



Weekly Report for April 12, 2019

GOVERNMENT CONTRACTING

The Small Business Administration (SBA) issued a notification of the availability of a white paper regarding the revision of its size standards methodology and explaining how it establishes, reviews, or revises small business size standards. The revised white paper, entitled “SBA’s Size Standards Methodology (April 2019)” (Revised Methodology) is available on the SBA’s [website](#), as well as on the [Federal rulemaking portal](#). SBA intends to apply the Revised Methodology to the ongoing second five-year comprehensive review of size standards required by the Small Business Jobs Act of 2010 (Jobs Act). On April 27, 2018, SBA published a notification seeking comments on proposed revisions to its size standards methodology. The notification discusses the comments SBA received on the proposed Revised Methodology and the SBA’s responses, followed by a description of major changes to the methodology and their impacts on size standards. The Revised Methodology is effective on April 11, 2019. [84 Fed. Reg. 70, 14587](#).

Secretary of the Department of Veterans Affairs (VA) Robert Wilkie announced an increase to the VA’s goals for contracting with Service-Disabled Veteran-Owned Small Businesses (SDVOSB) and Veteran-Owned Small Businesses (VOSB). For Fiscal Year (FY) 2019, the VA seeks to award at least 15% of its total contract dollars to SDVOSBs and at least 17% to VOSBs, representing a 5% increase in both goals, a significant change not noted since 2010. The law directs the VA to consider SDVOSBs first and VOSBs second, before considering other small business program preferences. Other federal agencies are covered by an SDVOSB program administered by the Small Business Administration, with a goal of only 3% for SDVOSBs. At these agencies, the government-wide SDVOSB program has equal priority with other small business socioeconomic programs. In FY 2017, the VA awarded more than one-fourth of the dollars given to SDVOSBs by the federal government, more than all other federal civilian agencies combined. Previously, the SDVOSB and VOSB goals were 10% and 12% established by former VA Secretary Eric Shinseki in FY 2010.

The National Security Agency/Central Security Service (NSA/CSS) Office of the Inspector General (OIG) issued a report after it conducted an audit of award fee contracts. The audit revealed that (1) neither the use of award fee contracts nor the fee percentages established thereunder were properly justified; (2) the NSA/CSS’s obligations for award fee contracts have increased while the Department of Defense is moving toward objective incentive arrangements; and (3) the NSA/CSS does not evaluate the effectiveness of award fees. The OIG found that there was insufficient evidence to support the determination that the use of award fee contracts and the award fee percentages established under the contracts were appropriate. Therefore, the OIG questioned \$636 million in award fees earned over multiple years associated with 54 contracts and made three recommendations to assist NSA/CSS in

addressing the record-keeping deficiencies and data analysis requirements identified in the audit. More information on the audit can be found in an [article](#) on Government Executive.

The Department of Defense (DoD) Inspector General (IG) [evaluated](#) whether the actions taken by Defense Contract Management Agency (DCMA) contracting officers on DoD contractor executive compensation questioned by Defense Contract Audit Agency (DCAA) complied with the Federal Acquisition Regulation (FAR), DoD Instructions, and agency policy. DCAA audits DoD contractor compensation and other costs claimed on Government contracts to determine if the costs comply with the FAR and any other applicable criteria. To determine if the compensation that DoD contractors claim for its executives is reasonable, DCAA compares the DoD contractor's claimed compensation to the average for comparable jobs published in private compensation surveys. For 18 of 35 audit reports selected for evaluation, the IG found that DCMA contracting officers failed to comply with the FAR and DoD Instruction requirements to document adequate rationale when they do not sustain DCAA's recommendations. As a result of not sustaining the DCAA recommendations, the contracting officers reimbursed DoD contractors \$22.5 million in executive compensation that DCAA reported as unreasonable. More information on the report can be found [here](#).

According to Bloomberg Law, [contract spending](#) obligations in fiscal 2020 are expected to range from \$583 billion to \$630 billion, according to an estimate based on data from Bloomberg Government's Market Forecast Dashboard. That is a significant increase from the \$560 billion that was reported in Fiscal Year 2018. The forecast range represents the spending growth of four to 12 percent through September 2020. Growth through the end of Fiscal Year 2019, ending in about six months on September 30, is currently estimated to increase by one to six percent from 2018 levels. Bloomberg Government's 2020 forecast shows that some of the biggest increases will be in the markets for aircraft (\$41 billion), IT outsourcing (\$39 billion), and management and advisory services (\$37 billion).

LABOR AND EMPLOYMENT

The Department of Labor (DOL) Wage and Hour Division issued a notice of proposed rulemaking and request for comments on a proposed rule intended to update and clarify the DOL's interpretation of joint employer status under the Fair Labor Standards Act (FLSA or Act), which has not been significantly revised in over 60 years. The proposed changes are designed to promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy. The DOL proposes that if an employee has an employer who suffers, permits, or otherwise employs the employee to work and another person simultaneously benefits from that work, the other person is the employee's joint employer under the Act for those hours worked only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. To make that determination simpler and more consistent, the Department proposes to adopt a four-factor balancing test derived (with one modification) from *Bonnette v. California Health & Welfare Agency*. A plurality of circuit courts use or incorporate *Bonnette*'s factors in their joint-employer test. The DOL's proposed test would assess whether the potential joint employer:

- Hires or fires the employee;
- Supervises and controls the employee's work schedule or conditions of employment;
- Determines the employee's rate and method of payment; and

- Maintains the employee's employment records.

Comments to the proposed rule are due June 10, 2019. [84 Fed. Reg. 68, 14043.](#)

According to Bloomberg Government, the DOL proposed to conduct construction-industry-focused compliance checks. The DOL's Office of Federal Contract Compliance Programs regularly selects government contractors for random audits to enforce equal employment opportunity laws, but compliance checks are not full-blown audits, which are known as compliance reviews. Per Bloomberg Government, the compliance checks would vary, depending on if the company directly holds a federal contract or is federally assisted. Companies that directly hold contracts would submit an affirmative action plan, personnel and payroll records, job advertisements, and other records for review. Federally assisted contractors that are at least partially funded by the government would not have to turn over an affirmative action plan.

According to Bloomberg Government, the National Labor Relations Board (NLRB) wants to release proposed changes to its rules for union elections sometime this spring. The NLRB announced the timing of its election rule proposals in a memo to an American Bar Association group, made public on April 4. NLRB Chairman John Ring previously announced that the board would take a piecemeal approach to amend its election rules, but he did not provide a time frame for that effort. The agency has rarely used formal notice-and-comment rulemaking to establish rules, and instead acts through decisions in individual cases. The announcement on the election proposal timing confirms that the NLRB will move forward with election rulemaking even as it works on a controversial regulation about when two business entities share liability for a group of contracted or franchised workers.

PILIEROMAZZA BLOGS

Following COFC Decision, GSA Rescinds Alliant 2 Small Business Awards

By Timothy F. Valley

On March 26, 2019, the General Services Administration ("GSA") posted a notice on FedBizOpps that it was taking corrective action in response to the recent Court of Federal Claims ("COFC") decision in the bid protest of *Citizant, Inc. v. United States*, No. 18-856C (Mar. 25, 2019). As part of that corrective action, GSA rescinded all 81 of the Alliant 2 Small Business ("A2SB") contracts it awarded in February 2018. A2SB, issued under Solicitation No. QTA0016GBA0002 in June 2016, is a government-wide acquisition contract, multiple-award, indefinite-delivery, indefinite-quantity contract for information technology services.

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