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Recovery Legislation Creates Both Opportunities and Risks for Government Contractors

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It is clear from the broad scope of the “Emergency Economic Stabilization Act of 2008,” which was passed by Congress on October 3, 2008, that Treasury will need a lot of help implementing the requirements of the Act, including asset managers, servicers, property managers, expert consultants, and other similar service providers. While tremendous opportunities are presented by the Act for service providers with the requisite capabilities and resources to contract with Treasury, there are commensurate risks for anyone not experienced in contracting with the federal government. As demonstrated in other emergency or urgent situations such as Hurricane Katrina and the Iraq War where contractors rushed in without carefully considering the pitfalls in dealing with the government, missteps can and do result in not only financial, criminal, and civil liabilities, but also suspension and debarment from doing any contracting with the federal government.

Treasury’s Waiver Authority

The Act does grant the Treasury Secretary broad authority to waive specific provisions of the procurement regulations, the Federal Acquisition Regulation (“FAR”), upon a determination that “urgent and compelling circumstances make compliance with such provisions contrary to the public interest.” The intent of this waiver authority is to streamline the process by which Treasury enters into contracts, including for financial institutions and outside firms to manage the distressed assets that the government acquires from companies under the rescue plan, as well as the full range of related services Treasury will need. The Act requires the Secretary to develop and publish program guidelines for implementing the Act, but it is not clear from the language in the Act whether potential contractors will be fully relieved from the cumbersome and often risky rules and regulations normally associated with federal procurements, particularly since many of the most burdensome requirements are imposed by statutes.

The Impact of Treasury's New Authority Is Uncertain

Conceivably, the Secretary could use his new authority to waive many of the FAR provisions governing the solicitation and administration of federal government contracts. It is likely, however, the contracts awarded by Treasury will retain many of their traditional FAR characteristics and, of course, the obligations and risks associated with them. For example, the Act imposes requirements that are already covered to some extent in the FAR, such as:

- Participation of minorities and women in the contracting process to the maximum extent practicable,
- Safeguarding against conflicts of interest by contractors or advisors, as well as those purchasing or managing troubled assets,
- Post-employment restrictions for certain employees, and
- Total access by the Comptroller General and the Inspector General to audit contractors' books and records.

As a result, potential contractors and service providers that are new to the federal space would be well advised to review the terms and conditions of any such contracts very closely to ensure they understand the risks and the internal compliance infrastructure they will need to implement these government-unique requirements.

Government Contract-Unique Requirements

By way of example, the FAR already provides for the acquisition of “commercial items,” including

services, using streamlined procedures and terms and conditions that are more in line with standard commercial practices than traditional federal procurements. For one, Commercial Item Acquisitions conducted under FAR Part 12 generally relieve the contractor — and subcontractors — from some of the most troublesome and highest risk requirements of traditional federal procurements, such as the Cost Accounting Standards (“CAS”) and the Truth in Negotiations Act (“TINA”). Even so, when commercial companies enter into Commercial Item contracts with the federal government, they are subject, *inter alia*, to the requirements identified below. Compliance with each of these requirements involves training, periodic internal audits, and the establishment, maintenance, and adherence to government contract-unique systems and procedures.

- **Bribery and Illegal Gratuities.** Contractors are prohibited by criminal statutes and regulations, with limited exceptions, from providing gifts or gratuities to federal employees. These prohibitions encompass many activities that are common in the commercial arena (e.g., providing meals to customers). Employees must be trained to avoid providing illegal gratuities.
- **Conflicts of Interest.** Contractors are prohibited by criminal statutes and regulations from discussing employment with certain federal employees. Similarly, former federal employees are limited in the types of services they may perform if later retained by a contractor. Compliance with these requirements involves the establishment and use of comprehensive screening procedures by Human Resources personnel.
- **Anti-Kickback.** Contractors are prohibited from receiving a kickback, the purpose of which is to improperly obtain or reward favorable treatment in connection with a federal prime contract or subcontract. Purchasing personnel must be trained to identify and refuse kickbacks.
- **Lobbying Restrictions.** Contractors are prohibited from using federal appropriated funds to lobby for the award of a government contract.
- **Procurement Integrity.** Contractors are prohibited from obtaining contractor bid or proposal information, or sensitive agency procurement information, prior to the award of a federal contract. Employees must be trained to refrain from soliciting or obtaining this type of information.
- **Service Contract Act.** Service contractors must pay their service employees not less than the wages set forth in the applicable Department of Labor wage determination. Contractors must implement procedures to ensure that all service employees who perform services under the contract are paid as required by the wage determination.
- **Equal Opportunity and Affirmative Action.** Contractors must not discriminate against minorities, women, disabled individuals, disabled veterans, and Vietnam era veterans. Contractors must establish written affirmative action programs and comply with the extensive regulations promulgated by the Department of Labor (including reporting requirements).
- **Subcontracting.** Contractors must establish a written subcontracting plan which details the efforts the contractor will make to assure that small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone, and women-owned small business concerns will have an opportunity to compete for subcontracts. The contractor must strive to meet the total and percentage dollar goals for subcontracting to these entities identified in the subcontracting plan.
- **Record Retention.** Contractors must retain all directly pertinent records involving transactions related to particular contracts for specified periods of time (two to three years depending upon the requirement).

Whether Treasury will retain any of the requirements identified above is unknown. The point being that even pared-down FAR requirements can impose additional burdens on commercial companies, requiring modification of existing policies and procedures to accommodate the government-unique requirements and implementation of programs to ensure continued compliance.