

Client Alert

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DOD's Secret Contract Awards During the Government Shutdown Undermine CICA

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The U.S. Department of Defense ("DOD") has announced that it will continue to award large contracts during the ongoing federal government shutdown, but that it will *not* "publicly announce" the contract awards until the government shutdown ends. This policy may have serious practical implications for both unsuccessful offerors and awardees. When combined with the closure of the Government Accountability Office ("GAO") during the government shutdown, the policy undermines the protections afforded by the Competition in Contracting Act ("CICA").

DOD'S POLICY DECISION

On October 3, DOD announced its policy that it would not be able to publicly announce the awards until the government is back up and running.¹ According to DOD, the "personnel that support the announcement" of contract awards were considered "nonessential personnel" and furloughed. DOD plans to make "one big announcement" of all contracts awarded during the shutdown after the government reopens.

DOD awarded more than \$360 billion in contracts in FY 2012; more than two-thirds of all government awards.² On September 30, 2013 alone, DOD awarded contracts valued at more than \$5 billion.³ Given these facts and the potential for a government shutdown that lasts several weeks, it is reasonable to estimate that DOD's policy will result in DOD awarding tens of billions of dollars in contracts during the shutdown without "publicly announcing" any of the awards and then ostensibly announce all of those awards at one time once an agreement is reached to reopen the government.

DOD'S POLICY DECISION IS UNLAWFUL AND UNDERMINES CICA

As currently articulated, DOD's policy would be in direct violation of FAR 15.503(b), which requires agencies to provide written notification to disappointed offerors within three days of contract award and to include in the notice specific information such as the total contract price and the reason(s) why the offeror's proposal was not selected for award.⁴ Moreover, as a factual matter, DOD cannot reasonably claim to have the contracting officers,

¹ See Emily Atkin, "DOD To Award, But Not Announce, Contracts During Shutdown," Law360 (Oct. 3, 2013), available at http://www.law360.com/governmentcontracts/articles/477670?nl_pk=dc4d7ac8-b833-4665-b632-3c25568279b7&utm_source=newsletter&utm_medium=email&utm_campaign=governmentcontracts ("Atkin, Law360"); Danielle Ivory & Kathleen Miller, "Pentagon Contract Winners Go Unannounced as Shutdown Lingers," Bloomberg (Oct. 4, 2013), available at <http://www.bloomberg.com/news/2013-10-04/pentagon-contract-winners-go-unannounced-as-shutdown-lingers.html> ("Ivory & Miller, Bloomberg"). DOD is able to award and fund new contracts because it enjoys funding appropriated during prior fiscal years.

² Ivory & Miller, Bloomberg.

³ *Id.*

⁴ Of course, FAR 15.503 only applies to FAR Part 15 solicitations. For sealed bids and simplified acquisitions, the agency's obligation to

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evaluators, source selection officials, and other personnel necessary to conduct evaluations and to make award decisions, yet not have the personnel necessary to send out standard award notices to disappointed offerors and to conduct post-award debriefings. Additionally, leaving contractors in the dark regarding whether they won or lost procurements would hamstring their ability to allocate their resources efficiently to multiple efforts.

Alternatively, DOD could award contracts and inform disappointed contractors of the identity of the awardee and basis for award as required by law, but not “publicly announce” the awards on the DOD website or other publications such as FedBizOpps. This approach too is unlawful and undermines CICA’s application to non-FAR Part 15 procurements. FAR 5.503 and DFARS 205.303 require that DOD publicly announce any contract award or modification that is valued at more than \$6.5 million “by 5 p.m. Washington, DC, time on the day of award.” DOD acknowledged this requirement and the illegality of its new policy when Pentagon spokesman James Swartout admitted that DOD “is aware of the public announcement of contract award requirements set out in the FAR and the DFARS, and of relevant statutory provisions.”⁵

The requirement that agencies publicly announce contract awards is a critical element to the function of CICA. CICA stays are triggered when a protest is filed with GAO either within 10 days of *contract award*, or within five days of a required debriefing, whichever occurs later. 31 U.S.C. § 3553(d)(4). CICA stays are *not* tied to the date on which an offeror learns that it did not win the contract.⁶ Consequently, for non-FAR Part 15 procurements in which a debriefing is not required, it is essential that disappointed contractors learn of their loss within a short time after contract award. If an agency were allowed to wait weeks to publish the announcement of an award decision in a non-FAR Part 15 procurement, the CICA window would close *before* the disappointed contractor learned of the basis of protest, thereby denying the contractor the ability to obtain an automatic CICA stay.⁷

EVEN IF DOD WERE TO PUBLICLY ANNOUNCE ALL CONTRACT AWARDS, THE AWARD OF ANY CONTRACT WHILE GAO IS CLOSED DEPRIVES CONTRACTORS OF CICA’S IMPORTANT PROTECTIONS

GAO recently announced that it is “closed due to shutdown of the federal government.” Disappointed offerors may still file protests during the shutdown, but there “will be no personnel monitoring protest filings at GAO” during the shutdown and “[a]ny new protest received by GAO during the time that GAO is closed will be treated as filed on the day that GAO resumes operations.”⁸

The following example illustrates how a contract award made while GAO is closed may deprive contractors of the CICA protections that Congress intended: A disappointed offeror learns of a DOD contract award to its competitor on October 1. The contractor requests a FAR 15.506 debriefing and DOD provides it on October 4. Consistent with CICA, the contractor files a timely protest with GAO on October 10 in order to give GAO time to notify DOD of

notify disappointed contractors is less clear.

