Weekly Report for December 14, 2018

GOVERNMENT CONTRACTING

A former National Aeronautics and Space Administration (NASA) Facility Chief pleaded guilty to receiving illegal gratuities. Steven Eric Kremer, a former Chief of the Range and Mission Management Office at NASA's Wallops Flight Facility (WFF) pleaded guilty to receiving gratuities in exchange for official acts performed in his capacity as a government official as well as stealing funds from a government contract. As Chief of the Range and Mission Management Office, Mr. Kremer administered the Range Operations Contract (ROC)—a multi-year government contract intended to provide services at test facilities and launch control centers. During the summers of 2008-2015, a subcontractor provided Mr. Kremer with the free use of the subcontractor's vacation home in Virginia in exchange for Mr. Kremer facilitating the selection of the subcontractor's firm to supply interior design services and office furniture for WFF. Mr. Kremer also used ROC funds to purchase gift cards for personal use and to obtain a piece of personalized art. Mr. Kremer will be sentenced in March 2019.

The U.S. Department of Veterans Affairs (VA) Office of Inspector General (OIG) Administrative Investigations Division did not substantiate allegations of improper contracting practices. The VA OIG investigated an allegation that an employee in the Veterans Health Administration, Office of Quality, Safety, and Value engineered the award of a contract valued in excess of $1 million to a company whose Chief Executive Officer was alleged to be a personal friend. The complainant alleged that an existing contracting vehicle was available to meet the requirement and should have been used to procure the services at issue and that the employee instead improperly steered the contract to the company run by the employee's friend. The OIG did not substantiate the allegations. The OIG's full report can be found here.

The U.S. Government Accountability Office (GAO) issued a legal advisory reviewing the 1974 Impoundment Control Act, which allows the president to propose to rescind funding previously approved by Congress. In the first-of-its-kind advisory, the GAO concluded that the Impoundment Control Act does not permit the withholding of funds through their date of expiration. For further discussion on the advisory and the political context within which it was issued, please see this article on Government Executive.

An enforcement agency within the U.S. Department of Labor (DOL) is offering federal contractors a five-year moratorium on compliance audits as part of workplace discrimination settlements. To cash in on the deal, federal contractors would have to turn over biannual data reports on companywide hiring and compensation data to the agency, something that immediately chills excitement, management attorneys told Bloomberg Law. The agency, at present, audits contractors based mostly on location, not by pooling companywide data. Some employer representatives are worried that agreeing to companywide exposure only increases the chances of adverse findings, instead of focusing on the issues of a single location. Employer representatives also raised concerns about ambiguities in the policy and whether it should have been introduced through a formal regulatory process.

The U.S. Department of Defense (DoD) published an announcement of public meetings to obtain views of experts and interested parties regarding revising policies and procedures for contract financing, performance incentives, and associated regulations for DoD contracts. The public meetings will be held on the following dates at the Mark Center Auditorium in Alexandria, VA, and registrations are due one week before each meeting:

- January 10, 2019, from 9:00 a.m. to 12:00 p.m., EST.;
- January 22, 2019, from 1:30 p.m. to 4:30 p.m., EST.; and
- February 19, 2019, from 1:00 p.m. to 4:00 p.m., EST.

The GAO issued a report after it was asked to review the federal government's use of noncompetitive contracts for information technology (IT). The report examined (1) the extent that agencies used noncompetitive contracts for IT, (2) the reasons for using noncompetitive contracts for selected IT procurements, (3) the extent to which IT procurements at selected agencies were bridge contracts, and (4) the extent to which IT procurements were in support of legacy systems. The GAO found, however, that the DoD, U.S. Department of Homeland Security (DHS), and U.S. Department of Health and Human Services' (HHS) contracting officials misreported competition data in the Federal Procurement Data System-Next Generation (FPDS-NG) for 22 of the 41 orders the GAO reviewed. The GAO's findings call into question competition data associated with nearly $3 billion in annual obligations for IT-related orders. DHS identified and corrected its errors, but the GAO asked the DoD and HHS to do the same. The GAO's overview and summaries can be found here.

The DoD issued a memorandum reminding contracting officers that the must comply with the documentation requirements for each phase of the negotiation process as outlined in FAR 15.406, "Documentation." The reminder was issued as a result of a recent evaluation performed by the DoD Inspector General (DoDIG) to determine whether contracting officers took appropriate actions when Defense Contract Audit Agency (DCAA) determined a price proposal was inadequate. The DoDIG reviewed 23 contractor price proposals and found that, even though the contracting officers addressed the proposal inadequacies, they did not adequately document the contractor price proposal inadequacies and the actions taken to address the same in the contract file.

CLASS DEVIATIONS

The U.S. General Services Administration's (GSA) Civil Agency Acquisition Council (CAAC) issued a letter permitting agencies to authorize class deviations to implement a section of the National Defense Authorization Act (NDAA) for 2019 to remove the best procurement approach determination requirement to use an interagency acquisition in FAR 17.502-1(a). In accordance with the CAAC letter, **the Department of Energy** issued a class deviation to remove the requirement for a best procurement approach, which was effective as of October 23, 2018

LABOR AND EMPLOYMENT

The National Labor Relations Board (NLRB) released a proposed rule that would establish a standard for determining when companies can be held liable for labor law violations committed by subcontractors. Under the proposal, a company would have to possess and exercise "substantial, direct and immediate control" over the hiring, firing, discipline, supervision and direction of another firm's employees to be considered a joint-employer. The rule further states that control can't be limited or routine, and the rule may have implications on bargaining between employers and jointly employed workers. For more, please see the article on The Hill.

