

Client Alert

Government Advocacy & Public Policy Practice Group

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Congressional Investigation Targets Food Service Contractors and “Wide Spread Waste”

“We’re not doing enough to ensure the government isn’t getting cheated.”

— *Senator Claire McCaskill (D-MO)*

Sen. McCaskill, Chairman of the Ad Hoc Senate Subcommittee on Contracting Oversight, announced last week that the Subcommittee intends to submit document requests to food service contractors that buy food for the federal government.

The Subcommittee, which is part of the Senate Committee on Homeland Security and Government Affairs, has oversight jurisdiction encompassing all aspects of federal contracting. Chairman McCaskill, a former prosecutor and state auditor, has been a vocal advocate for aggressive oversight of federal contracting. Under her leadership, the Subcommittee has focused on investigating waste, fraud, and abuse in federal contracting and has now targeted food service contractors for increased scrutiny.

Food service contractors need to assess their preparedness for potential congressional scrutiny, including taking steps to:

- Be proactive in high risk areas and respond to any allegations of possible misconduct
- Address and resolve significant audit findings
- Identify and address whistleblower complaints
- Maintain appropriate communication and cooperation with key agency officials
- Monitor Subcommittee developments and weigh the benefits and risks of communication with key Members of Congress and their staff

Focus of the Hearing

On October 5, 2011, Sen. McCaskill chaired a hearing entitled, “*Food Service Management Contracts: Are Contractors Overcharging the Government?*”¹ The Committee heard testimony from: Department of Agriculture (USDA) Inspector General, Phyllis K. Fong; New York State Assistant Attorney General, John F. Carroll; and University of Baltimore

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Law School Professor, Charles Tiefer, a former Commissioner on the Commission on Wartime Contracting in Iraq and Afghanistan.

In her opening statement, Chairman McCaskill focused on volume-based rebates that food service contractors get paid from food manufacturers and distributors: “The problem is that the invoice price may not include the rebates [the food service contractor] received from the manufacturer or distributor, so that the agency then pays the full amount of the invoice and the contractor pockets the difference.”ⁱⁱ

Chairman McCaskill highlighted recent government reports of fraud and other abuses on food service contracts:

- In September 2010, the Department of Justice announced a \$30 million settlement with a major contractor, based on allegations that it had overcharged the government by inflating food prices on contracts with the Defense Department and the Veterans Administration.
- The Department of Justice also has a major case pending against another company based in part on allegations that the company submitted false information, manipulated prices, and overcharged the government for food and related services under its contract to supply food to the military in Iraq.
- In June 2010, the Office of Inspector General (OIG) for the Department of Agriculture announced that it would be auditing food service management contracts. Previously, audits conducted by the OIG in 2002 and 2005 found serious problems with companies overcharging schools by withholding rebates.

The Subcommittee identified new contractor practices that are allegedly being used to avoid passing rebates on to the government. Despite law enforcement scrutiny, Chairman McCaskill said that food service contractors have simply devised new ways to characterize such rebates on invoices, where they appear, for example, as “marketing incentives” or “vendor consideration.”

What’s Next

During the hearing, Chairman McCaskill asked the witnesses for recommendations on next steps, both in terms of investigative efforts and legislative fixes. Inspector General Fong stated the OIG would like to see increased suspension and debarment of culpable food service contractors. Professor Tiefer suggested stronger rebate and audit provisions in contracts, greater transparency for invoices, and a Subcommittee survey of contractors, both suppliers and vendors, to better understand rebate practices. Chairman McCaskill said new legislation with such measures may be necessary and announced that the Subcommittee intends to submit document requests to federal agencies and companies with food service management contracts “to get an accounting of the retention of rebates by the contractors and an understanding of the policies that are in place at the agencies that contract for food service management.”

In closing the hearing, Chairman McCaskill reiterated her commitment to rooting out waste, fraud and abuse in federal food service management contracts, stating that the Subcommittee is “going to keep going down this road because I think there’s real money here ... and clean this area up once and for all.”

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Recommendations

In this environment of heightened scrutiny, food service contractors should anticipate inquiries from Congress, regulators, and the media. King & Spalding's considerable experience in congressional investigations and crisis management can reduce the adverse impact that this kind of investigation can have on a business.

King & Spalding has one of Washington's most active and respected congressional investigations practices. For the fourth consecutive year, King & Spalding's government relations practice was recognized in 2011 by *Chambers USA: America's Leading Lawyers for Business*. According to *Chambers*, "Congressional investigations and lobbying are two of the strongest components of this practice."

Our team of lawyers understands the congressional investigative process because they have been on both sides of the table: we have conducted high-profile congressional and government investigations and we have also provided effective representation to clients who are the targets of such investigations:

- Ted Hester leads the firm's congressional investigations practice and, according to *Chambers USA*, "is renowned for his work on congressional committee hearings and oversight investigations."
- Robert Ehrlich served while a Member of Congress on two of the key House oversight committees, the Energy and Commerce Committee and the Government Reform and Oversight Committee, in addition to his service as Governor, state legislator, and civil litigator.
- Eleanor Hill, an experienced federal prosecutor, trial lawyer, and former Inspector General, served as Staff Director of the Senate's Permanent Subcommittee on Investigations and then as Staff Director of the Joint Congressional Inquiry on the terrorist attacks of September 11, 2001; and
- Dan Donovan served as Senior Investigative Counsel to the Chairman of the Senate Committee on Finance for four years, and managed congressional investigations and oversight hearings in the U.S. Senate for eight years.

King & Spalding helps clients effectively respond to Congressional inquiries, while minimizing the considerable legal and public relations risks that these kinds of investigations can pose for both businesses and individuals. Our team of former Congressional investigators, prosecutors, and enforcement officials allow us to provide company management and boards of directors with sound legal judgment and to manage the results of investigations both internally and in response to Congress, regulators, and prosecutors.

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

ⁱ http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=8dad37a-5094-4f83-b548-cd3755785cb7

ⁱⁱ http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&&FileStore_id=799e4cf3-9a83-43cc-b1c2-df9c4daf4c5d