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FEATURE COMMENT: Past Is Prologue— The Clean Contracting Act As The Paradigm For Procurement Reform In The 110th Congress

While procurement activities related to the Iraq War and hurricane relief efforts prompted many commentators to expect the proverbial pendulum of oversight and reform to “swing back,” the last few years have seen little procurement reform and, apart from a few major scandals, only a moderate up-tick in oversight activity and enforcement actions against federal contractors. However, with the Democrats now controlling both houses of Congress and the continued scrutiny of the Iraq War, it appears likely that the pendulum will swing back full force and, in some instances, may go too far.

It is difficult to know what procurement reforms will be implemented by the 110th Congress because, as of the writing of this article, the new Congress is less than one month old. Numerous bills have been discussed, and some have been proposed. Rather than try to keep pace with ever-changing legislation, perhaps the best way to forecast the future is to review legislation proposed in the last session by prominent Democrats who have an interest in, and committee jurisdiction over, public procurement, such as Rep. Henry Waxman (D-Calif.), with the expectation that similar legislation may be proposed in this Congress. Thus, this FEATURE COMMENT largely focuses on Waxman’s Clean Contracting Act, first introduced in the 109th Congress, as paradigmatic of legislation to come. Speaker of the House Nancy Pelosi (D-Calif.) last term proposed the “Honest Leadership and Open Government Act of 2006” with similar provisions, which reinforces the view

that some of these provisions will be dusted off and proposed anew.

The Clean Contracting Act seeks to reform federal contracting dramatically. It is organized into broad titles, including Promoting Competition in the Award of Contracts, Limiting the Use of Abuse-Prone Contracts, Preventing the Abuse of Contract Flexibilities, Increasing Contract Oversight, Preventing Unjustified Award Fees, and Deterring Corruption in Contracts. Set forth below is a brief summary and analysis of many of the Act’s provisions. Note that, while as a theoretical matter the proposals are well-intentioned, in many instances, they do not reflect the realities faced by contractors, the federal procurement workforce or customer agencies, nor the needs of the public, and, thus, in the long run, may not have the salutary affect for which they are intended.

Limitation on the Length of Noncompetitive Contracts—For noncompetitive procurements, the Act modifies the Federal Acquisition Regulation to restrict performance to the minimum period necessary to meet urgent and compelling requirements. It also requires any subsequent contract for the required goods or services to be awarded through competitive procedures. In general, such urgent and compelling contracts will have a performance period of no more than 240 days.

While this reform is well-intentioned, one wonders whether all urgent and compelling procurements can truly be limited to performance periods of less than one year without the opportunity for renewal. Also, in practical terms, under urgent and compelling circumstances continuity may sometimes be more important than full-scale competition.

Competition in Multiple-Award Contracts—The Act requires each individual purchase of goods or services exceeding \$100,000 that is awarded under a multiple-award contract to be made on a competitive basis absent certain contracting officer waivers.

This provision may undo some of the efficiencies achieved by multiple-award contract programs such as the General Services Administration’s Federal

Supply Schedule. Under the FSS, GSA already has determined that the proposed price is fair and reasonable, and that offerors are otherwise prepared to perform. The program's purpose is to allow agencies to buy directly and efficiently from the schedule, while complying with competition requirements. While we certainly do not want to argue against appropriate competition, it seems to us that the threshold for this provision should be higher than \$100,000.

Minimizing Sole-Source Contracts and Public Disclosure of Justification and Approval Documents—The Act requires each Government agency to develop and implement a plan to minimize the use of contracts entered into using other than competitive procedures. The House Government Reform Committee and the U.S. Comptroller General must approve the plans. The Act also mandates public disclosure of justification and approval documents, and other determinations for noncompetitive contracts. Because the Act recognizes the applicability of the Freedom of Information Act (FOIA) in such instances, this disclosure appears reasonable.