⁵ Atkin, Law360.

⁶ In contrast, GAO’s bid protest regulations provide that a timely bid protest is filed within 10 days of the date on which “the basis for protest is known or should have been known (whichever is earlier),” which may or may not be more than 10 days after contract award. 4 C.F.R. § 21.2(a)(2).

⁷ Offerors in FAR Part 15 procurements are afforded the additional protection of FAR 15.503(b)’s notification requirement and CICA’s allowance for a protest within 5 days of a required debriefing, such as a FAR 15.505 or 15.506 debriefing.

⁸ GAO’s announcement is available at <http://www.gao.gov/legal/index.html>.

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the protest and trigger the automatic stay on October 11. Ordinarily, GAO would inform DOD of the protest within 24 hours and trigger the automatic stay, but imagine that the government shutdown continues to October 18 (sadly, a very realistic possibility). *GAO would be closed on October 11 and would not be able to inform DOD of the protest.* Because a CICA stay is only triggered when the agency “receives notice of the protest” from GAO within the required period,⁹ DOD would avoid the automatic stay even though the contractor complied with its filing deadlines.

DOD’s new policy is even more troubling in the context of a sole source contract. Contractors often learn of a sole source procurement *only after* it is publicly announced on DOD’s website or another public source such as FedBizOpps. DOD’s decision to cease making public announcements of sole source contract awards essentially makes them immune from CICA review.

Putting aside CICA, GAO’s announcement raises some doubts about whether it would find the protest in this example to be timely under its own bid protest regulations, which require a protest to be filed no later than 10 days after the basis of protest was known or should have been known. GAO’s announcement states: “Any new protest received by GAO during the time that GAO is closed *will be treated as filed on the day that GAO resumes operations.*”¹⁰ Consequently, in our example, GAO would “treat the protest as filed” on October 21, the first day that it resumes operations – far outside of the 10-day window.¹¹

The net result of DOD’s decision to continue awarding contracts while GAO is closed is that CICA and GAO may well be unavailable to disappointed offerors during the government shutdown.

Of course, even without CICA and GAO, contractors may still avail themselves to the U.S. Court of Federal Claims, which is more than capable of ensuring that DOD conducts its procurements in a rational and lawful manner, and awarding injunctive relief to halt contract performance where warranted. The availability of one means of relief, however, is not a justification for taking away another venue that Congress intended for contractors to have.

DOD AND AWARDEES MAY SUFFER AS WELL

Finally, awardees receiving contract awards from DOD are not immune from harm. Returning to our DOD contract award example above, if GAO were to find that the protest is timely under its “good cause shown” exception and sustain the protest 100 days later (Dec. 29), and the reevaluation resulted in a different award decision, the awardee and DOD would face significant difficulties in agreeing on compensation for costs incurred during the Oct 1-Dec 29 period and in transitioning the contract to the new awardee.

⁹ 31 U.S.C. § 3553(d)(3)(A).

¹⁰ <http://www.gao.gov/legal/index.html> (emphasis added).

¹¹ Of course, one would be hard pressed to find a more appropriate situation in which GAO should apply the rarely used “for good cause shown” exception to its timeliness regulations. See 4 C.F.R. § 21.2(c); *Marathon LeTourneau Sales & Serv. Co.*, B-254258, 1993 WL 306245, *2 (Comp. Gen. Aug 3, 1993) (providing that GAO may apply the “good cause shown” exception where there is a “compelling reason beyond the protester’s control that prevented it from filing a timely protest”) (citation omitted).

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WHAT CONTRACTORS CAN DO TO PROTECT THEMSELVES

On October 5, 2013, DOD announced that the recently enacted Pay Our Military Act would effectively put most of the 400,000 furloughed DOD civilian employees back to work.¹² With this new influx of civilian employees, DOD should immediately rescind its October 4 announcement that it will not “publicly announce” contract awards during the government shutdown. If DOD has the personnel capable to evaluate proposals and award contracts, it can spare the personnel necessary to post a single daily 5 p.m. email announcing the day’s contract awards.

Until DOD rescinds its new policy, however, contractors must be vigilant in scouring all available sources for information about DOD procurements, including decisions to issue solicitations and award contracts and modifications. Contractors currently in competitive procurements before DOD should communicate with their contracting officers to get assurance that they will be timely notified of an award decision, especially where it is not a FAR Part 15 procurement. Finally, any disappointed offeror that receives notice of a DOD award during the government shutdown should strongly consider filing any subsequent bid protest at the Court of Federal Claims rather than at GAO.

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¹² Sean Reilly, “Defense Department to end most civilian employee furloughs,” *Federal Times* (Oct. 5, 2013), available at <http://www.federaltimes.com/article/20131005/DEPARTMENTS01/310050002/Defense-Department-end-most-civilian-employee-furloughs>.