

Insights and Commentary from Dentons

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This document was authored by representatives of McKenna Long & Aldridge prior to our combination's launch and continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

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LEGISLATION

PRESIDENT SIGNED ACT EXTENDING SMALL BUSINESS PROGRAMS AND REQUIRE COMPETITION TO AWARD SBIR OR STTR FUNDS

On June 1, 2011, President Obama signed the “Small Business Additional Temporary Extension Act of 2011” (Pub. L. No. 112-17). This law extends the authorization of programs under the Small Business Act and the Small Business Investment Act of 1958 until July 31, 2011. It also extends the termination date for the Small Business Innovation Research (“SBIR”) and Small Business Technology Transfer (“STTR”) programs until 2011, while also requiring funds in those programs be awarded through competitive and merit-based selection procedures. (S. 1082)

HOUSE AND SENATE INTRODUCED BILL TO EXTEND THE MEJA TO COVER CIVILIAN AGENCY CONTRACTORS WORKING OVERSEAS

On June 3, 2011, Rep. David Price (D-NC) introduced the “Civilian Extraterritorial Jurisdiction Act of 2011” (“CEJA”) in the House. In anticipation of the increased role for agencies other than DOD, on June 6, 2011, Sen. Patrick Leahy (D-VT) introduced the CEJA in the Senate. The CEJA would provide criminal jurisdiction over the actions of employees and contractors working overseas for agencies other than the Department of Defense (“DoD”). The Military Extraterritorial Jurisdiction Act (“MEJA”), Public Law 106-523, already grants criminal jurisdiction for DoD employees and contractors. The CEJA would apply to both contractors and subcontractors at any tier. It would also direct the Department of Justice to create new investigative units for the purpose of investigating and prosecuting serious crimes by contractors. The bill was referred to the House Committee on the Judiciary and the Senate Judiciary Committee. (H.R. 2136, S. 1145)

SENATE INTRODUCED BILL TO REQUIRE INCREASED REPORTING OF CONTRACT AWARDS MADE TO SERVICE-DISABLED VETERANS

On June 7, 2011, Sen. Max Baucus (D-MT) introduced the “Honoring Promises to Service-Disabled Veterans Act of 2011.” The bill would require the Small Business Administration (“SBA”) to issue quarterly reports identifying the percentage of contracts (by prime contract value) awarded to service-disabled veteran-owned small businesses (“SDVOSB”), the percentage goal negotiated with prime contractors for award to SDVOSBs, the weighted average percentage goals for each contractor, and the percentage of subcontracts (by total value) awarded to SDVOSBs. The bill also would require these reports to be posted to a publicly available website. The bill was referred to the Senate Committee on Small Business and Entrepreneurship. (S. 1154)

SENATE INTRODUCED A BILL TO IMPROVE ENFORCEMENT PENALTIES FOR MISREPRESENTATIONS OF VETERAN-OWNED SMALL BUSINESS STATUS

On June 13, 2011, Sen. Maria Cantwell (D-WA) introduced a bill that would raise the minimum penalty to debarment for five years for any business that misrepresents itself as a veterans-owned small business concern or a SDVOSB. The companion bill, H.R. 1657, was

passed by the House on May 26, 2011. The bill was referred to Senate Committee on Veterans' Affairs. (S. 1184)

SENATE INTRODUCED BILL TO OFFER PREFERENCES FOR MANUFACTURING BASED ON DOMESTIC CONTENT PERCENTAGE AND TRANSPARENCY FOR WAIVERS

On June 15, 2011, Sen. Sherrod Brown (D-OH) introduced the "Strengthening Manufacturing and Rebuilding Transit Act of 2011" ("SMART Act"). The bill would provide rules and guidance and waiver notices applicable to the domestic content standards of federal grants administered by the Department of Transportation. The bill would provide a preference for grant recipients whose manufactured goods have a domestic content percentage that exceeds federal standards and meets industry-recognized standards. The bill would also establish a centralized website where all waiver notices and agency actions related to domestic content standards would be published. The bill was referred to the Senate Committee on Banking, Housing, and Urban Affairs. (S. 1210)