Prohibition against Monopoly Contracts and Limitations on Tiering—The Act contains a prohibition against the award of monopoly contracts—ostensibly any task or delivery order exceeding \$10 million—and limitations on tiering of subcontractors. In particular, regulations promulgated under the Act will preclude a prime contractor from using a subcontractor for work worth more than 65 percent of the cost of the contract—not including overhead and profit, unless the head of the agency concerned determines that exceptional circumstances exist. Similarly, the Act precludes a subcontractor from using a lower-tier subcontractor for work worth more than 65 percent of the cost of the subcontract—not including overhead and profit, unless the agency head determines that exceptional circumstances exist.

Minimizing Cost-Reimbursement-Type Contracts—The Act provides that each agency must develop and implement a plan to minimize the use of cost-reimbursement contracts. The plan should contain measurable goals, and must be submitted to congressional oversight committees and the Government Accountability Office within one year.

This provision probably is the most nearsighted of the Act's reforms. Although Congress may criticize cost-reimbursement contracting as an unrestrained opening of the public fisc, if administered properly, it is fair to contractors, customer agencies and the

public alike. Under cost-reimbursement contracts, contractors receive a guarantee of modest profit for legitimate and often riskier work, rather than assume the risk of cost overruns in a fixed-price environment. One wonders whether a shift back to fixed-price procurements would discourage contractors from participating in the federal marketplace, result in heightened claims activity and undermine the innovation more frequently associated with cost-reimbursement contracts.

Preventing Abuse of Commercial-Item Authority—The Act modifies commercial-item rules. Presently, items that are slightly modified to meet federal requirements can be procured pursuant to commercial-item authority, as can items that have modifications of a type customarily available in the commercial marketplace. The Act, however, strikes such allowances and more narrowly defines commercial items.

Although "commercial item" has perhaps, on occasion, been interpreted too expansively, the changes proposed by the Act could turn back the clock on many of the positive trends towards commerciality that have developed since the mid-1990s. One wonders whether a trend against commerciality also would disincentivize small, innovative companies from entering the federal marketplace.

Investigations, Audits and Preventing Procurement Abuses—The Act requires procuring agencies to submit to Congress a quarterly report listing all audits and other reports describing contractor costs exceeding \$1 million that have been identified as unjustified, unsupported, questioned or unreasonable under any contracting vehicle, including subcontracts, as well as the specific amounts and percentage of the total value of the award. This report also must list all audits or reports that identify significant deficiencies in the performance of any contractor or "business system" of any contractor. In other words, if an audit report finds that a contractor performed inadequately or sold to the Government a "business system" that performs inadequately, under this Act, procuring agencies must notify Congress, which, in turn, may request a complete report. Even if this Act is not implemented, it seems clear that the 110th Congress will focus on investigating allegations of procurement abuse, and this provision will provide additional fodder for such investigations.

The Act includes specific statutory authority for Congress to receive, within 14 days of requesting,

unredacted copies of contract administration files, including copies of the contract, orders issued, source selection documentation, cost or price analyses, and invoices with any supporting documents. Although such authority likely already exists under Congress' subpoena power, this specific statutory authority suggests that the new Congress is ready to get into the weeds of contract administration. Also, if this authority is enacted, Congress should take steps to assure contractors that Congress will protect confidential business information contained in such contract administration files.

Contracting Workforce—Not only may Congress increase its oversight of federal contractors, but it likely will expect procuring agencies to increase oversight and auditing of contractors as well. GAO has identified agencies' need for greater oversight and improved contract management to avoid potential waste and misuse. To this end, the Act proposes that procuring civilian and defense agencies allocate one percent of their aggregate contract spending to improve contract management, including contract planning, contract administration and oversight, and contract audit and enforcement. The Act adds to this list the hiring and training of additional acquisition management personnel, a good idea, as many federal workers are near retirement and their ranks have been dwindling while the field of Government contracting has been expanding.

Restrictions on Contractors Acting in an Oversight Capacity—The Act bars agencies from entering into contracts for the performance of "inherently governmental functions for contract oversight." The FAR contains a provision precluding agencies from contracting out inherently governmental functions, and lists as examples contract administration and "[d]etermining whether contract costs are reasonable, allocable, and allowable." Nevertheless, this provision broadens these examples, precluding the award of contracts for certain "contract oversight" that is an inherently governmental function, but not defining what types of contract oversight fall within this category.

