



Weekly Report for January 18, 2019

### **GOVERNMENT CONTRACTING**

**According to Bloomberg Government, contract spending has grown by almost 6% per year over the past five years as federal agencies increasingly rely on government-wide contract vehicles and simplified acquisition procedures.** Bloomberg Government identified five spending trends that developed from Fiscal Year 2014 through Fiscal Year 2018, listed below.

1. Federal contract spending reached a five-year high in Fiscal Year 2018. The \$560 billion in federal contract spending in Fiscal Year 2018 is the highest level since Fiscal Year 2010, when it hit \$562 billion. Bloomberg Government suggests that this could be due to the fact that efforts to slow federal discretionary spending—such as the Budget Control Act, which began imposing annual spending caps in 2013—are having less of an effect as the Trump administration boosts defense spending. Bloomberg Government suggested spending could remain above \$550 billion in Fiscal Year 2019 and beyond, whereas annual contract spending averaged \$542 billion from Fiscal Year 2008 to Fiscal Year 2012.
2. Federal spending surged on government-wide acquisition contracts that agencies use to buy information technology (IT), suggesting agencies are relying more on these types of contracts to satisfy IT purchases and modernize legacy systems.
3. Federal spending on small businesses has risen in lockstep with overall contract spending, meaning that the share of federal dollars won by small businesses has remained relatively flat. From Fiscal Year 2014 through 2018, small-business spending has hovered around 22% of the market.
4. Spending on indefinite-delivery contracts outpaced obligations on definitive contracts by about \$34 billion in Fiscal Year 2018. The share from Fiscal Year 2014 through 2017 was just about evenly split.
5. Spending through simplified acquisition procedures (SAP), a government process for buying commonly acquired goods and services that fall below a certain price threshold has gradually increased each year since Fiscal Year 2014. Bloomberg Government reported that SAP spending reached the highest amount ever reported in Fiscal Year 2018 and suggested the increase could be attributed to both threshold increases and the fact that SAP allows agencies to cut some red tape.

**Bloomberg Government reported that more than 40,000 D.C., Maryland, and Virginia companies performing work for the thirteen major federal agencies that have been shut down since December 22, 2018 could experience lost or delayed revenues amounting to \$91 million per day.** Of the three jurisdictions, Maryland accounts for 24% of the combined Fiscal Year 2018 spending and is the least affected by the current shutdown. A majority of federal money spent on contracts performed in the state come from the Departments of Defense and Health and Human Services, which are fully funded for Fiscal Year 2019. Virginia and D.C. are more dependent on the Departments of Homeland Security and Justice, which issued billions of dollars in contracts there during Fiscal Year 2018. Additionally, Bloomberg Government reported that small businesses holding shorter and smaller contracts are seeing cash flow problems. “Some companies have already furloughed workers and some believe they will go out of business after this week,” said Barbara Ashe, executive vice president of the Montgomery County Chamber of Commerce.

**As reported by Bloomberg Government, the Professional Services Council (PSC) sent a [letter](#) to House and Senate leaders calling on Congress to immediately end the partial government shutdown.** PSC requested that lawmakers prioritize providing full-year appropriations and highlighted its concerns about the hundreds of thousands of contract workers who work in support of the government but do not expect to receive back pay, unlike federal civilian employees. PSC’s letter pushed Congressional leaders to provide the same redress for government contractors as it does for federal civil employees.

**Cameron Leuthy, writing for Bloomberg Government, noted that whenever Congress makes full-year appropriations—whether on time, after a continuing resolution, or after a partial government shutdown—contractors can become impatient for new spending to get underway.** However, laws and rules designed to prevent the misuse of federal appropriations can delay the process. Some of the steps in the process include (1) apportionments by the Office of Management and Budget allocating funds from each appropriations account for specific time periods or for specific programs; (2) warrants issued by the Treasury Department allowing agencies to draw on central accounts to pay bills; and (3) agency “spend-plans” that may have to be updated due to the passage of time, congressional changes to the request, or real-world events.

**According to an [article](#) by Government Executive, several agencies announced they would recall thousands of employees to prepare for a long-term shutdown.** Some federal agencies, such as the Internal Revenue Service, Federal Aviation Administration, and Food and Drug Administration, have begun adjusting their shutdown plans, including reactivating previously-furloughed employees in order to continue mission-critical functions. Most agencies’ shutdown contingency plans also have provisions noting that furloughed employees can be recalled during an emergency, and this is particularly true at the Department of Homeland Security, which notes in its plan that those deemed excepted under the Anti-Deficiency Act do not entirely overlap with those deemed “essential” during emergency situations.

## **LABOR AND EMPLOYMENT**

**As reported by Law360, on January 11, 2019, the House of Representatives passed the [Government Employee Fair Treatment Act](#) by a vote of 411-7, one day after it unanimously passed the Senate.** President Trump signed the bill into law on January 16, 2019, which gives furloughed federal workers back pay after the end of the partial government shutdown. The bill calls for those who were working without pay or kept from working during the

shutdown to receive pay “at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates.”

