

Roundup

An Update on Government Contracts Issues for Clients & Friends

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Federal Circuit Upholds Daewoo Fraud Decision

By J. Michael Littlejohn (michael.littlejohn@akerman.com)

In one of the most anticipated appellate decisions in the last year, the Federal Circuit upheld the trial court's decision deciding that Daewoo Engineering and Construction submitted a false claim to the Corps of Engineers for the construction of a road in Palau and was subject to forfeiting its claim, liable to the Government for \$50 Million representing the amount of the

fraudulent claim, and subject to a \$10,000 penalty under the False Claims Act. Daewoo Eng'g & Constr. Co. v. United States, --- F.3d ---, 2009 WL 415490 (Feb. 20, 2009). The Federal Circuit decision raises several issues for contractors pursuing claims against the Government and continues to foster the concern that more contract disputes are being converted to fraud matters.

Trial Court Decision

In October 2006, the Court of Federal Claims issued a decision determining that, based on trial testimony, Daewoo Engineering and Construction ("Daewoo"), who had been seeking affirmative claims against the United States Corps of Engineers, had actually submitted false claims and committed fraud under the Contract Disputes Act. As a result, instead of recovering on its multi-million dollar claim, Daewoo was ordered to pay more than \$50,000,000 to the Government under the CDA's fraud provisions and \$10,000 under the False Claims Act.

The facts and issues in the 89-page decision are voluminous. In sum, Daewoo had a construction contract with the Corps to build a 53-mile road on the island of Palau. The Corps estimated the project to be worth around \$100 million and Daewoo's bid was only \$73 million. After experiencing severe weather delays during the project, Daewoo submitted a certified claim to the Contracting Officer in the middle of its work in the amount of \$64 million, seeking \$13 million for added costs incurred and \$50 million for "costs to be incurred" after the date of the claim. Daewoo's basic argument was that it had been misled by the weather clause in the contract and that the Corps had understated the amount of adverse weather to anticipate on the project. Daewoo argued that it was entitled to an adjustment for the impact of the weather because the clause was defective and that the Corps had superior knowledge about conditions.

It also argued that the embankment clause in the contract was defective and that the specifications were impossible to perform.

DOJ did not raise a fraud defense until after Plaintiff rested its case at trial. At that point, DOJ argued that unexpected testimony by Plaintiff's witnesses should allow DOJ to amend its answer to assert counterclaims based on the False Claims Act (31 U.S.C. § 3729), the Special Plead in Fraud (28 U.S.C. § 2514), and the CDA Fraud Provisions (41 U.S.C. § 604). The court allowed the counterclaims.

The trial court was troubled by several issues that led it to believe the claims were fraudulent. First, it found that Plaintiff pursued legal arguments relating to the interpretation of the weather clause in the contract that the Court found were "not credible." Second, the testimony from Plaintiff's witnesses was "disturbing" according to the court. The Korean company's executives testified in a "vague and unreliable manner." One of the company's witnesses testified that it filed its \$50 million-plus certified claim with the Corps as a "negotiating" ploy to make the government "pay attention" to the situation on the site. Moreover, the court was concerned with the way in which the contractor priced the claim. Plaintiff's loss of productivity claim stated that it was based on the "cost of operations" but trial testimony revealed that the claim was based on "planned costs of operations." The judge found that the claim misled the Corps into thinking that it was based on "actual" costs rather than "estimated" costs.

After submitting the claim, Plaintiff engaged an accounting expert that “updated” or “repriced” the claim. The court was concerned that the “updating” resulted in the original \$50 million claim being reduced to \$29 million.

As a result of its findings, the court held that the contractor had attempted to defraud the Government by submitting its claim. The court entered judgment for the United States under the fraud provisions of the CDA for the amount of the claim that was filed in bad faith by the contractor — \$50 million. It also reserved entering final judgment against the contractor under the False Claims Act and for the Government’s costs related to the CDA counterclaim. According the court, it could enter additional judgment against the contractor for \$4,000,000, representing the Government’s costs of trying the counterclaim. It also reserved deciding whether the overstatement of more than 700 items of equipment and 27 items of scrapped equipment in its claim would allow the court to enter judgment for multiple violations of the False Claims Act, amounting to \$7,620,000.

Appellate Decision

On appeal, the appeals court discussed several challenges raised by Daewoo to the trial court decision, but it agreed with none of them. 2009 WL 415490 (Feb. 20, 2009).

