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Assessing The Franken Amendment

Law360, New York (February 16, 2011) -- On Dec. 8, 2010, the U.S. Department of Defense issued a final rule implementing Section 8116 of the Defense Appropriations Act for Fiscal Year (FY) 2010 (Pub. L. No. 111-118), often referred to as the "Franken Amendment," after its sponsor, Sen. Al Franken of Minnesota.

The Franken Amendment imposes a restriction on the ability of certain DOD contractors and subcontractors to enter into or enforce mandatory arbitration agreements with their employees and therefore has potentially far-reaching significance for affected contractors and subcontractors.

Background

The Franken Amendment prohibits the use of funds appropriated or otherwise made available by the FY 2010 Defense Appropriations Act for any contract in excess of $1 million, if the contractor requires its employees to arbitrate 1) claims under Title VII of the Civil Rights Act of 1964; or 2) tort claims related to or arising out of sexual assault or harassment including assault and battery; intentional infliction of emotional distress; false imprisonment; or negligent hiring, supervision or retention (collectively referred to herein as "covered claims").

The impetus cited by Franken for offering his amendment was the case of Jamie Leigh Jones, a former employee of defense contractor Kellogg Brown & Root (KBR). Jones alleged that she had been gang-raped by co-workers in her bedroom in employer-provided housing while working for KBR in Iraq in July 2005.

Upon her return to the U.S., Jones tried to sue KBR in court, raising several tort claims based on the alleged sexual assault (including KBR's negligent hiring, retention and supervision of the employees involved in the alleged assault). KBR, however, sought to compel arbitration of her claims, citing a provision of her employment agreement mandating arbitration of any claims "related to her employment" or based on personal injury "arising in the workplace."

The Fifth Circuit ultimately sided with Ms. Jones, ruling that the assault-based claims were not covered by the mandatory arbitration provision in her employment agreement with KBR, but Senator Franken argued that his amendment was necessary to protect against further attempts by defense contractors to force their employees to arbitrate similar claims arising from sexual assault or harassment.

In his floor statement explaining his basis for proposing the amendment, Senator Franken explained that, while he viewed arbitration as "an efficient forum" for purely commercial disputes, he viewed it as ill-suited to resolving "claims of sexual assault and egregious violations of civil rights." 155 Cong. Rec. S10028 (Oct. 1, 2009). Because arbitration is "conducted behind closed doors," Senator Franken argued, it "doesn't bring persistent, recurring and egregious problems to the attention of the public" and "doesn't establish important precedent that can be used in later cases." Id.

Implementation

The DoD originally implemented the Franken Amendment through a class deviation issued Feb. 19, 2010, followed by an interim rule issued on May 19, 2010. The final rule adopted on Dec. 8, 2010, leaves the interim rule largely unchanged, though it does add some further guidance regarding the information the DoD must consider in order to waive the Franken Amendment requirements in the interests of national security.

To implement the Franken Amendment, the DoD has adopted a new Subpart in the Defense Federal Acquisition Regulation Supplement ("DFARS"), Subpart 222.74 ("Restrictions on the Use of Mandatory Arbitration Agreements"), which sets forth the scope and application of the Franken Amendment restriction and describes the limited basis on which the Secretary of Defense can waive application of that restriction to a particular contract or subcontract.

The restriction on the use of mandatory arbitration agreements is incorporated into specific DoD contracts or task/delivery orders through the use of a new contract clause, DFARS 252.222-7006, Restrictions on the Use of Mandatory Arbitration Agreements (DEC 2010).

The Scope of the Restriction

The contract clause at DFARS 252.222-7006 limits a contractor's ability to use mandatory arbitration provisions in employment agreements in two ways.

First, the contractor is prohibited from entering into any new employment agreement with an employee or independent contractor that would require the arbitration of a covered claim.

Second, the contractor is prohibited from enforcing any such mandatory arbitration provision in existing employment agreements, to the extent the contractor seeks to force the employee to arbitrate covered claims. Note that the restriction applies to all employees or independent contractors of an affected contractor, not merely those employees or independent contractors performing work related to the contract containing the DFARS contract clause.

The DoD explained in the guidance published with the interim rule that the Franken Amendment restriction does not affect the use or enforcement of mandatory arbitration agreements for non-"covered" claims: "enforcement of this rule does not affect the enforcement of other aspects of an agreement that is not related to the covered areas." 75 Fed. Reg. 27,946 (May 19, 2010).

Thus, affected contractors can still use employment agreements that have mandatory arbitration provisions, provided those provisions are carefully tailored to exclude coverage of the type of claims described in DFARS 252.222-7006.

Covered Contracts

The Franken Amendment restriction applies to any contract (including task and delivery orders and bilateral modifications adding new work) in excess of $1 million appropriated or otherwise made available by the FY 2010 Defense Appropriations Act and executed after Feb. 17, 2010 (the effective date of the Franken Amendment).

