

Contracting oversight: One of the most bipartisan, partisan issues in Washington

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With the 2018 midterm elections quickly approaching and the prospect of a Democratic wave appearing increasingly probable, some have begun to consider how the balance of power in Congress will determine the focus of congressional investigations at this critical moment in American history.¹

While a shift to Democratic control in the House of Representatives and/or the Senate will unquestionably result in intense oversight of the Trump administration, the retention of Republican control in Congress could mean just the opposite.

And while we do not yet know which party will control the Congress and how it will exercise the body's investigative authority in the coming years, recent history has shown that there are at least two safe assumptions. First, those who do business and contract with the government will remain a perennial target of congressional investigations. And second, if a Democratic wave hits, contractors should be prepared for an oversight storm surge.

Those who do business and contract with the government will remain a perennial target of congressional investigations.

These fundamental realities can be observed in congressional investigations spanning decades, but more recent history is quite instructive in looking ahead to the 116th Congress.

Key inquiries related to government contractors during the Bush and Obama administrations, as well as more recent trends that emerged during the Trump administration, have firmly established contracting oversight as an investigative mainstay of congressional committees — even in today's volatile political environment.

Indeed, contracting oversight is often one area where Republicans and Democrats can agree — even if they clash on the specific sectors and issues warranting scrutiny.

This expert analysis reviews the recent trajectory of congressional oversight related to government contracting and provides some commonsense rules of the road to mitigate the unique risks that may result from such scrutiny.

As recent investigations in this area demonstrate, shifts in congressional control can often spark more intense scrutiny of government contracts related to hot-button political or policy issues.

In fact, when different political parties control the executive and legislative branches of government, it is a virtual certainty that Congress — irrespective of which party is in control — will use oversight of government contracts as a proxy to attack the politics and policies of an incumbent White House.

Aside from the undesirable reputational risk that such inquiries can create, political disputes between the branches of government may leave contractors in a highly precarious legal position. Conceivably, contractors could be caught in an inter-branch altercation but unable to directly assert any of the rights or privileges that either branch of government might traditionally rely on.

Now, as Democrats hope to regain control of one or both chambers of Congress and seek to counter the policies of the Trump administration, a new range of issues has emerged for potential scrutiny, including those regarding government contracts related to immigration; emergency management response and preparedness; government big data storage, analytics and potential privacy implications; contracts related to the provision of government-funded health care services; and other areas.

These issues join a host of areas already under examination by congressional Republicans, who continue to scrutinize current and past government contracts closely associated with the Obama administration.

As these competing oversight agendas play out in the coming months and years, it is clear that government contracting will remain a considerable focus of Congress' investigative committees, regardless of which party holds the gavels on Capitol Hill.

THE PERFECT CONDITIONS FOR OVERSIGHT

An outgrowth of Congress' legislative function, congressional investigations can take many forms and examine nearly limitless subject matter.²

Yet, despite Congress' expansive power to investigate all manner of issues, contracting oversight has been a core component of its investigative activities in the modern era.³

There are several practical reasons for this, which contractors should keep in mind when contending with a congressional investigation.

First and foremost, congressional oversight of government contracting provides a valuable check on the federal government's operations.

As a co-equal branch of government, Congress has historically utilized its investigative powers to conduct oversight of the executive branch. It logically follows that executive branch functions that have been outsourced to private contractors are equally susceptible to scrutiny by the legislative branch.

However, although an investigation of a private contractor may proceed in a manner similar to oversight of an executive branch agency or office, contractors must remain mindful that these types of investigations carry various distinct legal risks specifically for private entities.

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For example, information demanded by a congressional committee is not subject to any explicit restrictions on subsequent disclosure by Congress. This means that proprietary business information that may be generally protected under the terms of a contract with an executive branch agency could be susceptible to disclosure once provided to a congressional committee.

What's more, such information may be — and often is — utilized in parallel legal proceedings, ranging from state and federal criminal investigations to civil litigation.

Second, oversight of government contractors — especially in cases of alleged waste, fraud and abuse — is simply good politics.

Although Congress' oversight authority is tied to its legislative power, the modern congressional investigation has a distinctive political character.

The scope and substance of a congressional inquiry can vary dramatically depending on many factors, but the influence of underlying political and media considerations remains a constant. In this sense, it can be a highly effective narrative for a congressional committee to allege that a particular contract is a waste or misuse of taxpayer dollars.

In light of these unique political considerations, the same legal strategies that a private contractor may employ in a bid protest or contract dispute could be untenable when responding to Congress.

Contractors should consider navigating the process with experienced counsel accustomed to dealing with congressional and other politically sensitive investigations.