First, Daewoo argued that the \$50 Million in future costs was never actually part of its claim submitted to

the Contracting Officer. Daewoo appears to have argued that the \$50 Million in future costs were “not sought as a matter of right, but instead were merely estimates provided to encourage the government to adjust the contract specifications.” *Id.* at *3. While the Federal Circuit agreed that a claim for future costs is not per se fraudulent, it noted that such claims projecting costs had to be made in good faith. It then turned to the question of whether Daewoo had actually submitted a claim for future costs in the amount of \$50 Million. Daewoo contended that it had only made a claim for the \$13 Million incurred and had reserved the right to pursue the future costs. The Federal Circuit read the claims correspondence differently, noting that Daewoo had stated that its REA was divided into past and future impacts and had totalled the amount of the REA at \$63.9 Million. The Federal Circuit still determined that the amount of the claim was unclear from the plain language of the document, so it looked to extrinsic evidence – namely the trial testimony. It noted that the Daewoo project manager had testified at trial that its claim was more than \$60 Million. The Federal Circuit accepted the trial court’s decision that the Daewoo project manager’s later recantation of testimony about the amount of the claim was not credible. Thus, the Federal Circuit determined that Daewoo had actually submitted a claim to the CO for \$50 Million in future costs.

Second, Daewoo argued that the \$50 Million portion of its claim was not fraudulent and should not have been the basis of a penalty. The Circuit also

rejected this argument. Initially, the court made the point that it was not Daewoo's pursuit of meritless legal theories that was the basis of the fraud but that its calculation of the damages was the problem. Under the anti-fraud provision of the Contract Disputes Act, 41 U.S.C. § 604, a contractor that is "unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim." In this case, the Federal Circuit found plenty of evidence of a fraudulent claim. In its decision, it set forth the following facts that supported a finding of fraud: 1) Daewoo assumed that all delay was the government's fault without even considering whether there was contractor-caused or non-government caused delay; 2) Daewoo assumed that the Government was responsible for all of Daewoo's current daily expenditures (and thus Daewoo improperly used a daily operations rate to calculate its claim rather than a number that would give some credit to the Government); 3) Daewoo never consulted an outside expert to review or prepare its certified claim; 4) Daewoo never attempted to "justify the accuracy of the claims for future costs or even to explain how it was prepared" when questioned about it at trial; 5) Daewoo witnesses that prepared the claim never distinguished between actual, future, estimated, calculated or planned costs; 6) the person who certified the claim "gave false testimony," and 7) the trial court was convinced from the testimony of one of Daewoo's own witnesses that the claim

was unsupportable and was pursued for a fraudulent purpose. *Id.* at * 4. In sum, the Circuit noted that the trial judge concluded that Daewoo submitted its claim as a "negotiating ploy" that Daewoo did not "honestly believe" when it submitted it to the Government.

Daewoo also tried to argue that the finding of fraud was improper because the Court of Federal Claims actually found that \$13 Million of the \$64 Million claim was not fraudulent (even though legally incorrect). *Id.* at *5. The Circuit again disagreed, finding that the court had found fraud in the claim but decided that only \$50 Million was subject to the penalty. The Circuit also rejected the argument that a claim must be based on "false facts" rather than just on a baseless calculation. *Id.* at *5. It noted that the claim certification that the amounts are made in "good faith" means that a "baseless certified claim" is a fraudulent claim. *Id.* at *5. Likewise, the Federal Circuit rejected the argument that the \$50 M penalty violated the 5th (due process) and 8th (excessive penalty) Amendments of the Constitution.

Third, Daewoo argued that the \$10,000 penalty under the False Claims Act was improper. The Federal Circuit spent very little time with this argument other than to state that a certified claim can be the basis of liability under the Contract Disputes Act and the False Claims Act.

