

Government Contracting Policy To Watch In 2011

By **Jessica Dye**

Law360, New York (January 1, 2011) -- As the balance of power shifts in Washington, D.C., government contract experts expect to see Congress tackle bipartisan legislative issues like cybersecurity, leaving thornier policies — like labor, intellectual property rights and insourcing — in the hands of executive agencies and enforcement officials.

2011 will be shaped by the debate over how to reduce ballooning government spending, experts say, as well as how to make the contracting dollars doled out to the private sector more efficient in achieving their mission and more effective in advancing critical portions of the Obama administration's agenda, particularly in regard to transparency and fiscal and social accountability.

"We're all interested in how things will develop, and what the tone of the new Congress will be," said George Ash, a partner and chair of the government procurement and government and public policy practices at Foley & Lardner LLP. "Is it going to be a series of compromises, as we have seen on tax and unemployment benefits in the lame duck sessions, or will it be gridlock? Is half a loaf better than no loaf, or is everyone going to dig in and start the 2012 election cycle off early?"

If legislation stalls, government contracting experts predict that both Republicans and Democrats in Washington will explore other ways to achieve their goals, through executive agency regulations, congressional and agency oversight bodies, and a renewed emphasis on enforcing the laws on the books and shining a light on companies that break the rules.

"This administration is very focused on wanting good actors, not bad actors," said Leigh Nason, a shareholder at Ogletree Deakins Nash Smoak & Stewart PC and chair of the firm's affirmative action and Office of Federal Contract Compliance Programs compliance practice. "Increasing amounts of transparency into contractors is going to give all the enforcement agencies more impetus and a bigger stick."

Experts said they would be watching the following legislative, regulatory and oversight and enforcement policies closely in 2011.

Legislation

Republicans will retake control of the U.S. House of Representatives in January, creating a political split with the Democrat-controlled Senate that will force lawmakers to look for any legislative common ground and consensus from the previous session to jump-start the debate, experts said.

"In those areas where there is bipartisan support for things that did not get off the ground in 2010, one might expect to see those bills introduced again in 2011," said James J. McCullough, head of the government contracts practice at Fried Frank Harris Shriver & Jacobson LLP. "If there was bipartisan support before, there likely will be again."

One example is cybersecurity, the subject of several bills with backing from both parties in 2010, despite never gaining enough traction in a busy year to make it into law, McCullough said. A recent report from government business analysis firm INPUT projected that the federal investment in IT security will see an average compound annual growth rate of approximately 9 percent, reaching an estimated \$13.3 billion by 2015 to fortify, upgrade and maintain IT defenses under increasing attack.

The two main proposals on the table — S. 3480, Protecting Cyberspace as a National Asset Act of 2010, from Senate Homeland Security Committee Chairman Joe Lieberman, I-Conn.; and S. 773, the Cybersecurity Act, from Senate Commerce Committee Chairman John Rockefeller, D-W.Va. — aim to provide a framework for federal and private sector cooperation to increase control over critical IT infrastructure governmentwide. The bills expired at the end of the 111th legislative session, but McCullough sees a distinct possibility that they, or something similar, will resurface in 2011.

Sen. Claire McCaskill, D-Mo., who will remain chairwoman of the Senate contracting oversight subcommittee in the next session, has pledged to push legislation to end the U.S. Small Business Administration's special preference program for Alaska Native Corporations, following a string of scandals in 2010 in which big contractors were allegedly caught siphoning off ANC perks.

“Sen. McCaskill will be clearly taking some action on the SBA programs, particularly the ANC program, where there has been a lot of abuse,” said Sean A. Sabin, of counsel in the government procurement law group at Foley & Lardner.

Whether or not it becomes law, the National Commission on Fiscal Responsibility and Reform's draft plan to trim the federal deficit — which puts major budget and contracting cuts for the Defense Department on the table — will play a central role in the debate over government contracting in 2011, Sabin said.

“The panel's report is very interesting, but it remains to be seen whether any of the rigorous and demanding requirements are implemented, or if it's something that's just talked about,” Sabin said. “Both parties have made it clear that, with the recession, they don't see significant cuts to contracting awards in 2011. But down the road, I do see that as a significant issue.”

Regulation

Several major regulatory proposals that stirred chatter in the government contracting community in 2010 are expected to advance in 2011, experts said, along with some possible new agency initiatives to alter the procurement process without wading through the legislative quagmire.