Third, and perhaps less apparent, oversight of government contracting can be far easier for congressional committees to execute than other types of investigations.

In fact, in many cases, such inquiries can be triggered by investigative reporting in the news media or the findings of executive branch watchdogs, such as inspectors general.

With this in mind, the initial playbook for a congressional investigation can be largely written even before a committee sends its first information request or subpoena.

In investigating a government contract, congressional committees may also be able to leverage multiple sources for information, with the ability to seek documents and underlying facts from a government agency, the agency's prime contractor, subcontractors and others.

Needless to say, these realities enhance the legal risk and political complexity facing contractors.

MAKING WAVES: THE IMPACT OF MAJOR ELECTORAL SHIFTS

As contractors seek to mitigate the reputational and legal impacts of congressional scrutiny, they should consider how current and future political conditions can drive these inquiries.

Particularly following the last two "wave" midterm elections in 2006 and 2010, major changes in the composition and control of Congress have brought about a heightened focus on contracting issues in key congressional committees.

Importantly, in these recent periods the party assuming power in Congress has used oversight of government contracts as a proxy issue to attack the politics and policies of an incumbent White House.

This strategy was on display in 2007, when Democrats gained control of both the House and Senate following the 2006 midterms and dedicated extensive investigative resources to scrutinizing defense contracts supporting the U.S. wars in Iraq and Afghanistan.

Rep. Henry Waxman, D-Calif., who had, for several years prior, distinguished himself as a vocal critic of the Iraq War and the defense contracts supporting it, assumed the chairmanship of the House Oversight Committee and launched extensive investigations of U.S. defense contracting in the Middle East.

Waxman's inquiries were as expansive as they were politically salient, directly and indirectly critiquing the foreign policy and defense spending of the Bush administration in the run-up to the 2008 presidential election.

In fact, even after the Obama administration assumed office in 2009, Democratic leadership on key congressional committees continued to focus acutely on contracting issues.

In the Senate, Claire McCaskill, D-Mo., and James Webb, D-Va., pushed for further investigations and major reforms

in government contracting, including legislation to create a bipartisan Commission on Wartime Contracting.⁴

The strategic use of contracting oversight has been equally as effective when deployed by Republican majorities in Congress.

After the GOP regained control of the House of Representatives in 2011, Republican-chaired committees launched inquiries regarding government contracts in the insurance industry. Many of these investigations focused on contractors associated with the implementation of the Affordable Care Act, commonly referred to as Obamacare.⁵

Other aggressive congressional investigations focused on additional private-sector interests doing business with the federal government, including the recipients of federal loans to support alternative energy technologies.⁶

Politically, each of these inquiries was strategically targeted to confront a major legislative accomplishment of the Obama administration, but involved extensive document and testimonial demands on private companies engaged in implementing or otherwise impacted by the policies.

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Given the political success of these oversight strategies and the prospect of an upcoming shift to Democratic control in at least one chamber of Congress following the 2018 midterms, contractors can reasonably expect another period of aggressive oversight in the coming years — particularly in areas closely aligned with Trump administration policies or messaging.

For example, as many Democrats in Congress have been outspoken in their opposition to the Trump administration's immigration policies,⁷ it is highly likely that a Democratic majority in the House would take steps to scrutinize government contracts related to immigration enforcement.

Other hot-button policy issues involving extensive government contracts, such as federal emergency management and disaster preparedness, are equally susceptible to scrutiny.

In sectors implicating civil liberties, such as law enforcement and defense technology, congressional Democrats have also signaled interest in potential inquiries concerning tools like facial recognition software, which could ensnare current and future government contractors.

This type of targeted scrutiny could place contractors in a worst-case scenario — one in which they are forced to navigate the competing demands and objectives of a customer (the

contracting executive branch agency) and a congressional committee's subpoena.

Such was the predicament AT&T famously confronted in the late 1970s when it received a congressional subpoena for information relating to federal wiretaps, and the Justice Department intervened to block the company's cooperation with Congress.⁸

Although AT&T did not serve as a government contractor in this context, its experience is nonetheless instructive for private companies now engaged in federal contracting around sensitive or highly politicized issues most likely to provoke a confrontation between the branches.

Any contractor working in a politically sensitive area — or an area that may become sensitive down the road — should consider how it might navigate its way through such a dispute.

Although all the specific legal, legislative, political, press and other contours may not yet be known, it is always easier to formulate a plan at 3 p.m. than it is at 3 a.m.

PASSAGE THROUGH ROUGH WATERS: HOW TO PREPARE

A congressional inquiry can create considerable legal and reputational risks in any circumstances, but these proceedings can be especially impactful when a targeted entity is seeking to maintain — or perhaps even expand — its contracted services to the government.