Finally, the Federal Circuit addressed the status of Daewoo's affirmative claims. Under 28 U.S.C. § 2514 (the Forfeiture Act), a contractor forfeits

claims under the contract if it pursues a fraudulent claim in the Court of Federal Claims. The trial court had found that Daewoo forfeited its claims because of the fraud. The Federal Circuit upheld the COFC and found that "forfeiture under 28 U.S.C. § 2514 requires only part of the claim to be fraudulent." *Id.* at *7. In explaining why the Forfeiture Act could cause a contractor to lose more than the fraudulent amount of the claim, the court noted that the anti-fraud provision of the CDA only holds a contractor financially liable for the amount of the unsupported claim, but the Forfeiture Act required Daewoo to forfeit its claims for money, increase in performance time because the Government proved by clear and convincing evidence that Daewoo "knowingly presented a false claim with the intention of being paid for it." *Id.* at *7. The Circuit did not clearly address what would happen if Daewoo wanted to pursue other claims under the contract at a later date that might arise from some other legal theory or facts.

Lessons Learned

The Daewoo decisions of the Court of Federal Claims and the Federal Circuit will likely continue to present issues and impediments to contractors pursuing claims before the Court of Federal Claims. There are clear lessons from the case. One is that contractors cannot submit a request for equitable adjustment or claim to the Government that is over-inflated merely for the purpose of getting the Government's attention and starting negotiations.

The contractor must have a "good faith" basis for the claim and a reasonable method of calculation. Moreover, contractors need to construct claims for future, estimated costs with care to ensure they can explain the basis for the claim. In addition, the Circuit suggests that contractors should have a claims consultant assist them in the preparation of claims and be willing to explain the basis for the claim at trial – even if they are no longer pursuing that claim. The decision seems to call into question the practice of recalculating a claim downward during litigation. It certainly suggests that contractors will need to explain such changes in the claim at trial and be able to show that the original claim numbers were submitted in "good faith" and not simply as a negotiating ploy.

The Circuit leaves open some questions. Can Daewoo pursue any other claims it may have on the project or is it precluded from doing so by the Forfeiture Act? Where will the line of "good faith" be drawn in the future for contractor claim certifications? Will the DOJ step up its practice of filing fraud counterclaims in the Court of Federal Claims now that the Circuit has affirmed this decision? One thing is for sure. Contractors need to proceed with caution when filing claims with the federal government and pursuing them, especially at the Court of Federal Claims. As the Daewoo case shows, the downside can be disastrous. A contractor can walk into court seeking compensation and walk out of court owing the Government substantial sums.

Court Finds Postal Service Terminated Contract in Bad Faith CDS Contractor Entitled to Lost Profits

By David P. Hendel (david.hendel@akerman.com)

In a scorching opinion issued on February 3, 2009, the U.S. Court of Federal Claims found that four Postal Service officials acted in bad faith in terminating a \$39,000 contract delivery service (CDS) contract. In its 38-page decision in Keeter Trading Company v. United States, No. 05-243C, the Court found multiple acts of bad faith and awarded the contractor \$42,000 in breach of contract damages. Keeter will likely recover his attorney fees as well in a separate action.

Keeter I

In Keeter I, the issue was whether the Postal Service's default termination of Keeter's contract was justified. The Postal Service terminated Keeter's contract after he refused to perform a service change which exceeded the \$2,500 threshold for minor service changes. Keeter contended, and the Court agreed, that the Postal Service could not unilaterally impose a service change that exceeded \$2,500 in value (now raised to \$5,000 in most contracts). Such changes require mutual agreement. The Court thus overturned the default termination.

Keeter II

In Keeter II, the most recent decision, the issue was whether the Postal Service acted in bad faith in terminating Keeter's contract. If it did, Keeter would be entitled to breach damages, not just termination for

convenience damages. In demonstrating bad faith, Keeter faced a tough road. Courts frequently apply a strong presumption that agency officials exercise their duties in good faith. The Keeter Court applied this presumption, holding that Keeter was required to show "clear and convincing" evidence of improper motive on the Postal Service's behalf. Notwithstanding this difficult standard, the Court found Keeter met its burden.

The Postmaster's Bad Faith Conduct

The Court found that each of four separate Postal Service officials acted in bad faith toward Keeter. The Court started first with the local postmaster, who served as the Administrative Official (AO) under Keeter's contract. She also served as the AO under Hoover's contract, another CDS contractor in the same office with an adjacent route. Hoover complained to the AO that he did not have enough time to case the mail and needed an increase in compensation. The AO met with Hoover, but not with Keeter, and discussed how to divvy up Hoover's and Keeter's routes. Not surprisingly, the resulting change significantly increased the value of Hoover's contract and lowered the value of Keeter's contract.