To the extent authority remains to contract out for "contract oversight," the Act also expands existing conflict-of-interest prohibitions in the FAR. Agencies may not enter into a contract for performance of a function relating to contract oversight if there is a conflict of interest. According to the Act, a "function relating to contract oversight" includes developing a

statement of work, a service in support of acquisition planning, the evaluation of contractor performance or contract proposals, and contract management. The Act defines "conflict of interest" as including cases in which the contractor performing the function:

- is performing all or some of the work to be overseen;
- has a separate ongoing business relationship such as a joint venture or contract with any of the contractors to be overseen or any related entity;
- is in a position to affect the value of performance of work that it or any related entity is performing under any Government contract;
- has a reverse role with the contractor to be overseen under one or more separate Government contracts; and
- has some other relationship with the contractor to be overseen that could reasonably appear to bias the contractor's judgment.

This prohibition applies to any entity "related" to the contractor proposed to perform the contract oversight, including any subsidiary, parent, affiliate, joint venture or other entity related to the contractor. Although existing rules against organizational conflicts of interests apply in many of these circumstances, the Act more broadly defines a "conflict of interest" and, at least as drafted, does not provide avenues to mitigate or neutralize the conflict. Despite the obviously salutary intentions of this provision, given the wide-ranging activities of many of the largest Government contractors and their teaming relationships, one wonders whether such a broad prohibition is workable. Many federal agencies cannot staff all procurement functions, and will lose valuable assistance in managing and supervising contracts if appropriate safeguards are undertaken.

Public Disclosure of Contract Awards—Waxman's bill from the last term includes requirements for publicizing contract awards and proposes modifications that may impact FOIA Exemption 4, which protects from public disclosure confidential commercial and financial information. Though the FAR requires agencies to publicly announce information on awards over \$3 million, it does not identify the type of information to be disclosed. Under the Act, procuring agencies must make publicly available the award date, the contractor, the number of offers received, the total amount of the contract, the contract type, and the "item, quantities, and any

stated unit price of items or services to be procured under the contract.”

With respect to the last requirement, federal courts have held that unit pricing and line-item pricing may constitute confidential commercial information and may be protected from public disclosure under Exemption 4. If enacted, such a provision could be construed as modifying FOIA and precluding contractors from being able to protect from public disclosure such unit or line-item pricing, which, hopefully, is not the intent of the Act. The Act further requires agencies to publicly disclose noncompetitive procurement information, including the authority used to conduct the procurement, the number of sources solicited, the general reasons for selecting the contractor, and the name of the executive agency to receive the goods or services procured, if other than the awarding agency.

Incentive Fee—In response to specific GAO criticisms of award and incentive fees for cost-based contracts, Waxman likely will pursue his efforts to restrict award of such fees. The Act proposes new standards to govern award fees, providing that for any cost-based contract with an award or incentive fee, the fee shall only be paid for “above-satisfactory performance of the contract.” The term “above-satisfactory performance” includes ratings of “excellent,” “outstanding” and “very good,” and specifically excludes ratings of “good,” “exceptional” and “satisfactory.”

One GAO report found that the Department of Defense paid incentive fees, despite acquisition outcomes that fell far short of DOD expectations. Of course, paying incentive fees under such circumstances does not make sense, but the Act may go too far in excluding “satisfactory” performance from qualifying for an award fee. Although we certainly believe that federal contractors should excel in performing Government contracts, in many cases, simply meeting contract cost or performance goals can justify an award fee. Indeed, the legislation appears to acknowledge this, as it provides that, in determining whether a contractor is entitled to an award fee, agencies must consider whether the contractor met cost, schedule and performance goals, and delivered the required goods or services. Although the Act proposes that award fees be paid only for “above-satisfactory performance,” the enumerated factors seem to describe acceptable and satisfactory performance, i.e., meeting the specified cost or performance goal set forth in the contract.

The burden here should be on procuring agencies to provide specific, achievable outcome-based award-fee criteria, and satisfying those criteria should be worthy of an award fee.