This week, the NLRB also published a proposed rule extending the comment period concerning the standard for determining joint-employer status under the National Labor Relations Act. Comments are due by January 14, 2019, and replies to comments submitted are due January 21, 2019. The published version can be found here.

The NLRB also issued a strategic plan for fiscal years 2019-2022, which includes four mission-related goals: (1) achieving a collective 20% increase (5% over each of four years) in timeliness in case processing of unfair labor practice charges, (2) achieving resolution of a greater number of representation cases within 100 days of the filing of an election petition, (3) achieving organizational excellence and productivity, and (4)

managing agency resources efficiently and in a manner that instills public trust. The strategic plan also calls for an annual, agency-wide 5% reduction in case processing time for unfair labor practice charges at all levels of handling these matters, from case handling in the regional offices to the time between the issuance of an ALJ's decision and a Board Order. More information can be found on the NLRB's website.

BUSINESS AND CORPORATE LAW

Members in both the House and Senate have introduced bills that would add regulatory oversight for proxy advisors, whom institutional investors hire for recommendations on how to vote their shares in public companies. Legislative action is unlikely in the current session of Congress, which ends Jan. 3. But the bills' sponsors—Rep. Sean Duffy (R-Wis.) and Sen. Jack Reed (D-R.I.)—plan to reintroduce their legislation in the new Congress, their spokesmen said. **The SEC is reportedly considering making its own changes as part of a broader look at shareholder voting in company elections, presumably through new rules**. Further discussion of the issues, Congress's role, and the SEC action can be found in a Bloomberg Government article.

CAPITOL HILL

As of December 14, 2018, the Small Business Runway Extension Act (H.R. 6330) had not yet been signed into law by President Trump. The U.S. Constitution dictates that when Congress passes a bill and presents it to the president, the president has ten (10) days, excluding Sundays, to either sign the bill or veto it. H.R. 6330 was presented to President Trump on December 11, 2018, so he has until December 22 to sign the bill into law.

Generally, if the president does not take any action by the end of the ten-day period, the bill is automatically enacted into law without the president's signature. However, if Congress adjourns prior to the end of the ten-day period, and the president does not sign the bill by the end of the ten-day period, the bill does not become law. This is known as a "pocket veto." If this happens, the bill would have to be reintroduced in the next session of Congress, and the legislative process would have to start over again. Due to Congress's impending adjournment, it is possible that H.R. 6330 would be pocket vetoed if President Trump does not sign the bill into law by December 22.

PILIEROMAZZA BLOGS

Key Considerations for Government Contractors Facing a Government Shutdown

By Nichole D. Atallah and Jacqueline K. Unger

A government shutdown is looming once again. Congress has already passed five of the twelve FY 2019 funding bills, which fund 70% of the government through September 2019, through two vehicles. H.R. 6157 includes funding for the Departments of Defense, Labor, Health and Human Services, Education, and related agencies. H.R. 5895 provides funding for the Departments of Energy, the Interior (Bureau of Reclamation only), Veterans Affairs, and related and independent agencies, as well as the Army Corps of Engineers civil works projects, and the legislative branch. However, the remaining departments and agencies have yet to be funded for FY 2019, leading to a potential partial government shutdown as of December 21st if another Continuing Resolution or funding measures are not passed. [Read More].

Congress Passes New Receipts Calculation for Determining the Size of Small Businesses *Update*

By Emily J. Rouleau

On December 6, 2018, the Senate passed the Small Business Runway Extension Act (HR 6330), which amends the Small Business Act by changing the time period for determining a company's size based on average annual receipts. Initially, the Small Business Act required a company's compliance with the size standards to be prescribed on the basis of the company's average annual receipts from the previous three years; the Small Business Runway Extension Act extends this time to the previous five years. The House passed the bill on September 25, 2018, and on December 11, 2018, it was presented to President Trump to be signed into law. [Read More].

Important Changes Governing Limitations on Subcontracting Immediately Affecting All DoD Procurements

By Kathryn V. Flood

In a welcome step towards regulatory conformity, on December 4, 2018, the FAR Council finally issued its proposed rule to bring the FAR into compliance with the statutory requirements of § 1651 of the NDAA for FY 2013, which governs limitations on subcontracting. The proposed rule will conform the FAR's limitations on subcontracting clause, FAR 52.219-14, with how SBA performs the calculation, codified at 13 C.F.R. § 125.6. [Read More].

SBA Proposes Significant Changes to Its Small Business Regulations

By Samuel S. Finnerty

On December 4, 2018, the U.S. Small Business Administration ("SBA") issued a proposed rule ("Rule") to 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 ("RISE Act"), as well as other clarifying amendments. The Rule will likely garner a lot of attention in the coming weeks, as it proposes a number of sweeping amendments that could have a significant impact on small business government contracting. Indeed, the proposed revisions address key small business issues such as subcontracting plans, the non-manufacturer rule ("NMR"), Information Technology Value Added Reseller ("ITVAR") procurements, limitations on subcontracting ("LOS"), recertification, size determinations, and the ostensible subcontractor rule. Below, we summarize some of the more notable amendments that will impact small business procurement. [Read More].