When Keeter was advised of the service changes, he was not pleased. He told the AO that he did not have to accept them – which was contractually correct, since the change exceeded the \$2,500

unilateral threshold. The AO responded that "it didn't matter what [he] thought." While the AO had various justifications for her actions that on the surface appeared legitimate, there remained troubling and unjustifiable aspects of her actions. The Court was troubled that the AO discussed the changes with Hoover, but not with Keeter, and that she went to great lengths to make certain Hoover (but not Keeter) benefited financially from, and was happy with, the changes.

The rationale the AO applied was also troubling. The AO justified giving Keeter extra boxes without adding any additional casing time because Keeter supposedly had "extra time" in his schedule that he did not use. When advised of this rationale, Keeter noted he had a fixed price contract, so how could that even matter. He also noted that he was able to case the mail in less time than assigned under the contract because he did not take smoking breaks or socialize with other contractors during casing time.

When Keeter refused to perform the service changes, the AO issued a new PS Form 5500 (Irregularity Report) on a daily basis for Keeter's arriving and leaving earlier than his scheduled time. The Court saw this for what it was – retaliation for Keeter's refusal to agree to the service changes. The Court noted that Keeter had been arriving and leaving earlier than his scheduled time for the past year and a half, but had never been issued 5500s for doing so. Moreover, it was the policy of the post office to allow contractors to arrive earlier than scheduled, and to leave the post office before their appointed

contract schedule time. Based on the foregoing, and other acts, the Court found that the AO acted in bad faith toward Keeter.

The Contracting Officials' Bad Faith

The Court next addressed the conduct of the three Postal Service contracting officials involved in the matter. The Court found that these officials committed bad faith toward Keeter by relying so completely on the AO and demonstrating "an obvious disregard of . . . contractual provisions." By failing to exercise their own independent and informed judgment, the contracting officials acted in bad faith in the administration of Keeter's contract.

For example, one contracting official deferred to the AO "at all times rather than making her own decisions." Keeter asked this official to advise the AO about the proper administration of the contract, but the official refused to do so. Instead, she told Keeter: "I told him NO, that I was not getting involved in telling her that. I reminded him that she was his boss and she felt that the change was in the best interests of the Postal Service." By refusing to exercise her independent judgment in the matter, and ignoring the terms of the contract, the contracting official acted in bad faith toward Keeter.

The Court also found bad faith conduct on the part of the Postal Service's contracting officials based on their failure to apply the standard formula used in calculating compensation for additional box count. The contracting officials contended that application of

the formula was optional, and that it need not be applied in this case, because Keeter already had extra time built into his contract. The Court easily dispensed with this argument, finding that the Postal Service's assertion "makes no sense." The Court found the formula was both a contract requirement and a national policy set out in USPS's P-5 Handbook. The Court rejected the Postal Service's convoluted arguments and held that it "should have been obvious to the contracting officials" that the supposed extra time in Keeter's contract could not serve as a rationale for failing to apply the compensation formula. The Court held: "It reflects poorly on the Postal Service that ... contracting officials then continued in a campaign to wrongfully force [Keeter] to accept a unilateral change which the contract dictated was to be negotiated."

With respect to another contracting official, the Court found it was bad faith when he forbid Keeter from using a lawyer to address his contractual concerns. He also acted in bad faith by ignoring "an inconvenient contractual provision because it no longer benefitted the Postal Service's interest, despite a contractual obligation to apply the formula."

Finally, the Court found the contracting officer acted in bad faith toward Keeter because he, too, relied exclusively on the AO, ignored the terms of the contract, and failed to acknowledge that the Postal Service had a contractual obligation to make a good faith effort to negotiate the service change with Keeter. The contracting officer had a responsibility to carry out the terms of Keeter's contract. The fact that he had thousands of other contracts in which he also served as contracting officer did not excuse him from exercising this responsibility.

The Scariest Part

While the Court did not mince words in excoriating the Postal Service's bad faith conduct toward Keeter, perhaps the scariest words came from the Postal Service's own brief. In attempting to defend the agency's action, the Postal Service contended that Keeter "was treated no differently than would be any supplier under the circumstances." Let us all hope that this is not true, but if it is true, let us hope that the Postal Service never treats another supplier this way ever again.