**According to Law 360, on January 15, 2019, the U.S. Court of Appeals for the Ninth Circuit stated that California's prevailing wage law could be expanded or narrowed, depending on how the state's highest court may rule on a question about the payment of workers who transport machinery to and from public construction projects.** In this case, *Mendoza et al. v. Fonseca McElroy Grinding Co. et al.*, case number [17-15221](#), which is currently pending before the Ninth Circuit, road construction workers filed an appeal claiming they were underpaid for work done off the job site. Because the Ninth Circuit found no applicable decisions from California’s Supreme Court or appellate courts to aid its decision, it asked the California Supreme Court to weigh in. The Ninth Circuit wants to know if offsite "mobilization work," such as hauling asphalt and grinding equipment to and from public works sites, is performed "in the execution of" a public contract, which would entitle the workers performing those tasks to the prevailing wage. The Ninth Circuit stated that, if the California Supreme Court accepts the case and applies a broader application of the prevailing wage law, it could extend its coverage to a range of "public works-adjacent" activities, including travel and machine transport. Alternatively, if the California Supreme Court applies a narrower application, it could limit wages for workers on public projects when they do offsite tasks, even when that work is closely related to their onsite job. The California Supreme Court has not yet decided if it will accept the case.

**According to Bloomberg Government, and based on sources that communicated with Bloomberg Law, the Department of Labor (DOL) sent a proposal to expand overtime eligibility to the White House’s Office of Information and Regulatory Affairs (OIRA).** This is the first step of regulatory review before a proposal can be released to the public for comments. A new overtime eligibility policy has been the biggest issue at the DOL since Secretary Alexander Acosta took office in 2017. Per the agency’s latest regulatory agenda, a rule was scheduled for release in March, but the government shutdown could affect the actual publication of the proposal.

**According to an article on Law360, the National Labor Relations Board (NLRB) issued another extension of the public comment period for the proposed rollback of the joint employer test.** Law360 reported that the NLRB has received nearly 30,000 comments on the proposed rule, which demonstrate a sharp divide between pro-business and pro-labor groups about how broad the standard should be. The proposed rule was issued in September and would tighten the NLRB’s test for determining joint employer status and liability, which was previously expanded in 2015. In an [announcement](#) on January 11, the NLRB noted that in light of the “unique circumstances” presented by the D.C. Circuit’s decision in *Browning-Ferris Industries of California v. NLRB*, --- F.3d ---, 2018 WL 6816542, it was extending the time for submitting comments regarding its Notice of Proposed Rulemaking (“NPRM”) on joint-employer status in order to permit issues raised by that decision to be addressed. Comments must now be received on or before January 28, 2019.

**Additionally, according to Law360, the NLRB general counsel’s office unveiled a trio of advice memorandums, finding in one that an energy company could start enforcing a non-solicitation clause that prevented subcontractors from hiring its workers for six months without first bargaining with the union that represented them.** The three memos were written last month by Jayme Sophir, head of the NLRB’s Division of Advice, which is part of the board’s Office of the General Counsel. Memos can be released at the general counsel’s

discretion after a case has been closed, and each resulted from requests for guidance by various NLRB regional directors on cases their offices were handling. The memos can be found [here](#).

## **LITIGATION**

**According to Bloomberg Government, the federal courts are expected to run out of money as soon as January 18, 2019.** Judges will continue to hear some criminal cases, but almost everything else will be put on hold. The Equal Employment Opportunity Commission, which is shut down, is already asking courts to pause litigation involving the agency.

## **CAPITOL HILL**

**The House passed four contractor-related bills over the past week.**

1. [H.R. 227](#) modifies required subcontracting plans for companies that win federal contracts and establishes a dispute resolution process for payment issues between subcontractors and prime contractors.
2. [H.R. 226](#) requires the Small Business Administration (SBA) to report on “best-in-class” contract awards to small businesses.
3. [H.R. 190](#) increases the size of sole-source manufacturing that could be awarded to disadvantaged small businesses. The anticipated awards of sole-source contracts could be worth as much as \$7 million for manufacturing, or \$4 million for other opportunities. Current thresholds are (1) \$5 million for manufacturing contracts and \$3 million for other contracts awarded to HUBZone or service-disabled veteran-owned businesses and (2) \$6.5 million for manufacturing contracts and \$4 million for other contracts awarded to qualified woman-owned businesses.
4. [H.R. 246](#) requires federal agencies that award contracts and grants to small businesses for research and development through the Small Business Innovation Research (SBIR) or Small Business Technology Transfer (STTR) programs to help small businesses participate in research and development contracting programs. In particular, the SBA would have to coordinate with senior procurement executives at agencies with SBIR and STTR programs to help small businesses commercialize their research before they are awarded contracts.

## **PILIEROMAZZA BLOGS**

### **Teaming Agreements: Are They Necessary or Not Worth the Effort?**

By Antonio R. Franco

Government contractors enter into teaming agreements to secure contracts with partners that will help them win and perform the work. It surprises many, however, that certain terms in a teaming agreement may not be enforceable, particularly the clauses providing for the award of a subcontract. This has led contractors to ask, "What is the point of a teaming agreement?" There

are many advantages to teaming agreements, or they would not be so prevalent in the government contracting industry. Although those advantages cannot be understated, contractors need to know the limits of teaming agreements. Depending on whether the contractor is the anticipated prime or subcontractor, those limitations need to be carefully considered.

[\[Read More\]](#)