PILIERO MAZZA

Weekly Report for January 11, 2019

GOVERNMENT CONTRACTING

A Government Executive article discussed the impact of the shutdown on some defense contractors. As the partial government shutdown continues, some American defense firms are receiving multi-million-dollar IOUs instead of payments. For example, executives for Science Applications International Corporation (SAIC) and Engility, two of the government's largest service contractors, said the payroll for workers idled by the shutdown comes to $10 million every week, and, just three weeks into the freeze, they say the government is about $40 million to $50 million behind in payments. In the short term, this is not a huge deal for most affected firms, because the government will eventually make good on its debts, but there is cause for concern because Wall Street does not look favorably on companies whose cash flow falters.

According to a Bloomberg Government article, contractors with small, specialized practices could be at risk of losing employees, may have to move workers to other projects, or use downtime for training as the partial government shutdown continues. Attorney Dismas Locaria from Venable LLP told Bloomberg Law that employees will be "out of sorts" if the shutdown "drags on for weeks or months." He further said that employees will eventually exhaust their annual and sick leave and will be less inclined to be loyal to their employers. Attorney Locaria opined that contract employees with in-demand skills, such as cybersecurity specialists, would likely be the first to "jump ship." Larger contractors with diverse customer bases—particularly those who do work for state and local governments or private-sector companies as well as the federal government—may be able to keep their employees working despite the shutdown by moving them to other projects or using the time for training.

The partial government shutdown is also beginning to affect federal contracts cases litigated by the Department of Justice (DOJ). According to a Bloomberg Government article, the shutdown is being cited in motions to stay proceedings in false claims cases. Four false claims cases and two cases in the Court of Federal Claims have been stayed because of the shutdown. DOJ attorneys noted in one brief that they are prohibited from working except in emergencies involving the safety of human life or the protection of property unless an appropriation is secured. However, in an Army bid protest case, Judge Charles F. Lettow denied a motion to stay due to the shutdown and noted the hearing should proceed because the funding lapse did not impact the Army or the court at the time, just the DOJ.

The U.S. Supreme Court declined to hear two petitions that could have provided clarity as to what False Claims Act (FCA) cases must allege to advance. According to a Bloomberg Government article, the Court's decision to reject the petitions ended defendants' hopes that the Court would adopt a rule clarifying that FCA cases in which the government continued to pay a contractor despite knowledge of misconduct must fail for lack of materiality. “Materiality” concerns whether the government would have withheld payment to a contractor had it known about allegations of noncompliance, and both petitions concerned the impact of continued payments to contractors on the issue.

The Department of Defense (DoD) issued a memorandum ordering that, as of December 20, 2018, the Defense Contract Management Agency (DCMA) Commercial Item Group (CIG) contracting officers will serve as determining officials for all commercial item review requests submitted to DCMA. This will relieve buying activating procuring contract officers from duplicating effort expended reviewing CIG recommendations to determine whether an item meets the Federal Acquisition Regulation 2.101 definition of “commercial Item” and provide consistency in the commerciality review process. Determinations made by the DCMA CIG will be contained in the commercial item database available for all DoD contracting officers to rely on for future purchases of the same item or service. The full memorandum can be found here.

LABOR AND EMPLOYMENT

A Texas-based contractor, J&L Imperium Industries LLC (J&L), had to pay back wages to 10 employees after a U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) investigation found the company violated requirements of the Davis-Bacon and Related Acts (DBRA), the Contract Work Hours and Safety Standards Act (CWHSSA), and the Fair Labor Standards Act (FLSA), while operating at a worksite in Birmingham, Alabama. WHD investigators found J&L inaccurately classified several employees working as batch plant managers, truck drivers, or office administrators as exempt from the overtime requirements of the FLSA when, in actuality, none met the requirements for exemption. J&L paid all of the affected employees’ flat weekly salaries regardless of the number of hours they worked, resulting in overtime violations when they worked more than forty hours per week without overtime pay. J&L also employed workers in violation of the CWHSSA because some employees who worked on the project were not paid time-and-one-half for their overtime hours when they worked more than 40 hours in the workweek.

An Alabama roofing contractor was also found to have violated pay and benefits requirements. Maldonado Roofing LLC (Maldonado Roofing)–based in Tuscaloosa, Alabama–will pay back wages, overtime, and fringe benefits to forty-one employees after a DOL WHD investigation found the employer violated requirements of the DBRA, the CWHSSA, and the FLSA. WHD investigators found that Maldonado Roofing failed to pay one employee for overtime hours worked on a Davis-Bacon Act covered project, resulting in a violation of the CWHSSA. Maldonado Roofing also failed to pay several employees overtime when they worked more than forty hours in a workweek on a commercial project as required by the FLSA. Additionally, Maldonado Roofing failed to submit accurate certified payroll records and maintain accurate records of the number of hours employees worked, as required by the Davis-Bacon Act. Investigators also found the Maldonado Roofing violated FLSA recordkeeping requirements by failing to maintain accurate, daily records of the number of hours employees worked.

The Department of Labor (DOL) started the new year without Senate-confirmed leaders at seven sub-agencies. Jaclyn Diaz, in a Bloomberg Government article, reported that those openings could slow some significant regulatory initiatives. The vacancies, including in the Wage and Hour Division, come as the department is still working on tackling overtime policy and “joint employer” liability. The DOL is likely to face some challenges to those and other moves in the courts and Congress.

