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Transparency In Government Contracting?

Law360, New York (September 20, 2010) -- Openness and transparency are two familiar buzzwords that we have been hearing more frequently in the government contracts community. And, while on its surface, transparency in government contracting would seem to be as American as apple pie, there is a tension between disclosing information about government contracts and protecting proprietary information of companies.

The federal Freedom of Information Act is one avenue for obtaining records from federal government agencies. And, government contractors often use the FOIA to try to get information about their competitors and government contracts. The FOIA was first enacted in 1966, and it applies to all federal agencies and departments. But how effective is the FOIA in opening up government? Not very.

The FOIA requires government agencies to respond to FOIA requests for information within 20 days. And, the FOIA requires government agencies to track their compliance. The U.S. Department of Justice maintains scorecards for all federal agencies' compliance with the FOIA requirements. So, in the face of a statutory 20-day deadline, how quickly do agencies respond to FOIA requests?

In fiscal year 2009, the Department of Homeland Security reported that its average response time for simple requests was 103.86 days. For complex requests, DHS's average response time was 309.89 days. On average, DHS processed "expedited" requests in 91.28 days. (This data looks only at response times and does not address the substance of the agencies' response. The FOIA contains numerous exemptions from disclosure that limit what records agencies are required to provide to requesters.)

Based on agency FOIA scorecards, it appears that the Congress can write the laws but unless the Executive branch holds up its end of the bargain and properly implements those laws, congressional intent will be frustrated.

Congress has more recently been active in the area of "Transparency." That term appears in the titles of at least two laws from the 109th and 110th Congresses — the Federal Funding Accountability and Transparency Act of 2006 (the "FFATA") (Publ. L. No. 109-282) and the Government Funding Transparency Act of 2008 (the "GFTA") (Publ. L. No. 110-252).

In short, these statutes seek to create a more robust reporting of government spending, allowing the taxpayers to see just where their tax dollars are going. These statutes require the Office of Management and

Budget (“OMB”) to set up a publicly accessible website containing data on government contracts awards and grants. But how effective have these statutes been in creating a more transparent government?

The Government Accountability Office recently completed a study of OMB’s compliance with the requirements of the FFATA. GAO found that OMB’s implementation was less than stellar. While OMB has complied with the requirement to establish a public website for the data on federal awards (at www.USAspending.gov), GAO found fault with OMB on some of the important details.

GAO found that the website lacks any reporting of subcontract award data, contrary to the requirements of the FFATA. GAO found numerous “widespread” inconsistencies between data on the website and records provided by awarding agencies. And, GAO found that OMB did not have a process in place to identify nonreporting agencies, thus impairing the utility of the website. Overall, GAO found that the USAspending website will be limited in providing access to the details of federal spending until OMB and the agencies ensure that complete and accurate information is published there.

On July 8, 2010, the Federal Acquisition Regulatory Council issued an interim rule — effective immediately — that implements the requirements of the FFATA and the GFTA. The interim rule requires contractors to disclose “first-tier” subcontract awards of \$25,000 or more under government contracts for publication on the USAspending website.

The rule also requires certain contractors and “first-tier” subcontractors to report on compensation of their top five executives, also for publication on the USAspending website. The interim rule also directs government contracting officers to modify existing indefinite-delivery indefinite-quantity (“IDIQ”) contracts to include these reporting requirements for future awards under the IDIQ contracts.

This rule and what are deemed to be “excessively burdensome requirements” have caused an uproar in the government contracting community and among contractor organizations. On Sept. 7, 2010, a group of contractor organizations submitted comments in response to the interim rule that ranged from calling the rule a threat to national security to warnings of the potential for competitive harm.

Despite the comments, any relief from the rule would require new legislation or litigation. So at least for now, the reporting requirements are a fact of life for contractors, although the end product — publication on the USAspending website of subcontract awards and executives’ compensation — has not yet taken effect.

On July 29, 2010, President Obama signed a supplemental defense authorization bill for the wars in Iraq and Afghanistan that includes a provision requiring contractor performance information in the Federal Awardee Performance and Integrity Information System (“FAPIIS”) to be made publicly available.

The FAPIIS information — including information intended to aid agencies’ evaluation of contractors’ business ethics, expected performance and other responsibility information — currently is available only to government and acquisition officials. The new law mandates that the General Services Administration (“GSA”) publish the FAPIIS information “excluding past performance reviews” on a public internet website.

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GSA's implementation of the law is forthcoming, but so is the likely opposition from government contractor organizations. When it comes to a seemingly good idea — like transparency in government contracting — the devil is in the details. And with \$1 trillion of federal government contracts, grants and loans being made every year, we have not heard the final word on transparency in government contracting.

--By Kenneth B. Weckstein (pictured) and Michael D. Maloney, Brown Rudnick LLP

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The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.

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