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Contractor Integrity

BNA Insights: Procurement Integrity—New Bill Aims to Regulate Procurement Officers and Former Contractors Involved in Acquisitions



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The *Financial Services Conflict of Interest Act* (FSCIA) (H.R. 3065, S. 1779) is expected to establish stricter rules for federal employees and their family members seeking to work in the private sector. This bill will also mean more stringent pre-employment screenings for federal contractors and their compliance officers who seek to avoid protests and potential litigation. The FSCIA also seeks to assign the responsibility of receiving employment histories of covered federal employees to the U.S. Office of Government Ethics, thus giving the U.S. government a greater visibility on

whether its former employees working in the private sector violate federal law.

In its current form, the FSCIA seeks to amend the Procurement Integrity Act (PIA), 41 U.S.C. § 2104, by prohibiting procurement officers from accepting employment from federal contractors for a number of years. It also prohibits federal employees from being substantially involved with any award of a contract to federal contractors who violate the FSCIA. As of July 29, 2015, the Subcommittee on Crime, Terrorism, Homeland Security and Investigations is reviewing this bill.

The Procurement Integrity Act. The PIA, previously codified as 41 U.S.C. § 423, was subsequently repealed and replaced by 41 U.S.C. § 2101-2107 in 2011. The Federal Acquisition Regulation (FAR) implements it in subpart 3.104 (Improper Business Practices and Personal Conflicts of Interest).

There are four general provisions/requirements under the PIA: (1) a prohibition against disclosing procurement information; (2) a prohibition against obtaining procurement information; (3) a prohibition against procurement officers engaging in employment contacts with contractors, and a duty to report such contacts; (4) and a prohibition for a certain period of time against certain federal employees accepting compensation from a contractor.

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The FSCIA attempts to build on the current laws by placing additional restrictions on certain federal employees. Sections of the PIA are already punitive in nature, and have criminal consequences, civil fines, and administrative penalties. See 41 U.S.C. § 2105. The PIA also has a prompt reporting requirement of potential PIA violations. See 41 U.S.C. § 2106.

In addition to the PIA, there are also other laws that address the same or related prohibited conduct listed in the FSCIA. 18 U.S.C. § 207 lists post-employment restrictions for federal employees; 18 U.S.C. § 208 places restrictions on government officers and employees ‘personally and substantially’ participating in particular matters affecting the financial interests of any person with whom they would seek employment; 18 U.S.C. § 208 also requires an employee’s disqualification from participating in the acquisition even if the employee did not ‘personally and substantially’ participate in the acquisition. See FAR 3.104-2 for more details.

Recent Legal Developments Relating to Procurement Integrity. The current FSCIA bill shows that Congress believes that the U.S. government needs additional tools to ensure greater procurement integrity and transparency. Some recent examples of the U.S. government enforcing the PIA and related laws include: (1) an executive convicted of providing things of value to the former director of the VA Medical Center in exchange for ‘confidential information about VA construction projects’ in 2015, (2) a former federal employee and service contractor who pleaded guilty to conspiracy for his role in accepting over \$300,000.00 in gratuities and violating the PIA in 2014, and (3) in 2013 the Gallup Organization agreeing to pay \$10.5 million to settle allegations that it violated, in part, the PIA. This information is based on the U.S. Department of Justice Office of Public Affairs releases.

Contracting Officers may also terminate contracts for cause for violating the PIA. See 41 U.S.C. § 2105. In *Appeal of Atlas International Trading Corporation*, ASBCA No 59091 (2014), the appellant appealed the contracting officer’s final decision terminating the contract for cause. The Armed Services Board of Contract Appeals dismissed the appeal because the evidence showed that the appellant paid over \$180,000.00 to a government program manager in exchange for favorable procurement decisions and non-public procurement information. The Board held that the contract was void *ab initio*. The program manager pled guilty to bribery, and procurement fraud, among others. Violations of the PIA may also amount to a cause for debarment under FAR 9.406-2, or suspension. In one case, the U.S. Air Force (AF) suspended a private company from doing business with the U.S. government after the AF inadvertently disclosed Source Selection Sensitive Information to the company. The cause of the suspension was that the company represented to the AF that the company employees exposed to the AF disclosure were not working on its technical proposal, when in fact they did.

Protestors and potential awardees also look to the PIA to raise grounds to protest contract awards, or whether the agency even conducted a potential organizational conflict of interest (OCI) analysis relating to the PIA. For the federal courts and the Government Accountability Office (GAO), the proof of the PIA violations is found in the ‘hard facts’ without which the

agency’s decisions will be presumed reasonable. Most recently, in B-409985.4; B-409985.5; B-409985.6; B-409985.7; B-409985.8, ViON Corporation; EMC Corporation (April 3, 2015), the protesters challenged, in part, the agency’s failure to ‘investigate potential organizational conflict of interest’ where the protesters alleged that the agency stored product briefs and analysis with a private company providing IT storage services, and also had ‘financial ties’ with. The GAO found that the protesters failed to identify any ‘hard facts’ showing that the private company crafted any provisions of the solicitation that could be said to be biased or otherwise impaired objectivity.