New Executive Order - Nondisplacement of Qualified Workers Under Service Contracts

By Daniel J. Donohue (daniel.donohue@akerman.com)

One of the early actions by the new Obama administration was to issue a sweeping new Executive Order (E.O.), No. 13495, applicable to nearly all Service Contract Act contracts. The new E.O. contains a mandatory contract clause that, with few exceptions, requires a successor contractor and its subcontractors to offer jobs to the existing employees of the prior contractor and its subcontractors. It becomes effective when new implementing FAR regulations are issued, said to be due within six months. The Department of Labor—not the Contracting Officer—is in charge of enforcing this new requirement, and the DOL is also to issue implementing regulations. This new requirement for mandatory employment offers is a major change in procurement policy regarding service contracts. This E.O. was among the AFL-CIO's recommendations to the new administration's transition team, so it may be worthwhile to review the AFL-CIO's other recommendations for a preview of things to come. (Call us for a copy of the AFL-CIO letter.)

President Obama signed E.O. 13495, "Nondisplacement of Qualified Workers under Service Contracts," on January 30, 2009. The E.O. declares that the Federal government's interests in economy and efficiency are better served when a successor contractor hires the predecessor's employees. It also declares that the carry-over workforce reduces disruption in services during the

transition between contractors, and provides the government the benefit of an experienced and trained workforce familiar with the government's personnel, facilities, and requirements. E.O. 13495 requires that service contracts and solicitations for such contracts include a contract clause, included in the E.O., that requires a successor contractor and its subcontractors to offer employees (other than managerial and supervisory employees) employed under the predecessor contract, a "right of first refusal of employment" for positions for which the employees are qualified. The successor contractor and its subcontractors are required to make an express offer of employment to each such employee with an acceptance period of not less than ten days. It forbids other employment openings under the contract until these requirements are satisfied.

This new requirement applies to all contracts covered by the Service Contract Act, excluding only those awarded under the Javits-Wagner-O'Day Act, sheltered workshops for handicapped workers and vending facilities under the Randolph-Sheppard Act. Also exempted are "employees who were hired to work under a Federal service contract and one or more non-federal service contracts as part of a single job. . . ." While the scope of this last exemption remains to be defined in regulations, it may apply to a commercial organization, like a

laundry, whose employees work on commercial orders as well as a Federal agency service contract for laundry services. The E.O. also authorizes the head of a contracting department or agency to exempt from this requirement an individual contract, subcontract, or class of contracts and subcontracts. Such an exemption must be based on a finding that the application of this right of first refusal requirement would not serve the purposes of this E.O.

To implement the policy, the new contract clause requires an incumbent contractor, not less than ten days before completion of its contract, to furnish the contracting officer a certified list of the names of all service employees working under the contract and subcontracts under it. We note that this is similar to the existing Service Contract Act clause requiring such a list of employees prior to the end of a contract, yet our clients frequently report that they are not provided such a list. This existing requirement is in 29 C.F.R. 4.6(1).

The Department of Labor—not the contracting officer—is responsible for enforcing the requirements of this E.O. In this respect, it is like other Service Contract Act matters, including disputes arising under them, that are resolved by DOL, not the contracting officer. The E.O. states that disputes regarding this E.O.'s requirement for job offers to incumbent employees cannot be claims under the Contract Disputes Act, but will be resolved by the Department of Labor.

If DOL decides that a contractor has violated the requirements of this E.O., it is authorized to issue sanctions and remedies, including but not limited to orders requiring employment and payment of wages lost. In addition, if DOL decides that a contractor or subcontractor has failed to comply with any DOL order, or has committed willful violations of the E.O. or regulations issued thereunder, the Contractor or Subcontractor, and its responsible officers and affiliated firms, may be debarred for a period of up to three years. The E.O. provides that "neither an order for debarment of any contractor or subcontractor" nor the inclusion of a contractor or subcontractor on a published list of "non-complying contractors" shall be carried out without affording the contractor or subcontractor "an opportunity for a hearing." In this respect, the E.O. differs from suspension and debarment under FAR 9.4, which allows immediate temporary suspension of a contractor from Federal contracting without a hearing.

The E. O. requires the FAR Council to issue implementing regulations within 180 days of the order (thus, by August 1, 2009). It also requires the DOL to issue implementing regulations.

This new E.O. is similar to, but much broader than, an October 1994 Clinton administration Executive Order 12933, "Nondisplacement of Qualified Workers under Certain Contracts," revoked by the Bush administration in 2001. The 1994 E.O. was limited to maintenance services, while the new E.O. 13495 applies to nearly all service contracts. The 1994 E.O. contains a contract

clause that appears to be the basis for the one in the new E.O. 13495.

