Weekly Report for March 29, 2019

GOVERNMENT CONTRACTING

The Office of the Under Secretary of Defense released a class deviation, effective immediately, that implements section 1006 of the National Defense Authorization Act for Fiscal Year 2019. The class deviation prescribes that all contracting officers shall use the clause prescribed in the attachment to the class deviation when contracting with accounting firms providing financial statement auditing or audit remediation services to the Department of Defense in support of the audits required under 31 U.S.C. § 3521.

The Office of the Undersecretary of Defense released a memorandum regarding changes to certification standards for the contracting workforce, effective October 1, 2019. Specifically, "Intermediate Cost and Price Analysis" (CON 270) will no longer be required for Level II certification, and "Analyzing Contract Costs" (CLC 056) will be required for Level I certification.

According to Bloomberg Law, the General Services Administration (GSA) must reevaluate 81 contract awards made to small businesses under an IT services procurement worth $15 billion, per an order from the U.S. Court of Federal Claims. The Court of Federal Claims enjoined the GSA from proceeding with the current awardee list and directed it to reevaluate the proposals in a manner that addressed errors raised in a post-award bid protest brought by Citizant, Inc. The Court of Federal Claims' decision can be found here.

The Government Accountability Office (GAO) released a report regarding the Department of Defense's (DoD) simultaneous undertaking of new major acquisitions to replenish its missile warning, protected communications, navigation, and weather satellites at the same time as boosting efforts to increase space situational awareness and protect space assets. The GAO identified a wide range of resource and management challenges including growing threats to satellites, implementing leadership changes, and having the right resources and know-how. The GAO did the study because the DoD's space systems provide critical capabilities that support military and other government operations. They can also be expensive to acquire and field, costing billions of dollars each year. Past GAO reports have recommended that DOD adopt acquisition best practices to help ensure cost and schedule goals are met. The DoD has generally agreed and has taken some actions to address these recommendations.

According to a Nextgov article, the federal government wants to hold defense contractors accountable for the cybersecurity of their supply chain, but experts testified that that would be difficult to achieve. The Senate Armed Services Committee held a hearing where defense contractor industry representatives explained that the increasingly complex levels of supply chains make it difficult for prime contractors to ensure all subcontractors are upholding cybersecurity protections and that ever-lengthening chain

increases the possibility of compromised information or cyber attacks. The article reported that the panelists explained that a large part of the problem is that the government frequently does not have access to the contracts between primes and their subcontractors, or a prime contractor may know its immediate supplier is but not know the subcontractors that supplier uses—a loop that can repeat for each subcontractor. Per the article, Christopher Peters, CEO of Lucrum Group, told the Committee that prime contractors are hesitant to identify their subcontractors out of fear that the government may select the subcontractors instead of them on future contracts, which makes it nearly impossible for the government to ensure that all subcontractors on federal projects are abiding by cybersecurity protocols.

The Department of Justice (DOJ) announced that Kessey Reggie Durand, of Miami, Florida, pled guilty to one count of wire fraud in connection with his scheme to steal monthly pension payments from victims enrolled in pension plans managed by the Pension Benefit Guaranty Corporation (PBGC). Mr. Durand used personally identifiable information (PII) he obtained while working as a contractor at the PBGC's Miami Field Office to create or take over online MyPBA accounts of pension plan participants. After commandeering those accounts, Mr. Durand changed the associated electronic direct deposit information in order to funnel victims' monthly pension payments into accounts Mr. Durand controlled. In other cases, Mr. Durand tried to change participants' electronic direct deposit information through social engineering, using stolen PII to call into the PBGC call center to trick operators into believing he was the participant requesting the change. The DOJ reported that Mr. Durand's scheme spanned approximately five months and targeted over $100,000 in monthly pension payments.