The restriction would apply to a delivery or task order exceeding $1 million using FY 2010 Defense appropriations even if the underlying indefinite-delivery/indefinite-quantity ("IDIQ") contract itself would not be covered. The restriction would also apply if a bilateral contract modification adding new work was funded with more than $1 million in FY 2010 Defense appropriations. However, contracts for the acquisition of commercial items, including commercially available off-the-shelf ("COTS") items, are not subject to the Franken Amendment restriction.

Definition of "Contractor"

The final rule reaffirms the DoD's position in the interim rule that the term "contractor" as used in DFARS 252.222-7006 refers only to the specific entity that has the contract, and does not encompass a parent or subsidiary corporation unless that parent or subsidiary is a party to the contract.

This limited definition of "contractor" should assist the contracting community in monitoring and ensuring compliance with the Franken Amendment restriction, as the imposition of the Franken Amendment restriction on one corporate entity will not require compliance by all of that corporation's parent, subsidiary, or affiliated corporations.

"Flow down" and Certification Requirements

A contractor subject to the Franken Amendment contract clause must also certify that it requires each "covered subcontractor" to agree not to enter into, and not to take any action to enforce, mandatory arbitration agreements requiring arbitration of covered claims by employees or independent contractors performing work related to that subcontract.

The guidance issued with the final rule clarifies that the term "subcontract" as used in the DFARS contract clause is "limited to those contracts placed by the contractor or higher-tier subcontractors that are specifically for the furnishing of supplies or services for the performance of the contract, not supplies or services a contractor or higher-tier subcontractor might purchase for other purposes." 75 Fed. Reg. 76,296 (Dec. 8, 2010).

Thus, an affected contractor would only need to flow down the Franken Amendment restrictions in subcontracts specifically related to the contract (or higher-tier subcontract) containing the restriction on the use of mandatory arbitration agreements.

The Franken Amendment contract clause defines the term "covered subcontractor" as "any entity that has a subcontract valued in excess of $1 million, except a subcontract for the acquisition of commercial items, including commercially available off-the-shelf items." DFARS 252.222-7006(a).

Thus, the certification requirement at the prime contract level necessitates that a contractor subject to the contract clause at DFARS 252.222-7006 include an appropriate "flow down" provision in any subcontract valued at greater than $1 million. Moreover, because DoD has clarified that the certification applies to compliance by "covered subcontractors" at all tiers, the contractor will need to take steps to ensure that any "covered subcontractor" flows down the same requirement to any "covered subcontractors" of its own.

Waiver Process

The Franken Amendment allows the Secretary of Defense to waive its application to a particular contractor or subcontractor under a particular contract or subcontract, if the Secretary or Deputy Secretary "personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm." Pub. L. 111-118, § 8116(d).

The final rule clarifies that any such waiver determination must set forth with specificity the grounds for the waiver, identify any alternatives considered, and explain why each of the alternatives would not avoid harm to national security interests.

Practical Considerations for Affected Contractors

As noted above, the restrictions imposed by the Franken Amendment apply to all of an affected contractor's employees, not merely those employees performing work on a covered contract.

Thus, prime contractors whose contract contains the DFARS 252.222-7006 clause must take immediate steps to ensure that their employment agreements either do not contain mandatory arbitration provisions or contain arbitration provisions tailored so as to exclude coverage of the types of sexual assault/harassment claims encompassed by the Franken Amendment.

Affected contractors likewise need to take steps to ensure that they do not enforce broad mandatory arbitration provisions in existing employment agreements to attempt to compel arbitration of claims covered by the Franken Amendment.

Affected contractors must also put in place procedures to monitor and enforce compliance by covered subcontractors, such as adopting appropriate "flow down" contract clauses to include in subcontracts, or adding certification of compliance with the Franken Amendment to the list of representations and certifications required of subcontractors. This will likely require revision of any standard terms and conditions or subcontractor representation and certifications used by prime contractors to reflect the new Franken Amendment requirements.

The Franken Amendment restrictions currently apply only to defense contracts receiving funds from FY 2010 appropriations (including contracts funded by the continuing resolution enacted on Dec. 21, 2010, to fund the government's operations through March 4, 2011, as the continuing resolution generally extended FY 2010 appropriations and authorizations — including the Franken Amendment restriction — through March 4, 2011).

The applicability of the Franken Amendment to future defense appropriations remains uncertain. In the past, some limitations on defense appropriations that were initially introduced as amendments to annual appropriations acts — for example, the so-called "Berry Amendment," which imposed strict domestic source requirements for certain defense purchases — eventually became entrenched as a matter of procurement policy through their annual inclusion as provisions in subsequent defense appropriations acts for many years after their initial adoption.

Accordingly, defense contractors should monitor whether the Franken Amendment, or a similar restriction on mandatory arbitration provisions in employment agreements, becomes a long-standing defense procurement policy or remains a provision applicable only to the FY 2010 appropriations cycle. Other government contractors should also monitor whether the Franken Amendment restriction on mandatory arbitration agreements expands to apply to nondefense procurements.

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