SENATE INTRODUCED DEFENSE AUTHORIZATION BILL WHICH WOULD CUT DEFENSE SPENDING, ALTER THE CONTRACTING VEHICLE FOR THE JSF PROGRAM, AND IMPOSE REPORTING REQUIREMENTS

On June 22, 2011, Sen. Carl Levin (D-MI) introduced the "National Defense Authorization Act for Fiscal Year 2012." The bill is a companion bill of S. 1254, S. 1255, and S. 1256. The bill sets a base budget almost \$6 million less than requested by the President. The cuts from the proposed budget would come from operation and maintenance accounts ("O&M") for the acquisition of contract services, excess unobligated balances, O&M of DoD business systems, O&M for military intelligence programs, unjustified growth in Air Force administration funding, and unjustified growth in Army O&M for joint DoD support and strategic communications. The bill also increases the allotted amount for the DoD Office of Inspector General. The bill takes aim at the F-35 Joint Strike Fighter Program, ensuring that the contractor is responsible for cost overruns of the low-rate initial production and requiring the DoD to update its analysis on the benefits of competition for the engine. The bill was reported out of the Senate Armed Services Committee and placed on the Senate Calendar. (S. 1253)

HOUSE PASSED DOD AUTHORIZATION BILL THAT CONTAINED NEW RESTRICTIONS ON CONTINGENCY CONTRACTING

On May 26, 2011, the House passed the "National Defense Authorization Act for Fiscal Year 2012" ("NDAA"). The NDAA is a companion bill to S. 981, S. 1044, and S. 1062. The Act included a number of significant provisions related to the oversight of contingency contracting which reflect the growing discontent in Congress with the use and cost of civilian contractors in Iraq and Afghanistan. The provisions that are likely to make it into the final Act include provisions to: prohibit contracts with adverse entities identified by CENTCOM as engaged in hostile conduct toward U.S. forces; permit access to the records of "foreign contractors"; dramatically increase the simplified acquisition and micro purchase thresholds for contracts in the support of contingency operations; require the Secretary of Defense to establish as plan, to be known as a "Quality Assurance Surveillance Plan," setting standards for oversight

plans governing all security contractors operating in current and future contingency operations; and establish goals and process to ensure competition in contractors for the procurement of property or services to be used outside of the United States in support of a contingency operation, including the possibility to elevate LOGCAP subcontracts to prime contracts. (H.R. 1540)

HOUSE PASSED BILL TO AUTHORIZE FY 2012 APPROPRIATIONS FOR THE DEPARTMENT OF HOMELAND SECURITY THAT PROHIBITS DISCLOSURE OF POLITICAL DONATIONS BY CONTRACTORS

On June 2, 2011, the House passed the “Department of Homeland Security Appropriations Bill of 2012.” The Act was introduced by Rep. Robert B. Aderholt (R-AL) on May 26, 2011. It authorizes FY2012 appropriations for the Department of Homeland Security and contains an amendment which prohibits federal agencies from inquiring about contractor’s political donations. The Act was received by the Senate and referred to the Senate Appropriations Committee. (H.R. 2017)

HOUSE INTRODUCED BILL TO REFORM THE HUBZONE PROGRAM

On June 3, 2011, Rep. Rick Larson (D-WA) introduced the “Protect HUBZones Act of 2011.” This is a companion bill to S. 633. The bill would amend the Small Business Act by adding definitions for “HUBZone Program” and “HUBZone Map.” It was referred to the House Committee on Small Business. (H.R. 2131)

HOUSE INTRODUCED BILL TO REDUCE THE NUMBER OF FEDERAL EMPLOYEES BY LIMITING THE REPLACEMENT OF RETIRING EMPLOYEES

On June 3, 2011, Rep. Darrell E. Issa (R-CA) introduced the “Reducing the Size of the Federal Government Through Attrition Act of 2011.” The bill would reduce the total number of federal employees at least 10% by 2015 by allowing only one new hire for every three employees retiring or otherwise leaving government service. It would allow for exceptions in cases of emergency, agency efficiency, or critical missions. The bill was referred to the House Committee on Oversight and Government Reform. (H.R. 2114)

