PILIERO MAZZA

Weekly Report for June 29, 2018

DEFENSE DEPARTMENT

Federal Acquisition Regulation: Special Emergency Procurement Authority

The Department of Defense, General Service Administration, and National Aeronautics and Space Administration are proposing to amend the Federal Acquisition Regulation to implement sections of the National Defense Authorization Act for Fiscal Year 2017 to expand special emergency procurement authorities for acquisitions of supplies or services that facilitate defense against or recovery from cyber attack, provide international disaster assistance under the Foreign Assistance Act of 1961, or support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. 83 Fed. Reg. 123, 29736

Class Deviation—Defense Commercial Solutions Opening Pilot Program

According to a memorandum released by the Department of Defense, effective immediately, contracting officers may acquire innovative commercial items, technologies, or services using a competitive procedure called a commercial solutions opening by following the procedures provided in this class deviation.

Defense Federal Acquisition Regulation Supplement: Undefinitized Contract Action Definitization (DFARS Case 2015-D024)

Department of Defense is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action on allowable profit. 83 Fed. Reg. 126, 30584

Defense Federal Acquisition Regulation Supplement: Repeal of DFARS Clause "Requirements" (DFARS Case 2018-D030)

Department of Defense is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement to remove a clause that is duplicative of an existing Federal Acquisition Regulation (FAR) clause. 83 Fed. Reg. 126, 30587

Defense Federal Acquisition Regulation Supplement: Repeal of DFARS Clause "Pricing Adjustments" (DFARS Case 2018-D032)

Department of Defense is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove a clause that is duplicative of an existing Federal Acquisition Regulation clause rendering the DFARS clause unnecessary. 83 Fed. Reg. 126, 30584

Defense Federal Acquisition Regulation Supplement: Offset Costs (DFARS Case 2015-D028)

Department of Defense is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 related to costs associated with indirect offsets under foreign military sales agreements and expand on the prior interim rule guidance related to FMS offset costs. 83 Fed. Reg. 126, 30825

LABOR AND EMPLOYMENT

The Department of Labor issued the following CFR correction:

(4) * * * Circumstances may require that FMLA leave begin before the actual date of birth of a child.

The regulation change has, in effect, made it possible for pregnant mothers to add leave before "maternity leave" would be warranted. For example, a pregnant employee may be unable to report to work because of severe morning sickness. 83 Fed. Reg. 124, 30035

High Court Rules Against Unions In Battle Over Public Worker Fees

On June 27 2018, the U.S. Supreme Court, held that public-sector workers who aren't union members can't be forced to pay "agency fees" that cover the cost of collective bargaining, overturning 41-year-old precedent that found those fees constitutional and dealing a financial blow to organized labor. The justices by a 5-4 vote upheld Illinois state worker Mark Janus' bid to overturn the Supreme Court's landmark 1977 Abood v. Detroit Board of Education decision, which allowed public employers to require nonunion workers in union-represented bargaining units to pay agency fees, also known as "fair share" fees, to cover the cost of collective bargaining so long as the workers were not forced to pay for a union's political or ideological activities. For more information, please see the decision.

OFFICE OF PERSONNEL MANAGEMENT

Proposed OPM Reorganization Draws Widespread Criticism

According to an article in govexec.com, the Trump administration's proposal to shuttle the Office of Personnel Management's (OPM) service responsibilities to other agencies and bring its policy arm into the White House's management structure drew nearly unanimous condemnation since it was announced Thursday, including from a former architect of the reorganization plan. The plan would send the National Background Investigations Bureau, which is responsible for security clearance investigations across the government, to the Defense Department, accelerating a congressional effort to move security clearance checks out of OPM that began with the 2018 National Defense Authorization Act. HR Solutions, and retirement claims processing and administration of the Federal Employees Health Benefits Program would move to the General Services Administration, renamed the Government Services Agency, while OPM's policy arm would become part of the Executive Office of the President. Although Office of Management and Budget Deputy Director for Management Margaret Weichert suggested that the transition of policy offices from an independent agency to the White House could be done administratively, most experts are confident the changes would require legislation from Congress, from both legal and logistical standpoints.

GOVERNMENT CONTRACTING

Watchdog Finds Flaws in Certification Process for Women-Owned Small Businesses

According to an article on govexec.com, the Small Business Administration must improve its execution of the law requiring it to steer certain types of contracts to women-owned small businesses. A review of a major portion of sole-source federal contracts in 2016 and early 2017 awarded to self-certified women-owned companies showed that 50 out of 56--worth as much as $52 million—did not follow regulations, according to an inspector general's report released last week. "Federal agencies' contracting officers did not comply with the program requirements," the report said. "Furthermore, the firms that received those contracts did not comply with the program's self-certification requirement," the result being "no assurance that these contracts were awarded to firms that were eligible to receive sole-source awards under the program."

PILIEROMAZZA BLOGS

The FLSA Is 80 Years Old—Has It Made Us Wiser?
By Nichole Atallah

This week marks the Fair Labor Standards Act's ("FLSA") 80th birthday. Because I have a particular affection for birthdays, this occasion is a good time to send the FLSA some overdue love and reflect on how it continues to challenge us today. [More]

False Claims Act Cases Involving Set-Aside Contracts Held to More Stringent Requirements Following Escobar
By Ambika Biggs

Two years have passed since the U.S. Supreme Court issued Universal Health Services, Inc. v. United States ex rel. Escobar, a key False Claims Act ("FCA") case that resolved a circuit court split regarding the scope and validity of the implied false certification theory and established that the materiality standard for FCA cases is "demanding." Since that time, lower courts have been implementing those standards to varying effects. The trend has been favorable for companies facing FCA cases that allege false certifications related to qualifications to participate in socio-economic contracting programs. [More]