Weekly Report for February 22, 2019

GOVERNMENT CONTRACTING

The Government Accountability Office (GAO) sustained a protest filed by Ekagra Partners, LLC challenging the terms of a request for proposal (RFP) issued by the General Services Administration (GSA). In its protest, Ekagra Partners argued the solicitation for the OASIS Small Business on-ramp, which included terms that improperly restricted competition by limiting the ways in which a small business joint venture could form teams to submit a proposal. The GAO found that the solicitation's limitation on the ability of a joint venture to submit a proposal as a contractor team arrangement that relied on the experience of subcontractors that are not members of the joint venture was unduly restrictive of competition. The GAO further concluded that Ekagra Partners was prejudiced by the RFP term because the solicitation prevented it from relying on the experience of proposed subcontractors to enhance its ability to compete for and win an award. The GAO held that if the GSA cannot justify why such a restriction is necessary, it should amend the solicitation to remove the challenged term and request revised proposals.

According to Government Executive, eight House Democrats have asked White House Budget Director and Acting Chief of Staff Mick Mulvaney to reopen some expired comment periods for agency rule-making. The letter, sent to Mr. Mulvaney on February 15, urged him to direct federal agencies to (1) immediately reschedule all canceled public hearings and meetings, (2) reopen comment periods that closed during the shutdown for at least an additional 35 days, and (3) extend the comment periods that were open during the shutdown for at least an additional 35 days. The lawmakers said that the shutdown "significantly harmed the right of the American people to meet with federal agencies and comment on proposed actions." They further argued that "[p]ublic participation is a hallmark of good governance and a core tenet of administrative law."

The Department of Defense (DoD) Office of Inspector General (OIG) summarized systemic problems with the contract administration of energy savings performance contracts (ESPCs) as reported in eight Government Accountability Office (GAO), DoD OIG, and U.S. Army Audit Agency (USAAA) reports issued since 2013. The OIG also evaluated whether the DoD, Army, Navy, Air Force, and Defense Logistics Agency officials implemented the recommendations in the eight reports. Overall, the reports found that the government did not know whether it received contractor-claimed energy savings and whether the ESPCs program was cost effective. The full DoD OIG report can be found here.

LABOR AND EMPLOYMENT

According to Bloomberg Government, the U.S. Court of Appeals for the Eight Circuit upheld a city's decision to deny an employee's telework request. The employee, Gary Brunckhorst, had a nearly fatal bout with flesh-eating bacteria, causing him to be out of work for the city of Oak Park Heights, Minnesota for nearly a year. It left him with painful leg and foot injuries that limited his mobility. When Mr. Brunckhorst was cleared to return to work, he requested a part-time schedule during his first four months back and wanted to work from home during that time. Oak Park Heights denied his request, and eventually terminated Mr. Brunckhorst's employment. The Eighth Circuit determined that Mr. Brunckhorst failed to show that he could perform the essential functions of his job while teleworking. As such, working remotely was not a reasonable accommodation for him. Bloomberg Government commented that courts have long been skeptical that working remotely can be a reasonable accommodation for a disability, but judges have grown more open to examining whether physical presence at a job is necessary in particular situations. However, according to Bloomberg Government, plaintiffs challenging a denial of telework accommodations still face a tough court battle. In a Bloomberg Law analysis of cases over the past two years, 70% of employers won on the issue of whether they could reject an employee's request to work remotely as an accommodation for a disability. But, Carolyn Wheeler, a former assistant general counsel for the Equal Employment Opportunity Commission, told Bloomberg Government that while courts used to simply state that working remotely was not reasonable, end of discussion, courts are now more likely to say that working remotely "could be reasonable, but not in this case."

According to Law360, a Virginia federal judge blocked the pending discharge of HIV-positive airmen by the Air Force, ruling that the Air Force's HIV policies were irrational and did not reflect the availability of modern HIV treatments. The airmen sued in December alongside an LGBT service-member advocacy group, OutServe-SLDN Inc., challenging the Department of Defense's HIV policies. They alleged their pending discharges were arbitrary and capricious under the Administrative Procedure Act and had violated constitutional equal protection requirements. The airmen argued that modern anti-retroviral drugs mean their HIV "viral load" is effectively undetectable and that they are fully capable of carrying out their duties. Despite their arguments that they were fit to serve, Air Force review boards and a representative for the Air Force Secretary recommended their discharge, citing the possibility of "sudden and unpredictable progression" in their conditions that would prevent them from being deployed worldwide. U.S. District Judge Leonie M. Brinkema ruled that the two airmen had shown they are likely to succeed on the merits of their claims that they faced unfair discharges due to their HIV-positive status and granted them and a class of similarly-situated airmen a preliminary injunction. As reported by Law360, Judge Brinkema said that neither airman should have been classified as non-deployable under Air Force policy as written, as they are asymptomatic, and their treatment is straightforward and without significant side effects.

According to Law360, New York City's Commission on Human Rights put employers on notice that banning or restricting hairstyles that are associated with black people is a form of racial discrimination. Alicia McCauley, the deputy press secretary for the Commission, told Law360 that the law's racial discrimination protections had always been interpreted to include hair. However, a rise in cases concerning hairstyle bias and national news stories around the issue sounded an alarm for the commission. Ms. McCauley said that the Commission issued guidance on the issue because the Commission thought it needed to clarify the law and let victims know they could seek justice through the Commission. The Commission's guidance warns employers that they could find themselves in trouble under New

York City's human rights law if they create policies prohibiting or restricting natural hair and hairstyles since those policies disparately affect black people.

PILIEROMAZZA BLOGS

The Contracting Officer Denied My Claim: Is It Time to Appeal?
By Michelle E. Litteken

The Contract Disputes Act ("CDA") was intended to provide a straightforward process for contractors to resolve disputes that occur under a government contract. In short, a contractor may initiate a dispute by submitting a claim to the contracting officer. The contracting officer then issues a final decision, and if the contractor disagrees, it may appeal to a board of contract appeals within 90 days or to the U.S. Court of Federal Claims ("COFC") within one year. Although this path seems clear, questions arise when the process is put into practice. One common question is whether the contracting officer's decision is sufficient to trigger the deadline for the contractor to appeal if the decision is lacking some of the usual formalities. The Civilian Board of Contract Appeals ("CBCA") recently issued a decision that answered that question. [Read More]