HOUSE INTRODUCED BILL TO CREATE INDEPENDENT BOARD TO OVERSEE GOVERNMENT SPENDING AND TRANSPARENCY

On June 13, 2012, Rep. Darrell Issa (R-CA) introduced the “Digital Accountability and Transparency Act” (“DATA Act”). He later offered an amendment in the nature of a substitute to clarify the original version. The bill would create the Federal Accountability and Spending Transparency (“FAST”) Board to oversee government-wide spending, modeled after the board mandated by the American Recovery and Reinvestment Act of 2009, Public Law No. 111-05. The FAST Board would provide a means for consistent reporting of federal spending, government contracts and grants, and agency expenses. The bill was passed unanimously by the House Oversight and Government Reform Committee. President Obama issued E.O. 13576 creating a similar oversight board. (H.R. 2146)

HOUSE INTRODUCED BILL TO REQUIRE GOVERNMENT-WIDE APPLICATION OF “LEAN SIGMA SIX” CONTINUOUS PROCESS IMPROVEMENT METHODS

On June 15, 2011, Rep. Tom Latham (R-IA) introduced the “LESS Government Act.” The bill would attempt to reduce waste and improve government effectiveness by mandating the use of the continuous process improvement methods known as “lean six sigma.” The bill would also create a Center of Excellence for Continuous Process improvement to provide training on continuous process improvement methods. The bill was referred to the House Committee on Oversight and Government Reform. (H.R. 2188)

HOUSE INTRODUCED 2012 DOD APPROPRIATIONS BILL WHICH WOULD LIMIT USE OF APPROPRIATED FUNDS TO ENTITIES WITH OUTSTANDING TAXES OR FEDERAL CRIMINAL VIOLATIONS

On June 16, 2011, Rep. C.W. Bill Young (R-FL) introduced the “Department of Defense Appropriations Act, 2012.” The bill would approve \$9 million less in funding than was requested by President Obama. The bill would also establish absolute prohibitions on contracting with corporations that have unpaid tax debts and corporations that have been convicted of federal criminal violations, without consideration for suspension and debarment due process procedures, the significance of the violation, remedial actions taken to address identified issues, or other appropriate circumstances. Similar language was included in Section 414 of House-passed “Military Construction and Veterans Affairs and Related Agencies Appropriation Act for FY 2012,” H.R. 2055, which extended even further to prohibit contracting with corporations guilty of felony criminal violations under state law. The bill was reported out of the House Armed Services Committee (H.R. 2219)

HOUSE INTRODUCED BILL TO PROHIBIT AWARDING CONTRACTS TO CHINESE ENTITIES UNTIL CHINA SIGNS WTO AGREEMENT ON GOVERNMENT PROCUREMENT

On June 22, 2011, Rep. Edward R. Royce (R-CA) introduced a bill that would prohibit any federal agency from awarding a contract to a Chinese entity until the People’s Republic of China signs the World Trade Organization (“WTO”) Agreement on Government Procurement. The bill was referred to the House Committee on Oversight and Government Reform. (H.R. 2271)

REGULATIONS

DOD, GSA, AND NASA ISSUED PROPOSED RULE TO CLARIFY THE ORDER OF PURCHASING PRIORITY OF GOVERNMENT SUPPLY SCHEDULES

On June 14, 2011, DoD, General Services Administration (“GSA”), and National Aeronautics and Space Administration (“NASA”) issued a proposed rule to amend the Federal Acquisition Regulations (“FAR”) to limit the discussion of government supply sources to mandatory government sources. The rule would also encourage agencies to fulfill their supply and service needs from certain sources, even though the sources are not mandatory. The rule is in response to the Government Accountability Office’s decision in *Murray-Benjamin Electric*

Company, B-298481, Sept. 7, 2006, that an agency could hold a best-value competition instead of use a non-mandatory Federal Supply Schedule contract. Written comments are due by August 15, 2011. (76 Fed. Reg. 34,634, 6/14/2011)