The Center for American Progress published a [report](#) and called on state lawmakers to ban non-compete and “no poaching” agreements in a wide range of employment contracts. The report comments that emerging research and litigation have revealed that many companies use non-compete agreements even for low-wage workers. From fast-food workers and check-cashing clerks to health care providers and engineers, companies are requiring workers across income and educational attainment to sign restrictive contractual agreements, such as non-compete contracts and even “no-poaching” agreements between firms. Employment contracts often carry these requirements as well as several other provisions—including mandatory arbitration requirements, class-action waivers, and nondisclosure agreements—that may restrict workers’ rights on the job and their ability to leave the job for a better one or to start a new business. The report outlines three concrete solutions that states should take to prevent corporations from using these sorts of agreements to suppress competition and workers’ wages and to instead boost workers’ pay and freedom in the economy: (1) ban non-compete contracts for most workers, (2) ban franchise no-poaching agreements, and (3) give workers and enforcement agencies tools to enforce their rights.

According to Law360, two House Democrats—Representatives Bobby Scott (D-SC) and Rosa DeLauro (D-CT)—wrote a letter to the National Labor Relations Board (NLRB) asking NLRB Chairman John Ring not to narrow its joint employer test under the National Labor Relations Act. The Representatives argued that a recent D.C. Circuit Court decision affirmed a broader standard and asked that Chairman Ring withdraw its notice of proposed rulemaking, which seeks to back away from a 2015 NLRB decision. The 2015 decision, involving Browning-Ferris Industries, was affirmed in part by the D.C. Circuit, and the court agreed with the test that a business could be deemed a joint employer if it exhibited “indirect control” or reserved the ability to exert such control. In September, the NLRB made public its draft rule that would undo the 2015 standard and say a business is only a joint employer if it has "direct and immediate control" of another’s workers.

According to a Law360 article, employers have had a hard time fighting U.S. Equal Employment Opportunity Commission (EEOC) subpoenas since an April 2017 U.S. Supreme Court ruling limited court review of the agency's information bids, forcing businesses to undertake costly data searches and potentially disclose information that could make way for bias suits. The Court’s decision in McLane v. EEOC also endorsed a broad reading of the agency's subpoena power. Since that recent decision, federal courts have largely approved the EEOC’s subpoenas in the few cases in which the EEOC has taken businesses to litigation. This trend has left subpoenaed parties little choice but to turn over whatever data the EEOC demands.

BUSINESS AND CORPORATE

According to Bloomberg Government, the Securities and Exchange Commission (SEC) is on hold due to the partial government shutdown. Initial public offerings (IPOs) and normal policing of the securities industry are on currently on hold. Many SEC officials cannot respond to emails or calls, and only a few are able to hold meetings. The agency’s normal back-and-forth with companies on capital raising, enforcement matters, and other issues is at a standstill. Ride-sharing companies Uber Technologies Inc. and Lyft Inc. could face delays in launching their highly anticipated IPOs. The SEC has said it is still helping with fee calculations and "emergency" enforcement matters but has put most rulemaking, filing processing, and other work to the side.

LITIGATION

According to Law360, the federal judiciary has pushed back the date it is expecting to run out of funding due to the government shutdown to next week, increasing the chances that the impasse will resolve before courts may have to start cutting staff and delaying litigation. The federal court system has been operating in full swing since the shutdown began by using fees and other spare funds. The federal judiciary was originally expecting those reserves to dry up by January 11, but it revised that estimate to January 18.

CAPITOL HILL

On January 9, the House passed a bill, H.R. 264, which provides funding for federal services and some federal agencies at levels approved by the Senate last year. In particular, the bill provides appropriations for Fiscal Year 2019 to the Department of Treasury, the federal judiciary, the District of Columbia, and several independent agencies including the Small Business Administration and Securities and Exchange Commission. According to a Government Executive article, the bill includes a 1.9 percent pay increase for civilian federal employees, overriding President Trump's pay 2019 freeze, and reinstates a pay freeze that has been in place since 2013 for the vice president, Cabinet-level officials, and nearly 1,000 other political appointees. The Office of Management and Budget (OMB) announced that President Trump's administration opposes the House-passed bill, along with three other appropriations bills the chamber plans to consider, saying the administration "is committed to working with the Congress to reopen agencies affected by lapsed appropriations, but any effort to do so must address the security and humanitarian crisis on our Southwest border and should restore funding for all agencies affected by the lapse." The other three appropriations bills have provisions to fund other federal agencies.

The House passed two more appropriations bills on January 10—H.R. 265 and H.R. 267—both of which were included in the OMB's announcement of opposition. H.R. 265 provides Fiscal Year 2019 appropriations for the Department of Agriculture, the Food and Drug Administration, and related agencies. H.R. 267 provides Fiscal Year 2019 appropriations for the Department of Transportation, the Department of Housing and Urban Development, and several related agencies. According to a CNN article, both bills received slightly more Republican support than the bill passed on January 9, but the vast majority of Republican Representatives oppose the Democrats strategy. Moreover, even though these bills were passed in 2018 by the Republican-controlled Senate, President Trump is still expected to veto each piece of legislation, and Senate Republican Leader Mitch McConnell has indicated he would not bring shutdown-related bills to the Senate floor without the President's support.

PILIEROMAZZA BLOGS

SBA Information Notice Provides Guidance on SBA's Interpretation of the Small Business Runway Extension Act of 2018
By Jacqueline K. Unger

We recently wrote about the Small Business Runway Extension Act (Runway Extension Act), which President Trump signed into law on December 17, 2018. Under the Runway Extension Act, for industries with receipts-based size standards, the size of a firm is to be measured based on its average annual gross receipts over the previous five years (extended from the previously used three-year period). Missing from the Runway Extension Act is any explicit directive as to when the new five-year calculation takes effect, leaving open the question of whether agencies will interpret the law as effective immediately or only upon the issuance of revised regulations. This has led to significant confusion among contractors as to whether a firm's size status could immediately be impacted by the new law, i.e., whether a firm should report its size today based on average annual receipts over the past five years instead of three years.
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