enforce affirmative action obligations against network providers participating in the Federal Employee Health Benefits Program ("FEHBP"), although FEHBP providers must also participate in TRICARE to be covered by the policy. The moratorium also purports to cover providers participating in both TRICARE and Medicare, which may signal that OFCCP intends to formally assert jurisdiction over providers participating in Medicare Parts C and D.

The moratorium goes into effect on the heels of another legislative push to clarify the scope of OFCCP's jurisdiction, and coincides with OFCCP's withdrawal of its long-standing complaint against Florida Hospital of Orlando. In that action, OFCCP maintained that that the hospital was a federal subcontractor as a result of its participation in TRICARE as a network provider, notwithstanding the attempt in the National Defense Authorization Act for Fiscal Year 2012 to exempt network providers from federal subcontractor status. The moratorium does not, however, represent a retreat from

OFCCP's earlier positions. During the moratorium, OFCCP intends to "clarify" the obligations of TRICARE providers and to provide "technical assistance" to ensure their compliance.

OFCCP will close any open compliance evaluations of TRICARE subcontractors by June 18, 2014. However, OFCCP will continue to investigate claims of discrimination. Although OFCCP will not enforce recordkeeping requirements associated with affirmative action programs for the duration of the moratorium, a failure to preserve records after receiving a complaint of discrimination may result in an unfavorable presumption regarding a provider's employment practices.

GAO Recommends That DOD Engage Vendors Ealier in the Acquisition Process to Promote Competition

GAO released a report recommending that DoD focus on early vendor engagement as a means to avoid non-competitive awards by encouraging multiple offers. GAO found that the rate at which DoD awards competitive contracts has declined since 2009, with an average competition rate of 59% over the past five years. Competition rates vary widely between each component of DoD, with the Army competing 66% of contracts and the Missile Defense Agency competing 29% of contracts in Fiscal Year 2013. Of contracts that are awarded on a non-competitive basis, DoD invoked the exception for "only one responsible source" in an average of 64% of cases over the past five years.

GAO found that DoD often justifies noncompetitive awards by citing a lack of necessary data rights. Specifically, GAO cited instances in which DoD had initially purchased an item from an original equipment manufacturer without also acquiring data rights needed for subsequent acquisitions. GAO noted, however, that DoD has increasingly focused on acquiring open systems and architecture, which are intended to allow components to be added, removed, modified, or retained by multiple vendors.

Although DoD has established procedures designed to promote competition when only one offer is received in response to a solicitation, GAO found that these procedures are implemented too late in the acquisition process to have an impact on competition because vendors often make decisions as to whether to bid before the issuance of a final solicitation. Accordingly, GAO recommended that DoD provide vendors with sufficient information early in the acquisition process to allow vendors time to conduct an internal review of a solicitation's requirements and decide whether to submit a proposal.

Case Digest

GAO Upholds Requirement that Contractors Wait a Maximum of 420 Days Before Invoicing for Their Services (HealthDataInsights, Inc., B-409409 (Comp. Gen. Apr. 23, 2014))

GAO recently upheld payment terms in a Centers for Medicare and Medicaid Services ("CMS") solicitation requiring recovery audit contractors ("RACs") to wait up to 420 days before invoicing for services provided. Under CMS's Recovery Audit Program, RACs are paid a contingent fee for identifying improper payments made to entities eligible for Medicare payments. Under the terms of current recovery audit contracts, RACs are paid once an identified improper payment is collected, which typically occurs within 41 days of a demand for payment. Payments under the current contracts are subject to an offset if a RAC's determination is subsequently overturned.

Under the payment terms of a follow-on solicitation to current recovery audit contracts, however, a RAC will be permitted to invoice for identified improper payments only after the recipient has had an opportunity to appeal the RAC's determination. Thus, RACs will now be required to wait a minimum of 120 days and a maximum of 420 days before invoicing for their services. In response to this change, two RACs currently providing services to CMS filed pre-award protests to the follow-on solicitation, alleging that the new payment terms are inconsistent with customary commercial practice, unduly restrictive of competition, and in violation of both the enabling statute for the Recovery Audit Program and prompt payment requirements.