DOD, GSA, AND NASA ISSUED PROPOSED RULE TO STANDARDIZE PAST PERFORMANCE EVALUATION FACTORS, RATING SCALES, AND REPORTING

On June 28, 2011, DoD, GSA, and NASA issued a proposed rule to standardize the past performance system across all government agencies. The rule would establish uniform evaluation criteria and a consistent five scale rating system. It would also mandate that all past performance information be entered into the Contractor Performance Assessment Reporting System (“CPARS”), as opposed to the patchwork of agency past performance feeder systems currently in use. Written comments are due by August 29, 2011. (76 Fed. Reg. 37,704, June 28, 2011)

DOD, GSA, AND NASA REOPENED COMMENT PERIOD FOR PROPOSED RULE ON ORGANIZATIONAL CONFLICTS OF INTEREST

On June 29, 2011, DoD, GSA, and NASA extended the comment period for the proposed rule on organizational conflicts of interest (“OCI”). The proposed rule was published on April 26, 2011 at 76 Fed. Reg. 23,236 and sought comments from the public on how to improve the FAR’s coverage of OCIs. The comment period is extended by thirty days and written comments will be accepted until July 27, 2011. (76 Fed. Reg. 38,089, 6/29/2011)

DOD ISSUED FINAL RULE TO TRACK WARRANTIES FOR ITEM UNIQUE IDENTIFIED ITEMS

On June 8, 2011, DoD issued a final rule to amend the Defense Federal Acquisition Regulations Supplement (“DFARS”) to add procedures for tracking warranties for item unique identification items. The rule implements a February 6, 2007 policy memorandum from the Undersecretary of Defense for Acquisition, Technology, and Logistics. The rule is meant to improve the enforcement of warranties. The rule adds a definition for “warranty tracking,” amends the definitions for “acceptance” and “defect,” and adds appropriate clauses to the DFARS. The effective date of the final rule is June 8, 2011. (76 Fed. Reg. 33,166, 6/8/2011)

DOD ISSUED FINAL RULE TO MODIFY TERMINOLOGY AND CONTRACT ADMINISTRATION REQUIREMENTS OF THE SPOT SYSTEM

On June 23, 2011, DoD issued a final rule amending the DFARS to update terminology used in conjunction with Synchronized Predeployment and Operational Tracker (“SPOT”) system. The rule also adds internal contract administration requirements to the SPOT system. This final rule became effective on June 23, 2011. (76 Fed. Reg. 36,883, 6/23/2011)

DOD ISSUED FINAL RULE TO EXTEND THE RESTRICTIONS ON MANDATORY ARBITRATION AGREEMENTS

On June 29, 2011, DoD issued a final rule to extend the restriction on the use of mandatory arbitration agreements for all contracts in excess of \$1 million that use money appropriated by the 2011 or any subsequent DoD appropriations act. The restriction, known as the Franken Amendment, was originally included in Section 8102 of the DoD and Full-Year Continuing Appropriations Act of 2011, Public Law 112-10. Waivers from the rule for particular contractors or subcontractors are available from the Secretary of Defense to avoid harm to national security. The rule is effective as of June 29, 2011. (76 Fed. Reg. 38,047, 6/29/2011).

DOD ISSUED INTERIM RULE FOR THE MANAGEMENT OF MANUFACTURING RISK IN MAJOR DEFENSE ACQUISITION PROGRAMS

On June 29, 2011, DoD issued an interim rule that requires the source selection process for major defense acquisition programs to consider the manufacturing readiness and related processes of potential contractors and subcontractors. This rule implements Section 812 of the Ike Skelton National Defense Authorization Act of 2011, Public Law 111-383. The effective date of the rule is June 29, 2011. Written comments are due by August 29, 2011. (76 Fed. Reg. 38,050, 6/29/2011)