The Revolving Door—The procurement world has had several major scandals in the past few years, such as the allegations related to former Air Force official Darleen Druyun. Not surprisingly, the Act includes provisions attempting to tighten “revolving door” restrictions and disclosure obligations. Under the Procurement Integrity Act, a former federal agency official may not accept compensation from a contractor “as an employee, officer, director, or consultant of the contractor within a period of one year” after serving in certain positions of responsibility over a contract valued over \$10 million, or if that official acting for the agency “personally” made certain decisions affecting a contract valued over \$10 million.

The legislation modifies this law, stating that it will eliminate “loopholes that allow former federal officials to accept compensation from contractors or related entities.” First, it expands the scope of the restriction by replacing “consultant” with “consultant, lawyer, or lobbyist.” Second, the Act expands the restriction from one year to two years. Third, though current legislation imposes the restriction on federal officials who “personally” make certain enumerated decisions, the new legislation imposes these restrictions on federal officials who, more generally, “participated personally and substantially in” those decisions.

Moreover, the Procurement Integrity Act includes an exception providing that nothing prohibits “a former official ... from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor” with which the federal official had the requisite involvement. The Act retains that exception, but it applies only if the agency’s ethics officer determines that the “offer of compensation is not a reward for any action described” in the prohibitions and “acceptance of the compensation is appropriate and will not affect the integrity of the procurement process.” As a result, procurement officials must disclose an offer of compensation from another division or affiliate of an affected contractor, and obtain an ethics officer’s blessing before commencing employment.

The Druyun scandal also involved allegations that contractors received special consideration while offering jobs to relatives of DOD officials. The Act

tightens existing disclosure requirements to make clear that an official must disclose if a relative is contacted by an offeror regarding possible non-federal employment.

Similarly, the legislation addresses the reverse revolving door, i.e., an employee leaves a private company to enter the federal workforce. The legislation seeks to expand current regulatory restrictions to preclude a federal employee from any personal and substantial involvement in an award to the employee's former private employer, or from administering such a contract for a period of two years after leaving the contractor's employ.

Ethical Standards Generally—FAR pt. 9 requires that contract awards be made to “responsible” contractors and that agencies make an affirmative determination of responsibility, which includes considering whether the contractor has a “satisfactory record of integrity and business ethics.” GAO and federal courts have recognized that procuring agencies have broad discretion in making this determination.

The Act expands this consideration by providing specific examples in which a contractor could not demonstrate a “satisfactory record.” It directs that no prospective contractor may be considered to have a satisfactory record of integrity and business ethics if it has exhibited a pattern of overcharging the Government or of failing to comply with the law, including tax, labor, employment, environmental, antitrust and consumer protection laws, or is in delinquent status on an outstanding debt with a federal agency.

As reflected in current law, the Government should strive to contract with companies that have a demonstrated record of integrity and business ethics. This proposed modification, however, appears to permit a hodge podge of disputes over such things as environmental law or employment practices to

result in an absolute bar to federal contracting. Indeed, in one sweeping clause—“a pattern of failing to comply with the law”—Congress effectively could amend scores of federal and, potentially, state statutes to impose suspension and debarment for non-compliance. As written, this provision even appears to permit allegations of violations of federal law to be a basis for precluding corporations from competing for federal contracts. In our view, this standard may be too vague and broad to lead to fair results.

The Act further provides that an aggrieved party may protest a lack of compliance with this section, i.e., an arbitrary decision by an agency that a contractor has a satisfactory record of integrity and business ethics. The broad requirement that procuring agencies consider a contractor's overall compliance with the law, even if unrelated to federal procurement, may prove to be an irresistible opportunity for contractors to engage in some mudslinging against a competitor.

Conclusion—If the Clean Contracting Act or similar legislation is enacted by the 110th Congress, federal contracting could undergo a dramatic overhaul. However, given the Act's sweeping proscriptions, one wonders whether Congress has lost the forest through the trees. Although only time will tell, we hope some of the rough edges and potentially far-reaching changes described here will be moderated in a manner that is sensitive to the needs of all players in the federal procurement process and best serves the public.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Paul R. Hurst and Andrew D. Irwin, members of the Government Contracts Practice Group of Steptoe & Johnson LLP in Washington, D.C.

