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DOING BUSINESS IN HOMELAND SECURITY: REWARD & RISK

The new Department of Homeland Security (DHS) was stood up on January 24, 2003. The creation of DHS under the Homeland Security Act of 2002¹ is said to be the most significant transformation of government since the Department of Defense was formed in 1947. The Homeland Security Act consolidates a number of existing governmental functions and entities into a new cabinet-level department. By March 1, 2003, most of those existing governmental functions and entities will be transferred to, and become part of, DHS.

The mission of DHS is to protect the nation against further terrorist attacks. Component agencies are to analyze threats and intelligence, guard the nation's borders and airports, protect critical infrastructure, and coordinate the response of the nation in future emergencies. Besides protecting the homeland, DHS is to provide other essential services such as immigration control and natural disaster assistance.

The Homeland Security Act created expanded procurement authorities in meeting homeland security needs. Some of these authorities apply to all federal agencies. Companies will have new opportunities to do business with the federal government. Some new protections are provided, yet significant risks remain. The following is a description

of DHS, the new procurement authorities, and some of the protections and risks in doing homeland security business.

I. Homeland Security Business Opportunities

When fully organized, DHS will encompass 22 different existing federal entities, house 170,000 government employees, and become the third largest federal agency after the Departments of Defense and Veterans Affairs. The recently released federal budget for fiscal year 2004 requests \$36.2 billion for DHS. This amount represents a 7.4% increase over funding for fiscal year 2003, and a 64% increase over what the various components spent in fiscal year 2002. Another \$5.1 billion is being sought for homeland security, government-wide.

The 22 existing agencies will become part of one of four major DHS directorates: Border and Transportation Security, Emergency Preparedness and Response, Science and Technology, and Information Analysis and Infrastructure. Several other critical agencies are also being folded into, or created within, the new department, including the Coast Guard, the Secret Service, and a Bureau of Citizenship and Immigration Services.

Clearly, there will be opportunities for companies to pursue more business with existing customers, and for companies to seek first-time business with new customers.

¹ Public Law 107-100, November 25, 2002.

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II. Homeland Security Procurement Procedures

The new DHS will have procurement authority for all of its component agencies and will be operating for the most part like any other civilian agency under the Federal Acquisition Regulation (FAR), but will have expanded authorities in many ways mirroring those of the Department of Defense. One significant exception allows DHS to dispense with normal FAR procedures and use “other transaction” agreements, under Department of Defense authorities, for research and development for which DHS determines the use of a contract, grant, or cooperative agreement is not feasible or appropriate and to carry out prototype projects.²

The Homeland Security Act also gives DHS other “Special Streamlined Acquisition Authority.”³ This authority may be used until September 30, 2007, and includes: (1) making procurements without competition, up to \$7,500, under an increased Micro-Purchase Threshold;⁴ (2) the use of simplified acquisition procedures for contracts up to \$200,000 for domestic purchases and up to \$300,000 for purchases outside of the United States, under an increased Simplified Acquisition Threshold;⁵ and (3) a special application of the Commercial Item authority.⁶ Under this last authority, DHS may deem *any item or service* to be a commercial item for the purposes of federal procurement laws and use streamlined procedures for these purchases, up to \$7.5 million.

Further, the Homeland Security Act provides “Emergency Procurement Flexibility” authority to *all federal agencies* for any procurement of property or services used to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack.⁷ This authority may be used for any solicitation issued before November 25, 2003, and includes: (1) making procurements without competition, up to \$7,500, under an increased Micro-Purchase Threshold;⁸ (2) for procurements in support of humanitarian, peacekeeping, or contingency operations, an increase in the Simplified Acquisition Threshold of \$200,000 for domestic purchases and \$300,000 for purchases outside of the United States;⁹ (3) applying only the limited set of laws applicable to procurements of commercial items, without regard to whether the property or services are commercial items, and simplified acquisition procedures, without any dollar limitation;¹⁰ (4) using streamlined competition and task and delivery order procedures;¹¹ and (5) waiving the dollar limits on Section 8(a) and HUBZone sole source procurements.¹² These procedures were implemented in the FAR on January 27, 2003.¹³

III. Homeland Security Protections

The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (“Safety Act”),¹⁴ contained within the Homeland Security Act, limits the tort liability of sellers of anti-terrorism technologies that qualify for protection un-

² Id. at § 831. See also 10 U.S.C. § 2371 and Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 100–360).

³ Id. at § 831.

⁴ The rules for micro purchases are contained in the FAR at 48 C.F.R., Subpart 13.2.

⁵ The simplified acquisition procedures are contained in the FAR at 48 C.F.R., Part 13. Certain laws and terms and conditions are not applicable to contracts at or below the simplified acquisition threshold.

⁶ The rules for acquisition of commercial items are contained in the FAR at 48 C.F.R., Part 12.