“I think the administration is going to have to move its focus from Congress — it was easy when the Democrats controlled both houses,” Nason said. “It will move back to the agencies, back to the regulatory front, and also some changes in in-house administrative policies and practices.”

At the top of contractors' watch list is a proposed rule published by the Defense Department on Sept. 27, which would revise the Defense Federal Acquisition Regulation Supplement to substantially expand the commercial intellectual property rights that the DOD gets as part of its standard commercial computer software and technical data acquisitions. Although comments on the proposal were scheduled to close in November, the department extended the deadline until Dec. 30, suggesting that companies had much to say about the draft, which could be finalized as early as 2011, according to Ash.

“It could be a very significant change in the way the system works,” Ash said. “Even on the noncommercial side, we're seeing the government make comments about wanting more IP rights ... It could be a very important rule in setting a precedent, and since DOD is the 800-pound gorilla in terms of federal procurement, it might affect everything from standard commercial stuff to the research and development that contractors do.”

McCullough is expecting action in 2011 on what he calls the “big three” pending government contracting regulations: a proposal to amend the Federal Acquisition Regulation to offer guidelines on eliminating personal conflicts of interest; a draft Defense Department rule defining and banning organizational conflicts of interest; and a draft policy memo from the Office of Management and Budget and the Office of Federal Procurement Policy seeking to establish which jobs and functions are “inherently governmental,” and which should be farmed out to private contractors.

All three were proposed in 2010 but have not yet been finalized, signaling intense scrutiny from both contractors and agencies alike, McCullough said.

“All three are tied to how the government uses contractors to do various functions and activities, and how the government should hold certain activities and functions only for government employees,” McCullough said. “When there are long delays in the rulemaking process, it means that they're really giving due consideration to the comments, and are trying to get the

interested parties — especially within the government — to speak up and tell them what they think.”

The White House may consider formally proposing several other policy priorities already under discussion, such as a so-called high road contracting rule, which would make companies' pay and employment practices part of the calculus for awarding contracts, new guidelines to revise affirmative action standards in the construction industry and possibly rules to boost veteran- and disabled individual-owned businesses' share of contracts, Nason said.

“President Obama has put an emphasis on the identification of bad actors in government contracting,” Nason said. “We're also going to see more emphasis on the recruitment of veterans and disabled individuals, so the proposed rule we think will be published in late 2011 is going to really strengthen regulations to make agencies do more to help them.”

Enforcement and Oversight

Although legislative action on government contracting policy might be slow, experts are preparing for a flurry of hearings, investigations and other activity from congressional and executive oversight and enforcement bodies in the coming year.

Rep. Darrell Issa, R-Calif., who now holds the oversight gavel, has already vowed to crack down on improper payments from the government to contractors, and is pushing to boost the legal authority for agencies' inspectors general to attack fraud, waste and abuse governmentwide.

“Issa intends to hold hearings on a lot of matters, including government procurement, and there will be questions about cost overruns in certain programs,” Sabin said, including the controversial F-35 Joint Strike Fight alternate engine program, which has raised eyebrows with its price tag and lengthy delays.

“You'll also see hearings on some of the new requirements placed on government contractors, like labor requirements or insourcing, on the House side, to see what impact these policies have had on businesses,” Sabin said.

Experts agreed that the enforcement push under Obama was likely to continue into 2011, particularly in the form of audits and compliance checks from agencies like the OFCCP.

“I think the indications show a real surge in OFCCP audits and enforcement — equal opportunity, nondiscrimination, veteran support and all those various rules,” Ash said. “There has been a significant increase in the budget for audits, and contractors will see more oversight there, which is consistent with the view of Democrats and their constituents.”

With new rules being drafted and implemented to boost federal data on contractors' businesses, OFCCP will find itself with more tools than ever to crack down on less-than-desirable employment and procurement practices, Nason said.

“OFCCP has a lot more information now to hit the target and figure out who to direct their enforcement efforts toward,” Nason said. “It's very difficult to get into compliance from ground zero, so the practical consequence is that we're going to have a lot of people being surprised. The agencies are going to be looking for systemic, class action-type problems.”

With two wars still ongoing in Iraq and Afghanistan, in addition to the more ambiguous “war on terror,” federal contractors will also be keeping a close eye on the world outside Washington for clues about what policy changes might come during the year ahead, Ash said.

“As the world changes and politics change, that affects government spending, and that has a direct impact on the companies that service the government, as well as their business plans,” said Ash. “It's hard to look at things in a vacuum, in the political sense, without tying it to what's going on in the world, which will drive decisions more than anything.”