

PilieroMazza Weekly Update for Government Contractors and Commercial Businesses

December 3, 2019

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Client Alert: SBA to Enact Significant Changes to Small Business Regulations Before 2020: Everything You Need to Know, December 3, 2019, [Samuel Finnerty](#)

On November 29, 2019, the U.S. Small Business Administration (SBA) issued a [final rule](#) that will implement several provisions of the National Defense Authorization Acts (NDAA) of 2016 and 2017 and the Recovery Improvements for Small Entities After Disaster Act of 2015, as well as other clarifying amendments. As we [outlined](#) nearly a year ago when the rule was first proposed, **these changes address key small business issues for government contractors, including: subcontracting plans, the non-manufacturer rule, Information Technology Value Added Reseller procurements, limitations on subcontracting, recertification, size determinations, and the ostensible subcontractor rule.** Check out our summary of fundamental revisions, which take effect on December 30, 2019. [\[Read More\]](#)

Client Alert: Changes to SBA's HUBZone Program Are Here: Their Impact on Your Business Goals, November 26, 2019, [Jon Williams](#)

Effective December 26, 2019, SBA will implement [final rules](#) overhauling regulations for the Historically Underutilized Business Zone (HUBZone) Program. The new rules will (1) offer HUBZone firms reduced regulatory burdens, (2) help government agencies by eliminating ambiguities in the regulations, and (3) make it easier for HUBZone firms to understand and comply with Program requirements. **Check out [PilieroMazza's practical guide on how the final rules will impact the business goals of government contractors in the HUBZone Program.](#) For an in-depth look at the changes to SBA's HUBZone Program, please join PilieroMazza on December 10, 2019, for a webinar on this important topic. Visit this [link](#) to register.** [\[Read More\]](#)

LABOR & EMPLOYMENT LAW

OFCCP Issues Notice Regarding EEO-1 Component 2 Data

The Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) issued a notice regarding the collection of EEO-1 Component 2 data. DOL's OFCCP and the Equal Employment Opportunity Commission (EEOC) collect workforce data through the EEO-1 (currently OMB Control No. 3046-0007) under the Joint Reporting Committee. The EEO-1 collects information from private employers and federal contractors regarding the number of employees by job category, and by sex, race, and ethnicity (Component 1). This information is shared between the two agencies to avoid duplicative information collections and minimize the burden on employers. In May, the U.S. District Court for the District of Columbia reinstated the Office of Management and Budget's (OMB) approval of a 2016 revision to the EEO-1 that required filers to submit additional information including aggregated employee pay and hours worked, which was referred to as Component 2 data. However, the EEOC has now given notice that it does not intend to submit a request to renew Component 2 under the current OMB control number to OMB. Further, OFCCP reviewed the parameters of the EEO-1 Component 2 data collection and did not find Component 2 data necessary to

accomplish its mission to ensure federal contractors are not engaged in unlawful pay discrimination. Consequently, OFCCP will not request, accept, or use Component 2 data, as it does not expect to find significant utility in the data given limited resources and its aggregated nature, but it will continue to receive EEO-1 Component 1 data. This notice was effective immediately as of November 25, 2019. Read the published version [here](#).

Related Labor & Employment Law Presentations by PilieroMazza

WEBINAR: Key Labor & Employment Rules for Government Contractors, December 4, 2019, Speaker: [Nichole Atallah](#). [\[Read More\]](#)

WEBINAR: Resolving Onboarding Mistakes That Cause Legal Problems on Federal Contracts, December 11, 2019, Speaker: [Nichole Atallah](#). [\[Read More\]](#)

BUSINESS & CORPORATE LAW

Healthcare Company Investments and Acquisitions, November 21, 2019, [Francis Massaro](#)

In recent years, acquisitions of and investments in healthcare companies have been on the rise, particularly driven by increasing private equity investment activity. These investments can provide unique opportunities for healthcare companies to grow and for investors to realize the benefits of the expanding healthcare industry. While these acquisitions and investments often look and feel like standard acquisitions and investments, the highly regulated nature of the healthcare industry imposes additional risks and requirements on any investor in these companies. ***This blog will provide an overview of some of the potential risks and legal issues associated with investing in or acquiring a healthcare company.*** [\[Read More\]](#)