In B-405036; B-405036.2; B-405036.3; B-405036.4; B-405036.5; B-405036.6, PCCP Constructors, JV; Bechtel Infrastructure Corporation, (August 4, 2011), the protesters, in part, alleged that the agency’s investigation of the awardee’s unequal access to information OCI was unreasonable. Here, the protesters proved that the awardee hired a high-level government employee from the office responsible for the project being procured, and that the agency failed to address in its investigation what responsibility and role the government employee had in the procurement prior to his retirement, and what access the employee had to non-public, source selection information. In addition, the protesters have showed that the retired government employee ‘continued daily contact with members of the source selection team’ and had ‘access to inside information concerning the agency’s build-to-budget concept.’ The above facts were sufficient for the GAO and it sustained the protest.

In *American Safety Council v. United States*, 2015 WL 4722638 (August 10, 2015), a potential awardee challenged the solicitation, in part, because the agency failed to address a COI. The potential awardee argued that another company, ClickSafety, had an unequal access to competitively useful information because it maintained the training website for the agency. The agency conceded that it did not conduct an OCI analysis. Senior Judge Damich of the U.S. Court of Federal Claims found that the agency’s failure to consider whether there was a potential OCI was arbitrary and capricious.

New Requirements in the FSCIA Bill. The FSCIA seeks to expand the currently existing prohibitions, and assign the responsibility to receive all employment histories of selected federal employees to the Director of the U.S. Office of Government Ethics, and to refer violations for appropriate resolution.

1. FSCIA change to 41 U.S.C. § 2103. *An agency official participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold who contacts or is contacted by a person that is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official shall—*

The FSCIA seeks to expand ‘that official’ to ‘that official or for a relative (as defined in section 3110 of title 5) of that official.’ 5 U.S.C. § 3110(3) defines a ‘relative’ with respect to a public official as, an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-

in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

Currently, agency officials who are faced with the above situation have the duty to promptly report in writing, reject the possibility of non-Federal employment, or disqualify themselves. However, this new proposed expansion will also require government contractors to conduct proper pre-employment screenings to avoid situations where an extended family member is hired who is somehow related to the agency official involved in a federal contract. Since some family relationships may change over time, this may require directing employees to keep their personnel records current in the HR file.

2. FSCIA change to 41 U.S.C. § 2104. “A former official of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within one year after the official. . .”

The FSCIA seeks to change ‘consultant’ to ‘consultant, lawyer, or lobbyist.’ The FSCIA seeks to expand the time period from one year to ‘2 years’

“ . . . personally made for the Federal agency a decision to . . .”

The FSCIA seeks to change this to ‘participated personally and substantially in.’

This new requirement lengthens and expands the current prohibition. This means that the official will be prohibited from working on the contract even if he or she did not make any personal decisions on it.

3. FSCIA seeks to create a new section. The proposed new section 2108 states:

An employee of the Federal Government may not be personally and substantially involved with any award of a contract to, or the administration of a contract awarded to, a contractor that is a former employer of the employee during the 2-year period beginning on the date on which the employee leaves the employment of the contractor.

This section proposes the address the situation in which a highly experienced employee from the private industry begins to work as a Federal employee on the same contract on which he or she has worked before as a private contractor.

The FSCIA seeks to also make numerous other changes, many of which do not directly impact federal procurement law. One such major change is amending the Ethics in Government Act of 1978, 5 U.S.C. App., which directs the director of the U.S. Office of Government Ethics to receive all employment histories, recu-

sal, and waiver records and other disclosure documents for selected executive branch officials, promulgate appropriate regulations, assist designated agency ethics officers in providing advice to covered financial services regulators regarding compliance, and refer cases to the U.S. Attorney for the District of Columbia for enforcement actions. However, this insight focuses primarily on the sections relevant to the federal contractors and their employees.

Implications for Previous Federal Employees and New Government Contractors. The FSCIA shows the U.S. government’s continuing emphasis on achieving procurement integrity by seeking to regulate the non-public procurement information that federal employees may bring to the private sector. Many current, retired, and former agency officials, employees, their family members, and government contractor employees may not be aware of the PIA requirements, and the proposed new and stricter requirements under the FSCIA. Even if they are aware, they may not know how the law specifically applies to them. Here are some general suggested safe practices:

- Federal employees may consider creating an accurate and verifiable list all the procurements matters that they have been involved in. This should allow them certainty regarding which matters they have personally and substantially participated in.

- Federal employees may consider obtaining the written advice from an Ethics Counselor before retirement. Such opinions should be carefully drafted to match all the facts because they can very quickly become agency ‘swords’ instead of the employee ‘shields.’

- Government contractors may consider requiring future employees to disclose whether they or any of their family members, as defined in 5 U.S.C. § 3110(3), work for the federal government.

- Government contractors hiring recently retired federal employees, or offering employment to someone related to a federal employee should institute a proactive compliance program to properly screen for any PIA and FSCIA issues, and address them in advance. Failure to do so, may subject the new employee and the company to potential sanctions, litigation, and protests.

- Proactive compliance with the changing legal roadmap may help government contractors in securing contract awards, resolving inadvertent FSCIA issues, and successfully preventing litigation.