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Special Acquisition Authorities Contained in the House and Senate Proposals to Create a Department of Homeland Security

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Summary

H.R.5005, as passed the House, and Senate Amendment 4471, each of which propose the creation of a Department of Homeland Security, would grant special acquisition authorities generally aimed at speeding up and/or simplifying certain acquisitions during an organizational or transition period (five years in the House proposal and one year in the Senate proposal). These authorities would affect the procurement of research and development, personal services, and anti-terrorist technologies. Procurement would be streamlined through expanded use of the micro-purchase threshold, simplified acquisition procedures, and an amended definition of “commercial item.” The House bill would only grant these authorities to the new Department, whereas the Senate proposal would grant most of them to all executive agencies.

Introduction

Both the House¹ and Senate² bills under consideration to create the Department of Homeland Security (DHS) would grant special acquisition authorities generally aimed at speeding up and/or simplifying certain acquisitions during an organizational or transition period. These authorities would affect the procurement of research and development, personal services, and anti-terrorist technologies. Procurement would be streamlined through expanded use of the micro-purchase threshold, simplified acquisition procedures, and an amended definition of “commercial item.” The House bill generally grants these authorities to the new DHS for a period of five years. The Senate bill generally grants these authorities to all executive agencies for a period of one year.

¹ H.R. 5005 as passed the House on July 26, 2002 (hereinafter referred to as the House bill).

² Senate Amendment 4471, 148 Cong. Rec. S8100 (September 3, 2002) (hereinafter referred to as the Senate bill).

“Other Transaction” Authority for Research and Development

The House³ and Senate⁴ bills would grant the Secretary of DHS authority similar to that enjoyed by the Secretary of Defense under 10 U.S.C. § 2371 to enter into “other transactions.” The transactions would be required to be for the purpose of carrying out certain basic, applied, and advanced research and development projects for response to existing or emerging terrorist threats. Such authority would expire after five years and would not be subject to two Defense Department specific administrative provisions.⁵

An “other transaction” is by definition not a contract, cooperative agreement, or grant.⁶ Therefore, such a transaction is not limited by the statutory, regulatory or other requirements imposed on these more traditional forms of agreement.⁷ Removal of these requirements would give DHS greater flexibility in acquiring R&D in this area.

Procurement of Temporary and Intermittent Services

Both bills⁸ authorize the procurement of temporary (not to exceed one year) or intermittent personal services including experts or consultants in accordance with 5 U.S.C. § 3109. The pay cap of § 3109 may be exceeded whenever necessary due to “urgent homeland security need.” Explicit authorization is required to utilize § 3109 and to exceed its salary limits,⁹ thus the need for these provisions.

Special Streamlined Acquisition Authority or Emergency Procurement Flexibility

The House and Senate bills contain special authorities in the areas of micro purchases, simplified acquisition procedures, and designation of commercial items. The House¹⁰ bill would grant to the Secretary of DHS (for a five-year period) certain special streamlined acquisition authority for procurements whenever a determination has been made that the mission of the Department would be seriously impaired without the use of the authority. The Senate bill would grant to all executive agencies¹¹ special emergency procurement flexibility authorities in these areas. The authorities would be limited to procurements determined to facilitate defense against or recovery from terrorism or

³ § 731.

⁴ § 135.

⁵ 10 U.S.C. § 2371(b) requires “other transaction” authority be exercised through the Defense Advance Research Projects Agency and subsection (f) established and requires utilization of certain special accounts in Treasury for funding such transactions.

⁶ 10 U.S.C. § 2371(a).

⁷ See Richard N. Kuyath, The Untapped Potential of the Department of Defense’s “Other Transaction” Authority, 24 *Public Contract Law Journal* 521 (Summer 1995).

⁸ House bill § 732 and Senate bill § 195.

⁹ 5 U.S.C. § 3109(b).

¹⁰ § 733.

¹¹ § 501.

nuclear, biological, chemical or radiological attack. Solicitation for a qualified procurement must be issued within one year of enactment of the provision.¹²

Micro-Purchase Threshold. The current micro-purchase threshold is \$2,500.¹³ If the aggregate amount of a procurement is under the threshold it may be from any source using any simplified procedure.¹⁴ Most procurement restrictions, such as competition, Small Business set asides or the Buy American Act, are not applied to micro-purchases.¹⁵

The House¹⁶ bill would increase the micro-purchase threshold for qualifying purchases by DHS to \$5,000 and allow the designation of up to 7 employees to make such purchases. The Senate¹⁷ bill would raise the micro-purchase threshold for qualifying purchases by all executive agencies to \$10,000.

Simplified Acquisition Procedures. Simplified acquisition procedures are utilized for procurements of aggregate value of more than the micro-purchase threshold and less than the simplified acquisition threshold (\$2,500 and \$100,000).¹⁸ These simplified procedures are intended to reduce administrative costs, improve opportunities for small business, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors.¹⁹

The House²⁰ bill would increase the simplified acquisition threshold for qualifying purchases by DHS to \$175,000. The Senate²¹ bill would raise the simplified acquisition threshold for qualified contracts (which are carried out in support of a humanitarian or peacekeeping operation or a contingency operation) by all executive agencies to \$250,000 for contracts carried out in the United States and \$500,000 for contracts carried out outside the United States.

Commercial Item Designation. If a good or service is a “commercial item” then special rules and streamlined purchasing procedures are utilized. These procedures may be used for purchases of up to \$5,000,000.²² “Commercial item” means: (1) any item, other than real property, that is of a type customarily used for non-governmental purposes and that has been sold, leased, or licensed to the general public; or has been offered for sale, lease, or license to the general public; (2) any item that evolved from an item

¹² § 502.

¹³ 41 U.S.C. § 428 and FAR § 2.101.

¹⁴ *See*, FAR § 13.3.

¹⁵ 41 U.S.C. § 428(b).

¹⁶ § 733(b).

¹⁷ § 504.

¹⁸ 41 U.S.C. § 403 and FAR § 13.

¹⁹ FAR § 13.003.

²⁰ § 733(b).

²¹ § 503.

²² 41 U.S.C. § 427 and FAR § 12.00.

described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation; (3) any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for modifications of a type customarily available in the commercial marketplace; or minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements; (4) any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public; (5) installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (1), (2), (3), or (4) of this definition, and if the source of such services offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public; (6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions; (7) any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or (8) A non-developmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.²³

The House bill authorizes the Secretary of DHS to deem as a “commercial item” purchase any procurement for which a determination has been made that the mission of the Department would be seriously impaired without the use of the authority. For these deemed commercial items the threshold would be raised to \$7,500,000.²⁴

The Senate bill authorizes the head of any executive agency to apply the “commercial items laws” for procurements determined to facilitate defense against or recovery from terrorism or nuclear, biological, chemical or radiological attack. For these procurements, the \$5,000,000 threshold would not be applied.

²³ FAR § 2.101.

²⁴ § 733(c).