LABOR AND EMPLOYMENT

The Department of Labor (DOL) Wage and Hour Division published a notice of proposed rulemaking (NPRM) and request for comments regarding updating regulations pertaining to the Fair Labor Standards Act (FLSA). The FLSA generally requires that covered, nonexempt employees receive overtime pay of at least one and one-half times their regular rate of pay for time worked in excess of 40 hours per workweek. The regular rate includes all remuneration for employment, subject to the exclusions outlined in section 7(e) of the FLSA. In this NPRM, the DOL proposes updates to a number of regulations both to provide clarity and better reflect the 21st-century workplace. The proposed rule would clarify when unused paid leave, bona fide meal periods, reimbursements, benefit plans, and certain ancillary benefits may be excluded from the regular rate. Additionally, the DOL proposes minor clarifications and updates to part 548 of Title 29, which implements section 7(g)(3) of the FLSA, which permits employers, under specific circumstances, to use a basic rate to compute overtime compensation rather than a regular rate. Comments to the proposed rule are due May 28, 2019. 84 Fed. Reg. 61, 11888.

According to Bloomberg Government, the Department of Labor (DOL) wants to have its new overtime rule commented on, reviewed, and finalized by January 2020. Per Bloomberg Government, Tammy McCutchen, a Littler Mendelson attorney who was a Wage and Hour Division administrator under George W. Bush, explained there is a need for speed due to the November 2020 election. She opined that if a Democrat wins the 2020 election for president, there would be new leadership in the DOL and Department of Justice, and those officials may restart litigation in federal court defending the Obama administration's overtime proposal or could put a stop to the Trump administration's proposal before it is finalized. In 2004, the DOL took 13 months to review comments to the proposed overtime rule an issue the

final rule. In 2010, the DOL turned around the Obama administration's proposal in 10 months. However, Bloomberg Government noted that the DOL's goal of reviewing comments and finalizing a rule in 8 to 10 months is risky because the DOL is unlikely to grant requests to extend the time for public comment beyond the May 21 deadline, and, to make the rule legally defensible, the DOL has to show it responded to each comment and considered each submission.

According to Law360, the House of Representatives passed the Paycheck Fairness Act (H.R. 7), which will be sent to the Senate. The House voted 242-187, largely along party lines, to advance the bill, sponsored by Rep. Rosa DeLauro (D-CT). The bill would make employers with pay gaps between men and women liable for damages unless they can show non-gender, business-based reasons for the differentials, among other things. The current version of the Equal Pay Act outlaws paying men and women differently for the same work, with four exceptions; employers can pay workers at different rates if they do so based on (1) seniority, (2) merit, (3) the quantity or quality of the employee's work, or (4) "any other factor other than sex." The Paycheck Fairness Act would narrow the fourth exception, known as the catchall defense, to apply only to factors not "based upon or derived from" existing gender-based pay gaps, related to the job in question, consistent with business necessity, and fully account for any difference in pay between workers of different genders. Other provisions of the bill would block employers from punishing workers who discuss their pay, file Equal Pay Act claims, or initiate pay equity investigations as well as provide grants to cover salary negotiation training for women and girls, direct the Department of Labor to study pay disparities and provide information to employers, and require the Equal Employment Opportunity Commission to start collecting pay data from employers.

According to Law360, a National Labor Relations Board (NLRB) judge said that employers cannot bar workers from discussing the outcome of employment arbitration. Per Law360, the decision could curtail a key feature of arbitration agreements and tee up a new clash between labor law and the Federal Arbitration Act. According to the Law360 article, Administrative Law Judge Keltner Locke said that so-called confidentiality provisions in arbitration agreements infringe on workers' National Labor Relations Act (NLRA) rights to engage in concerted activity by barring them from discussing an employment term akin to their pay, and Judge Locke recommended that Pfizer Inc. eliminate a confidentiality policy. Per Law360, Judge Locke also said that the U.S. Supreme Court's Epic Systems Corp. v. Lewis decision allowing arbitration agreements does not shield the confidentiality clauses often included in those pacts.

PILIEROMAZZA BLOGS

Fourth Circuit Makes It Harder for Whistleblowers in FCA Cases
By Paul W. Mengel III

In a relatively recent decision, the U. S. Court of Appeals for the Fourth Circuit raised the bar a notch for whistleblowers in False Claim Act ("FCA") cases whose allegations lack specificity as to direct evidence of presentment for payment to the government for fraudulent services. Indeed, in her dissenting opinion in U.S. ex rel. David Grant v. United Airlines, Inc., No. 17-2151 (4th Cir. 2018), Judge Keenan opined that this ruling, affirming the dismissal of the claim at the pre-discovery pleading phase of the case, "effectively limits qui tam actions to whistleblowers in 'white collar' positions with access to financial and other business records."
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