⁷ Pub. L. 107–100 at § 852.

⁸ Id. at § 854.

⁹ Id. at § 853. This section of the Act also, correspondingly, increases the small business reservation rules for these procurements.

¹⁰ Id.

¹¹ Id. at § 856.

¹² Id.

¹³ 68 Fed. Reg. 4048–4051.

¹⁴ Pub. L. 107–100 at § 861.

der a system of risk management set forth in the Act. Qualified anti-terrorism technology is defined as any product, equipment, service (including support services), device or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism, that is designated by DHS.¹⁵ Qualified technologies are to be designated by DHS under criteria that suggest that the technology would be effective in facilitating the defense against acts of terrorism, including technologies that prevent, defeat, or respond to such acts. Other criteria include prior U.S. government use or demonstrated utility and effectiveness, the existence of extraordinarily large or unquantifiable potential third party liability, and the likelihood that the technology would not be deployed unless protection under the Safety Act is extended.¹⁶

The risk management provisions of the Safety Act include a federal cause of action that may be brought only in federal district court for claims for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been employed in defense against or response or recovery from such acts. Neither prejudgment interest nor punitive or other damages not intended to compensate a victim for actual losses may be awarded. Non-economic damages (such as physical and emotional pain, mental anguish, and other non-monetary losses) may only be recovered if the victim suffered physical harm, and only in an amount proportional to the percentage of responsibility of a defendant for the harm. Any recovery must be reduced by collateral source compensation.¹⁷

The Safety Act also creates a rebuttable presumption that the “government contractor defense”¹⁸ applies in any lawsuit arising out of, relating to, or resulting from an act of terrorism, when qualified anti-terrorism technologies ap-

proved by DHS have been deployed. The presumption applies regardless of whether a claim arises out of the sale of a product to the federal government or to a non-federal customer. For purposes of establishing the defense, DHS must have reviewed and approved the technology. To be approved, DHS must determine that the technology will perform as intended, conform to the seller’s specifications, and be safe for use as intended. Sellers of approved technologies will be issued a certificate of conformance, and the technology will be placed on an Approved Product List for Homeland Security.¹⁹

Further, the Safety Act limits the liability of a seller of a qualified anti-terrorism technology to the limits of liability of insurance coverage required to be maintained by the seller under the Act. Sellers must maintain liability insurance of such types and amounts required by DHS, but the seller is not required to obtain more than the maximum amount of liability insurance reasonably available on the world market. The liability insurance must also protect contractors, subcontractors, suppliers, vendors and customers of the seller, as well as contractors and suppliers of the customer; and the seller must enter into reciprocal waivers of claims with its contractors, subcontractors, suppliers, vendors and customers, and with contractors and subcontractors of the customer.²⁰

IV. Homeland Security Risks

The Safety Act limits the liability of companies when selling designated, qualified anti-terrorism technologies in defense of, response to, or recovery from terrorist acts. The Act, however, does not contain additional authority for the government to indemnify contractors for the research, development, or production of such technologies, and it remains to be seen how the protections of the law will be implemented and how extensive they will ultimately be.

¹⁵ Id. at § 865(1).

¹⁶ Id. at § 862.

¹⁷ Id. at § 863(a), (b), and (c).

¹⁸ The government contractor defense is not defined in the statute. Under traditional notions of the government contractor defense, a manufacturer of equipment is cloaked with the immunity of the government and will not be liable for injuries resulting from design defects in equipment complying with government approved specifications, provided the contractor warned the government of any known dangers in the equipment. See *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

¹⁹ Pub. L. 107–100 at § 863(d).

²⁰ Id. at § 864.

There are other risks for companies seeking to do homeland security business. Most homeland security business will be either directly with government agencies such as DHS or the Department of Defense, or under contracts with others who deal directly with the government. Doing business under government contracts brings into play requirements that can translate to problems for the unwary. Even companies that supply to government contractors can be subject to strict employment, workplace, cost and pricing, Buy American, and export control restrictions. Companies not experienced with government contract requirements may be more prone to make mistakes, and mistakes can make companies vulnerable to fraud claims. Claims of contract violations and wrongdoing can also subject companies and their officers and directors to suspension and debarment from all federal programs. The key is being alert to the complexities of government contracting and to being proactive in ensuring compliance.²¹

V. Conclusions

Homeland security can bring opportunities for new business. All indications are that funding for homeland de-

fense will continue to increase. New procurement rules make it easier for companies to engage in that business on a commercial basis. There are protections against liability to third parties for the sale and use of homeland security technologies, but some risks remain. Companies not accustomed to doing business under government contract requirements need to be wary and attentive to compliance.

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²¹ See "Hidden Dangers Await Unwary Government Contractors," Corporate Legal Times, Vol. 13, No. 134, January 2003.

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