It is important to note that the contract clause states several exceptions not otherwise addressed in the E.O. First, the contract clause allows the contractor and any subcontractors to employ under the contract any employee who has worked for them for at least three months immediately preceding the commencement of the contract, who would otherwise be laid off, without complying with the obligation to give offers of employment to incumbent employees. Second, the contract clause affirmatively states that it requires no employment offer to employees "who are not service employees within the meaning of the Service Contract Act of 1965"—i.e., professional, administrative, and executive employees. Third, the contract clause states that contractors and subcontractors "are not required to offer a right of first refusal to any employee(s) of the predecessor whom the contractor and any of its subcontractors reasonably believe, based on the particular employee's past performance, has failed to perform suitably on the job." This provision may be of little value, as there appears to be no requirement that the new contractor be given "past performance" information about the incumbent employees.

Finally, ¶(a) of the contract clause specifically states that the contractor and its subcontractors "shall determine the number of employees necessary for efficient performance of its contract and may elect to employ fewer employees than the predecessor contractor." There

is no requirement that incumbent employees be offered the same positions or the same pay as under the prior contract.

Under this new E.O., and the contract clause it requires, it appears that the new procedure for a new follow-on contractor will include the following. First, the new contractor must make sure the agency provides the new contractor with the list of incumbent employees, so that the new contractor can make the required offers of employment to those employees. Second, the new contractor should request and obtain past performance information about those incumbent employees, so that it may determine whether or not to make offers of employment to poorly performing employees. Third, the new contractor may determine which of its existing employees, employed for at least three months prior to the new contract, the new contractor wishes to employ on the contract. Fourth, the new contractor must insure that the "nondisplacement of qualified workers" contract clause is flowed-down to its subcontractors. Fifth, the new contractor and its subcontractors must draft offers of employment to incumbent employees, providing them with at least a 10-day acceptance period. Sixth, the new contractor should bear in mind that it need not offer the same positions to incumbent employees, nor must it offer the same compensation package to the incumbent employees. Finally, the new contractor must insure that there are "no employment openings under the [new] contract" until the incumbent employees have been given their first right of refusal for positions.

Buy American Highlights of the Stimulus Bill for Government Contractors

Our firm has been following closely the stimulus bill passed by Congress in late February because of its potential impact on our clients in federal contracting, construction, and infrastructure projects at the federal, state, and local levels. A full review of the stimulus bill as it relates to the construction industry can be found in the February edition of our construction newsletter found at www.akerman.com (or call us for a copy). Below are a few highlights of the Buy American provisions that we thought could be of particular interest to government contractors.

A "Berry Amendment" for DHS

By J. Michael Littlejohn
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Congress added a "Buy American" restriction on the purchase of textile products for DHS acquisitions entered 180 days after the enactment of the bill. Section 604 of the stimulus bill now imposes on DHS the same type of restrictions that DOD has under the "Berry Amendment" for purchase of textiles—with a few twists.

The Berry Amendment is a protectionist restriction in DOD procurements that dates back to 1941. It has limited the purchase of foreign textiles, food, and specialty metals. The new DHS restriction is limited to textile products and states that "funds appropriated or otherwise available to the [DHS] may not be used for the procurement of an item . . . if the item is not grown, reprocessed, reused, or

produced in the United States." § 604(a). The items covered by the DHS restriction are:

"A) clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with clothing (and the materials and components thereof);

B) tents, tarpaulins, covers, textile belts, bags, protective equipment (including but not limited to body armor), sleep systems, load carrying equipment (including but not limited to fieldpacks), textile marine equipment, parachutes, or bandages;

C) cotton and other natural fiber products, woven silk, or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or

D) any item of individual equipment manufactured from or containing such fibers, yarns, fabrics or materials."

§ 604(b). The list is similar to the restrictions on DOD textile purchases imposed by the Berry Amendment found at 10 U.S.C. § 2533a, with a few additional elements. The DHS law specifically includes protective equipment, while the DOD law provides an exception for certain chemical warfare protective clothing made in certain countries with which the U.S. has trade agreements or programs. 10 U.S.C. § 2533a(e). The new DHS statute also notes that the

restriction must be consistent with US obligations under international agreements, but it does not include the specific exception for chemical protective clothing. § 604(k).