GAO rejected the protestors' arguments in their entirety. As to their argument regarding customary commercial practice, GAO held that although FAR Part 12 generally prohibits an agency from departing from customary commercial practices in solicitations for commercial items, FAR Part 12 did not apply to CMS's follow-on solicitation because the RACs' services were being procured under orders placed against existing GSA Federal Supply Schedule ("FSS") contracts. GAO held that while FAR Part 12 applies to the award of FSS contracts, it did not apply to subsequent orders placed against those contracts. Instead, the orders were governed by FAR Subpart 8.4, which does not restrict departures from customary commercial practices.

Next, GAO determined that the payment provisions did not unreasonably restrict competition because CMS identified a legitimate basis for delayed invoicing procedures: the current contracts do not address circumstances in which a RAC's determination is overturned after the expiration of the RAC's contract. CMS argued that the current payment terms present a risk that CMS will not be able to offset future payments to account for RAC determinations subsequently determined to be invalid. In response to the RACs' argument that the payment terms of the follow-on solicitation were "'commercially impracticable,'" GAO explained that "the fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency's needs."

Finally, GAO concluded that, although the enabling statute for the Recovery Audit Program indicates that RACs are to be paid from amounts recovered from an identified improper payment, the enabling statute does not require RACs to be paid at the time of recovery. GAO also rejected the protestors' argument that the payment terms of the follow-on solicitation will violate prompt payment requirements by subjecting RACs to an "extended acceptance period," because RACs are required to support the agency during the appeals process. According to GAO, CMS will not accept the RACs' services under the resulting contract until the appeals process is complete.

The GAO's decision fully endorsed CMS's decision to depart from the terms of the current recovery audit contracts. The decision serves as a reminder to contractors that an agency generally has wide discretion to depart from the terms of a current contract when issuing a follow-on solicitation.

Allegations Against Competitor Protected as Political Speech (Kuwait & Gulf Link v. John Doe et al., 2014 PA Super 96 (May 6, 2014)).

The Pennsylvania Superior Court recently held that a contractor's allegations against a competitor qualify as political speech in the context of a federal procurement. As a result, the Superior Court determined that the identity of the authors of allegedly defamatory statements against a competitor are extended a measure of protection from disclosure.

In 2011, the Defense Logistics Agency ("DLA") awarded a contract for the operation of a military storage and distribution depot in Kuwait to Kuwait & Gulf Link Transport Company ("KGL"). Intermarkets Global protested the award to KGL. While the protest was pending, employees of another disappointed offeror, Agility Public Warehousing Company K.S.C. ("Agility"), sent pseudonymous letters to DLA and the U.S. Army Sustainment Command alleging that KGL had violated the Comprehensive Iran Sanctions, Accountability, and Divestment Act. KGL alleged that Intermarkets Global referenced the letters in its protest against KGL, characterizing KGL as a non-responsible contractor. KGL maintained, therefore, that it suffered losses in defending against these allegations and that it was not awarded another, unrelated contract based on concerns about its present responsibility.

KGL filed suit against Agility and its employees, claiming defamation and tortious interference with KGL's contractual and business relationships. Although Agility apparently admitted that the authors of the letters acted within the scope of their employment, Agility objected to KGL's request to discover the authors' identity based on the First Amendment right to anonymous speech.

After the trial court initially determined that the authors' identity could be disclosed because the letters constituted commercial speech, the Superior Court reversed, finding that the allegation that KGL had engaged in prohibited business with a foreign government constituted political speech because it implicated the affairs and operation of the federal government. The Superior Court determined that KGL's alleged interactions with Iran were of national importance and highlighted the questionable expenditure of public funds. According to the Superior Court, the letters "directly implicate the appropriateness of the relationship between the United States Government and some of its contractors and those contractors' relationship with a foreign government in the United States." Although the motives of the authors were unclear from the record, the Superior Court concluded that the letters constituted political speech even if they had been written with an economic motive.

The dissent, in contrast, highlighted the competitive relationship between Agility and KGL in concluding that the letters constituted commercial speech. The dissent also highlighted that the majority did not consider whether the allegations against KGL were false, potentially removing the letters from the protection of the First Amendment.

It is unclear from the majority's opinion whether other allegations against a competitor would qualify as political speech. Allegations concerning deficiencies in a contractor's past performance, for example, may not identify the same level of concern as alleged violations of statutorily imposed sanctions or the federal government's relationship with foreign entities. Nonetheless, this decision raises important questions about the extent to which contractors can make public statements about their competitors during protests and other disputes.

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