To mitigate the risk that congressional scrutiny could jeopardize existing or future contracts, or compromise a company's other interests, government service providers are well-advised to exercise heightened diligence.

The following are several key areas that have historically been points of focus for congressional investigative committees. Especially in highly politically sensitive areas, considering these commonsense precautions may pay dividends down the road.

1. MAINTAIN ADEQUATE POLICIES AND PROCEDURES

It is prudent to have policies and procedures in place to ensure that standards of conduct for contracting personnel are clearly defined and enforced. Behavioral and performance standards for subcontractors should also be consistent with those of the prime contractor. This includes subcontractors' labor procurement/practices.

As a best practice, employee handbooks and whistleblower policies should also be reviewed to ensure compliance with applicable regulatory and legal standards.

2. ACCOUNT FOR GOVERNMENT-FURNISHED PROPERTY

When contracting engagements require the use of government-furnished property, the failure to properly account for such items may be an attractive area of focus for a subsequent congressional inquiry.

3. METICULOUSLY DOCUMENT AND PREPARE FOR COST CONTROVERSIES

It is best to establish commercial market benchmarks for likely procurement and subcontracting needs during initial planning, if possible. This is especially true when extraordinary exigencies dictate price, such as in a war zone or in the aftermath of a natural disaster.

Relatedly, meticulous documenting of price considerations can prove invaluable later in resolving reimbursement disputes and mitigating congressional scrutiny.

4. CONDUCT THOROUGH VETTING OF SUBCONTRACTORS

The actions of subcontractors are always a potential source of investigative risk, and such risks are particularly high in cases of inadequate vetting or supervision. This is true because in a congressional inquiry the acts of a subcontractor are often attributed to a prime contractor.

Throughout their engagements in Iraq, Afghanistan and other military theaters, various defense logistics contractors have faced persistent congressional scrutiny related to their use of subcontractors and their level of diligence in retaining them.

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Common issues raised in congressional oversight of these subcontracts have included security concerns, cost overruns, shoddy or negligent performance and bribery or anti-corruption allegations.

In light of these concerns, thorough diligence in subcontractor selection and meaningful oversight of subcontractors are always advisable.

5. PROTECT YOURSELF, IF POSSIBLE

While it is sometimes impossible to predict where government oversight or public interest in a government contract will emerge, it is prudent for a contractor to seek to include contractual provisions that would require its government customer to alert it to potential scrutiny.

Such steps may include, if practical and allowable under the contracting regime, negotiating a provision to receive notice

of any public records requests related to the contract, such as requests by private parties or media outlets under the Freedom of Information Act.

Because such records requests may be a precursor to potential media coverage of a contract, other public scrutiny and/or eventual congressional oversight, early visibility into these events can be important.

CONCLUSION

The midterm elections may bring many changes to the U.S. political landscape, but history demonstrates that congressional investigations of government contracting are certain to remain a constant.

With the very real prospect that a Democratic-led House would direct congressional focus on these types of inquiries, contractors are well advised to take early steps to prepare.

NOTES

¹ See, e.g., Michelle Goldberg, *The End of Impunity*, N.Y. TIMES (Aug. 27, 2018).

² Because Congress' authority to investigate arises from its legislative powers under the Constitution, courts have historically determined that Congress may investigate any matter on which it may legislate. See *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

³ Indeed, congressional investigations of government contracting have been prominent since the Franklin D. Roosevelt administration. Prior to his ascension to the White House, as a U.S. senator, Harry Truman first built his political brand around conducting comprehensive oversight of U.S. wartime contracting and defense production in the early 1940s.

⁴ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 841 (2008). During this period, McCaskill also assumed the chairmanship of a new subcommittee on the Senate Homeland Security Committee dedicated to contracting oversight and was instrumental in supporting the enactment of enhanced whistleblower protections for contracting personnel. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §§ 827-28 (2013).

⁵ See, e.g., Press Release, Sen. Comm. on Finance, GOP Oversight Leaders Demand Answers on CMS Contracts for HealthCare.gov (July 31, 2014).

⁶ See, e.g., *Solyndra and the DOE Loan Guarantee Program: Hearing Before the Subcomm. on Oversight & Invest. of the H. Comm. on Energy & Commerce*, 112th Cong. (2011); *Department of Energy Oversight: Status of Loan Programs: Hearing Before the Subcomm. on Oversight & Invest. of the H. Comm. on Energy & Commerce*, 113th Cong. (2014).

⁷ Eliza Fawcett, *Members of Congress Protest Separation of Families at the Border*, L.A. TIMES (June 13, 2018).

⁸ See *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976).

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