The new DHS Act also provides an exception if the Secretary of DHS determines that compliant items "cannot be procured as and when needed at United States market prices." § 604(c). It does not apply to procurements under the simplified acquisition threshold. § 604(f). But, it does apply to the purchase of commercial items. § 604(g). These exceptions are similar to the operation of the DOD Berry Amendment.

The stimulus bill also provides an exception if the non-compliant fibers make up less than 10% of the total value of the "total purchase price" in the end item. § 604(d). This provision mimics the DOD regulation at DFARS 252.225-7012(c)(2).

One exception that may need more clarity is the Congressional mandate that the restriction does not apply to "emergency procurements." § 604(e). This exception is listed under the heading of "Exception for Certain Procurements Outside the United States" but the actual statutory language does not specifically apply to foreign procurements. Indeed, in this regard, the exception differs from the DOD statute which states that it does not apply to "emergency procurements . . . by, or for, an establishment located outside the United States for the personnel attached to such establishment." 10 U.S.C. § 2533a(d)(3). The DHS law also

does not directly address whether it applies for procurements conducted under other than competitive procedures relating to "unusual and compelling urgency of need" which is specifically set forth in the DOD statute.

Iron, Steel & Manufactured Goods Provision

By Sarah M. Graves

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Section 1605 of the Recovery Act, entitled "Use of American Iron, Steel, and Manufactured Goods" mirrors certain provisions of the Buy American Act with respect to construction materials. It applies to any project involving "the construction, alteration, maintenance, or repair of a public building or public work" funded under the Act. § 1605(a). Specifically, § 1605 requires such projects to utilize "iron, steel, and manufactured goods . . . produced in the United States." *Id.* These "Buy American" requirements, however, do not apply if the head of a Federal department or agency makes any one of the following determinations:

- (1) That application of the Buy American restriction "would be inconsistent with the public interest";
- (2) That "iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality"; or
- (3) That use of American-made iron, steel and manufactured goods would "increase the cost of the overall project by more than 25 percent."

§ 1605(b)(1)–(3). Following heated discourse in the press and opposition by some in the Senate, the final version of this section also includes a limitation noting that it must be "applied in a manner consistent with United States obligations under international agreements." § 1605(d).

While portions of § 1605 track the requirements of FAR subpart 25.2, the distinctions are prevalent enough to create some confusion as to the true meaning of the Recovery Act's Buy American provisions.

On the one hand, it is clear that the restrictions will only apply to public construction projects. The Act is slightly more far-reaching than FAR 25.200 in terms of scope, as it also applies to "maintenance" projects. Like FAR subpart 25.2, the Act is similarly limited to "public building[s] or public work[s]." Unlike the FAR, however, the Act does not define these terms. While the House version of the bill expressly adopted the definitions used in the Buy American Act and adopted in the FAR, the final version eliminated this clarification. See H.R. 1 EH at 13.

Further, the Recovery Act does not attempt to define one of the most important concepts in § 1605—what it means for iron, steel or goods to be "produced in the United States." Under FAR Part 25, "domestic construction material" means: (1) "[a]n unmanufactured construction material mined or produced in the United States"; or (2) "[a] construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components." FAR 25.003. Unlike the corresponding FAR subpart, the Recovery Act does not even attempt to clarify or explain its requirement that iron, steel, or manufactured goods be "produced in the United States." In time, this may prove to be problematic.

Section 1605 appears to set forth similar exceptions to those in FAR 25.202—allowing agency and department heads to decide when application of the Buy American restrictions are: (1) against the public interest; (2) impossible due to unavailability; or (3) unreasonably expensive. Compare § 1605(b)(1)–(3) with FAR 25.202(a)(1)–(3).

About Our Government Contracts Group

The Government Contracts Group at Akerman Senterfitt assists large and small businesses with all types of federal government contracts issues. To do business with the federal government, contractors must deal with a unique and complicated series of statutes, regulations and procedures. We help clients work with this system to maximize contracting opportunities with federal government agencies. We provide counseling and representation to clients in the areas of contract compliance issues, bid protests, Small and Disadvantaged Business matters, contractor and subcontractor claims administration, construction contracts, information technology contracts, and international contracts. In addition, we are uniquely qualified to advise and assist contractors who provide goods or services to the U.S. Postal Service.

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