GOVERNMENT CONTRACTS LAW

JEDI Protest Saga Continues: Amazon Protests Microsoft's Award in Court of Federal Claims, November 18, 2019, [Lauren Brier](#)

On November 8, 2019, Amazon filed a bid protest pre-filing notice with the Court of Federal Claims (COFC) indicating its intent to protest the Department of Defense's (DoD) award of the Joint Enterprise Defense Infrastructure (JEDI) contract to Microsoft. Amazon's decision to move forward with a protest does not come as a surprise to most practitioners who have been following this hotly contested procurement since its inception. ***For government contractors, if you are protesting an award, make certain you do not overlook important procedural requirements that could delay initial processing of a case before the COFC.*** [\[Read More\]](#)

New GIDEP Reporting Requirements for Government Contractors

The General Services Administration, National Aeronautics and Space Administration, and DoD issued a final rule amending the Federal Acquisition Regulation (FAR) to require contractors and subcontractors to report to the Government-Industry Data Exchange Program (GIDEP) certain counterfeit or suspect counterfeit parts and certain major or critical nonconformances. GIDEP is a widely available Federal database. Timely GIDEP reporting and screening allows all contractors to promptly investigate and remove suspect parts from the supply chain and to ensure that suspect parts are not installed in equipment, which could result in high failure rates. With this knowledge, contractors can also avoid costs resulting from production stoppage, high failure rates, rework, or lost time due to maintenance turnaround to remove and replace failed parts. GIDEP also permits contractors to learn from the experiences of others in the industry. Read the published version [here](#). A small entity compliance guide for the rule is available [here](#), and a summary presentation of a final rule is available [here](#).

Bid Protest Statistics for Fiscal Years 2019 through 2007

WIFCON.com released a bid protest statistics chart for fiscal years 2007 through 2019. The statistics were compiled by the Government Accountability Office's (GAO) Office of the General Counsel, but they also contain information from a 2009 Congressional Research Service (CRS) report titled, "GAO Bid Protests: Trends, Analysis, and Options for Congress." The chart contains information about the numbers of cases filed, merit decisions made, sustain rates, alternative dispute resolution cases, and cases that had hearings, among others. WIFCON's bid protest statistics chart is available [here](#).

GAO Fiscal Year 2019 Performance and Accountability Report

GAO reported on its performance measures, results, and accountability processes for fiscal year 2019. Specifically, the report titled, "Performance and Accountability Report Fiscal Year 2019," details that GAO's Office of General Counsel handled about 2,200 bid protests and issued approximately 600 decisions on the merits. The report also lists other performance information and services that the agency provided throughout fiscal year 2019. Read the full report [here](#).

Defense Acquisition Baseline Cost

In support of efforts to improve mission effectiveness and efficiency, the Office of the Secretary of Defense asked the National Defense Research Institute (NDRI), a federally funded research and development center operated by the RAND Corporation, to construct a baseline of DoD's government acquisition and procurement functions, including a functional decomposition and estimate of the cost of executing the government portion of DoD's acquisition enterprise. In a report titled "Baselining Defense Acquisition," NDRI researchers estimated the costs of executing the government portion of the DoD's acquisition enterprise at between \$29 billion and \$38 billion in fiscal year 2017 dollars. NDRI researchers further estimated that DoD's program management portion of these costs at about 1.5 percent in the last few years, which is below industry benchmarks of 2–15 percent. While more analysis may be needed, NDRI believes that DoD's and Congress' investment in increasing the size and quality of the acquisition workforce may be showing measurable benefits and that further research must be conducted to examine the cost-benefit relationships of defense acquisitions. Read the full report [here](#).