DOD ISSUED INTERIM RULE TO ESTABLISH PILOT PROGRAM FOR MILITARY-PURPOSE NON-DEVELOPMENTAL ITEM ACQUISITION

On June 29, 2011, DoD issued an interim rule that creates a pilot program for the acquisition of military-purpose non-developmental items. The program will assess the feasibility and advisability of acquiring those items in a streamlined manner. The rule implements Section 866 of the Ike Skelton National Defense Authorization Act of 2011, Public Law 111-383. The effective date of the rule is June 29, 2011. Written comments are due by August 29, 2011. (76 Fed. Reg. 38,048, 6/29/2011)

DOD ISSUED PROPOSED RULE TO REQUIRE OFFERORS TO REPRESENT THAT THE FORMER DOD EMPLOYEES IT EMPLOYS ARE IN COMPLIANCE WITH POST-EMPLOYMENT RESTRICTIONS

On June 6, 2011, DoD issued a proposed rule which would require representations by offerors that all former DoD officials employed by the offeror are in compliance with post-employment restrictions. These restrictions include the prohibition on representing parties before the officials former agency on matters the officials worked on, the one-year moratorium on accepting compensation from a defense contractor under certain conditions, and the requirement that officials substantially involved with large contracts require written ethics opinions about their employment. This representation would be required in both commercial item and non-commercial item contracts. Written comments should be submitted on or before August 5, 2011. (76 Fed. Reg. 32,846, 6/6/2011)

DOD ISSUED PROPOSED RULE TO AMEND THE DFARS TO REMOVE THE COMPONENT TEST FROM THE DEFINITION OF QUALIFYING COUNTRY END PRODUCT FOR COTS PRODUCTS

On June 6, 2011 DoD issued a proposed rule which would amend the definition of “qualifying end products” for commercially available off-the-shelf (“COTS”) items by eliminating the component test. This change is consistent with changes made to both the FAR and DFARS definitions of domestic end product COTS items. Written comments should be submitted on or before August 5, 2011. (76 Fed. Reg. 32,845, 6/6/2011)

DOD ISSUED PROPOSED RULE FOR SAFEGUARDING UNCLASSIFIED DOD INFORMATION

On June 29, 2011, DoD issued a proposed rule to amend the DFARS to add a new subpart and additional clauses regarding requirements for safeguarding unclassified DoD information. The changes include a cyber incident reporting requirement and encryption requirements. Written comments are due by August 29, 2011. (76 Fed. Reg. 38,089, 6/29/2011)

DOC ISSUED FINAL RULE TO CREATE STRATEGIC LICENSE EXCEPTION TO EXPORT ADMINISTRATION REQUIREMENTS

On June 16, 2011, the Department of Commerce (“DOC”) issued a final rule to create a strategic license exception to export administration requirements. The exception applies to the transfer to dual-use items listed in certain Export Control Classification Numbers to strategic American allies and partners. The rule is the first stage of a multiple stage process meant to ease regulations for exports. The final rule is effective on June 16, 2011. (76 Fed. Reg. 35,276, 6/16/2011)

PRESIDENT ISSUED EXECUTIVE ORDER TO IMPROVE GOVERNMENT EFFICIENCY, EFFECTIVENESS, AND ACCOUNTABILITY

On June, 13, 2011, President Obama issued an executive order aimed at eliminating government waste. The executive order commits the administration to operating with the utmost efficiency and effectiveness. It seeks to find and eliminate duplicative, inefficient, and wasteful government programs. It establishes periodic meetings, chaired by the Vice-President, for the purpose of sharing improvements that have been implemented and holding federal agencies accountable for finding more efficient ways to perform their missions. It also sets up an oversight board to provide increased transparency to government spending, modeled after the one created by the American Recovery and Reinvestment Act of 2009, Public Law 111-5. (E.O. 13576, 76 Fed. Reg. 35,297, 6/13/2011)

ACUS ADOPTED RECOMMENDATION FOR CONTRACTOR EMPLOYEE ETHICS STANDARDS

On June 17, 2011, the Administrative Conference of the United States (“ACUS”) adopted a recommendation to the Federal Acquisition Regulation Council to set compliance standards for the employees of government contractors. ACUS noted that the employees of contractors are

subject to significantly fewer ethics regulations than public workers, despite having similar access to non-public information and influence over government decisions.