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Insourcing Provisions Land on the Cutting Room Floor

By Robert Brodsky December 22, 2010

The scaled-down Defense authorization bill that cleared the House and Senate on Wednesday failed to include a pair of controversial provisions, opposed by industry contractors, that would have significantly expanded the government's ability to insource private sector functions.

The measure no longer includes language proposed by Rep. John Sarbanes, D-Md., that would have reserved work identified as "closely associated with inherently governmental" to federal employees. Government workers already are required to perform work deemed inherently governmental.

Current law requires agencies to provide "special management attention to functions that are closely associated with inherently governmental functions." These are generally jobs, such as assisting in contract management or evaluating another contractor's performance, that are not statutorily prohibited from outsourcing but require strict oversight and management.

The Sarbanes amendment, however, would have required agencies to ensure that "contracts do not include to the maximum extent practicable functions that are closely associated with inherently governmental functions."

Lawmakers included similar insourcing language in the fiscal 2011 omnibus bill that Senate leaders pulled from the floor last week. Rather, lawmakers passed a continuing resolution, funding the government through March 4.

The now-defunct omnibus also included language requiring agencies, before announcing a public-private job competition, to submit a report to the Office of Management and Budget. The report would have detailed the actions taken to convert contractor jobs to federal employees for functions deemed inherently governmental, closely associated with governmental functions, or critical to an agency's mission.

Industry officials strongly opposed all insourcing provisions, arguing they would accelerate private sector job losses, reduce state and local tax revenues, and substantially increase costs to taxpayers.

"Private sector companies working on federal government solutions not only employ hundreds of thousands of constituents in every state, but also allow agencies to harness the latest innovations, tap vital market expertise, and provide government with the flexibility to rapidly address emerging mission requirements without assuming the long-term costs associated with hiring a permanent workforce," Stan Soloway, president of the Professional Services Council, wrote in a Dec. 9 letter to Senate lawmakers.

The scuttled changes also would have run counter to a March proposed policy letter from the Office of Federal Procurement Policy that stated not all work considered "closely associated with inherently governmental" must be performed by government employees.

Industry officials won other significant legislative victories.

The Defense authorization bill, for example, was stripped of an amendment that would have excluded health care and retirement costs from any insourcing cost comparisons when contractors contribute less than Pentagon employees for civilian employees' benefits.

That legislation also included language prohibiting the establishment of arbitrary insourcing goals or targets and requiring Defense and the Government Accountability Office to examine the government-wide insourcing initiative.

Other acquisition-related provisions in the Defense bill that did survive focused on supply-chain security, cybersecurity, technical data rights, contractor business systems, broadening the industrial base and oversight of private security contractors.

Both the House and Senate versions include language requiring Defense to use a January Directive Type Memorandum -- essentially a Pentagon policy memo -- as its baseline for cost comparisons between the public and private sectors. Industry groups argue the memorandum unfairly excludes most post-retirement costs associated with the federal workforce.