Ongoing DoD Fraud Risk Assessment Efforts Should Include Contractor Ownership

GAO reported that DoD faces several types of financial and nonfinancial fraud risks and national security risks presented by contractors with opaque ownership. These risks, identified through GAO's review of 32 adjudicated cases, include price inflation through multiple companies owned by the same entity to falsely create the appearance of competition, contractors receiving contracts they were not eligible to receive, and a foreign manufacturer receiving sensitive information or producing faulty equipment through a U.S.-based company. DoD has taken steps that could address some risks related to contractor ownership in the procurement process, but GAO reports that DoD has not yet assessed these risks across the department. For example, DoD, in coordination with other agencies, revised the FAR in 2014 to require contractors to self-report some ownership information. DoD also has taken steps to identify and use ownership information, but GAO believes it has neither assessed risks of contractor ownership across the department nor identified risks posed by contractor ownership as a specific area for assessment. GAO reports that assessing risks arising from contractor ownership would allow DoD to take a strategic approach to identifying and managing these risks, make informed decisions on how to best use its resources, and evaluate its existing control activities to ensure they effectively respond to these risks. Read GAO's full report [here](#).

DFARS Requires COs to Consider Fixed-Price Contracts when Determining Contract Type

DoD issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the NDAA for fiscal year 2017 that requires a preference for fixed-price contracts,

review and approval for certain cost-reimbursement contract types, and the use of firm-fixed-price contract types for foreign military sales (FMS) unless an exception or waiver applies. This final rule is necessary to implement section 829 and 830 of the NDAA for fiscal year 2017. Section 829 requires contracting officers (COs) to first consider fixed-price contracts when determining contract type and to obtain approval from the head of the contracting activity for cost-reimbursement contracts in excess of \$25 million to be awarded on or after October 1, 2019. Section 830 directs DoD to prescribe regulations requiring the use of firm-fixed-price contracts for FMS. The objective of the final rule is to implement the statutory requirements in section 829 and 830 of the NDAA for fiscal year 2017 to: (1) establish a preference for the use of fixed-price contracts in the determination of contract price; and (2) accelerate the contracting and pricing process of FMS by basing price reasonableness determinations on actual cost and pricing data for purchases of the same product for DoD. Read the published version [here](#).

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CYBERSECURITY & DATA PRIVACY

Turning Compliance into a Competitive Edge: CMMC Levels 1 – 3 Update, November 26, 2019, [Anna Wright PilieroMazza](#) [previously wrote at some length](#) about the Cybersecurity Maturity Model Certification (CMMC), particularly following release of revision (rev.) 0.4 for public comment. DoD has now released [rev. 0.6](#) for public comment and review. Rev. 0.6 incorporates the public comments resulting from review of rev. 0.4 and, pursuant to those comments, has significantly streamlined the requirements present in rev. 0.4. ***DoD government contractors will need to prepare for the implementation of CMMC in order to use their compliance as a competitive edge.*** [\[Read More\]](#)

SMALL BUSINESS PROGRAMS & ADVISORY SERVICES

Opportunities Exist to Strengthen Performance Measurement, Collaboration, and Reporting on SBA Microloan Program

GAO reported that data for the SBA's Microloan Program showed that from 2014–2018, approximately 80 percent of microloans went to borrowers who identified themselves as women-owned, veteran-owned, or minority-owned businesses or low-income. In addition, most of the intermediaries (nonprofit lenders) that provide the loans participated in at least one other federal microlending activity. SBA has mechanisms in place for oversight of intermediaries and borrowers, including some established in response to recommendations of the SBA Office of Inspector General. For example, SBA developed a plan for conducting site visits of intermediaries and updated guidance for documentation requirements from certain borrowers. SBA also requires intermediaries to report various loan and borrower information into the program's data reporting system. The Microloan Program has data collection and performance measurement procedures, but GAO

identified weaknesses in these efforts. The Microloan Program collaborates informally with other SBA programs on oversight and other activities, but has little collaboration—for example, no information-sharing agreements—with other federal agencies that engage in microlending activities. As a result, the program may be missing opportunities to enhance collaboration and leverage existing resources from agencies that collect similar types of data. In addition, although SBA reports some aggregate data on the financial performance of the program, it does not include data on the populations served. Publicly reporting such data, as other agencies do, could provide greater transparency around program results and achievements. Read the full report [here](#). For a recent CRS report on the Microloan Program, please click [here](#).

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