



Weekly Report for December 7, 2018

## **RULES AND REGULATIONS**

### **Proposed Rules**

**The Small Business Administration (SBA) published a proposed rule** amending its regulations and implementing provisions of the NDAA's of 2016 and 2017 as well as the Recovery Improvements for Small Entities After Disaster Act of 2015 (RISE Act). The proposed rule would (1) clarify that contracting officers have the authority to request information in connection with a contractor's compliance with applicable limitations on subcontracting clauses; (2) provide exclusions for purposes of compliance with the limitations on subcontracting for certain types of contracts (i.e. environmental remediation contracts, information technology service acquisitions that require substantial cloud computing, and contracts performed outside of the United States); (3) require a prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals; (4) establish that failure to provide timely subcontracting reports may constitute a material breach of the contract; (5) clarify the requirements for size and status recertification; and (6) limit the scope of Procurement Center Representative reviews of DoD acquisitions performed outside of the United States and its territories. The proposed rule would also authorize agencies to receive double credit for small business "goaling" achievements and remove the kit assembler exception to the non-manufacturer rule. [83 Fed. Reg. 233, 62516](#).

**The General Services Administration (GSA), National Aeronautics and Space Administration (NASA), and DoD published a proposed rule** amending the Federal Acquisition Regulations (FAR) to implement the final rule published by the SBA implementing section 1651 of the NDAA for fiscal year 2013, which revised and standardized the limitations on subcontracting, including the non-manufacturer rule, that apply to small business concerns under FAR part 19 procurements. [83 Fed. Reg. 233, 62540](#).

**The DoD issued a class deviation implementing revisions made by the SBA to its regulations regarding the limitations on subcontracting.** Contracting officers must immediately follow the procedures in the [class deviation](#) when issuing solicitations and awarding contracts or task or delivery orders to small business concerns, 8(a) Program participants, historically underutilized small business concerns, service-disabled veteran-owned small business concerns, economically-disadvantaged women-owned small business concerns, and women-owned small business concerns. The revisions changed and standardized the limitations on subcontracting and the non-manufacturer rule with which small businesses must comply under government contracts awarded pursuant to the set-aside or sole source authorities of the Small Business Act.

**The DoD published a proposed rule** amending the DFARS to implement the NDAA's for fiscal years 2017 and 2018, which establish limitations and prohibitions on the use of the lowest priced technically acceptable source selection process. [83 Fed. Reg. 233, 62550](#).

**The DoD published a proposed rule** amending the DFARS to implement a section of the NDAA for fiscal year 2019 regarding set-asides for architect-engineer and construction design contracts. [83 Fed. Reg. 233, 62554](#).

## Final Rules

**The Department of Defense (DoD) issued a final rule** amending the Defense Federal Acquisition Regulations System (DFARS) to revise a clause to reflect current terminology and industry practices, pursuant to action taken by the DoD Regulatory Reform Task Force. [83 Fed. Reg. 233, 62502](#).

**The DoD issued a final rule** amending the DFARS to implement a section of the National Defense Authorization Act (NDAA) for fiscal year 2019 that removes the requirement to make a best procurement approach determination to use an interagency acquisition. [83 Fed. Reg. 233, 62501](#).

**The DoD issued a final rule** amending the DFARS to implement a section of the NDAA for fiscal year 2018 that repeals the fiscal year 2015 restrictions on the source of photovoltaic devices in contracts awarded by DoD that result in DoD ownership of photovoltaic devices by means other than DoD purchase of the photovoltaic devices as end products. [83 Fed. Reg. 233, 62498](#).

## LABOR AND EMPLOYMENT

In a [News Release](#), the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced three directives establishing (1) an opinion letter process and enhancing OFCCP's Help Desk, (2) a process to resolve compliance evaluations at the earliest stage possible with corporate-wide compliance, and (3) clarifying the Agency's compliance review procedures.

**According to an article on Bloomberg Government, the EEOC may lose its quorum** if the Senate does not end a logjam on nominations for three EEOC seats before the end of the year, which could leave the agency without the authority to green light new policy decisions, handle certain big-ticket lawsuits, and approve significant spending. The EEOC has increased harassment enforcement and training efforts over the past year as well.

**Companies' use of mandatory arbitration pacts, particularly for employee claims of harassment and assault, is getting more scrutiny from the Labor Department**, according to an article on Bloomberg Government. The article asserts that this issue is also on the nation's radar, particularly in light of the #MeToo movement. Google and Facebook recently announced they would make some mandatory arbitration policies optional for employees making claims of harassment and assault, and Airbnb also ended forced arbitration for employee harassment and workplace discrimination claims.

**Twenty Eight Years after its passage, President George H.W. Bush's Americans with Disabilities Act (ADA) is still developing.** According to an article by Robert Lafolla on Bloomberg Government, Congress amended the ADA in 2008 in response to U.S. Supreme Court rulings that had narrowed the definition of "disability" under the law. Chai Feldblum, a commissioner at the Equal Employment Opportunity Commission commented that, prior to these amendments, cases were often disposed of early in litigation on the question of whether a plaintiff was disabled, and, consequently, the ADA is not as developed as one would expect. The article asserts that unsettled legal issues in the law—such as long-term leave to accommodate employees with disabilities, competition between disabled and non-disabled candidates, and whether attendance is an essential function of a job—will ultimately need to be resolved by the U.S. Supreme Court. Until then, the lack of clarity in these areas could land employers in court, which can be costly even if an employer prevails.

**Though companies like Google have stopped requiring arbitration for employee sexual harassment and assault claims, most employee wage-and-hour claims and discrimination claims continue to have arbitration agreements in place.** According to an article in Bloomberg, the Economic Policy Institute reported that 56 percent of nonunion private-sector employees are subject to mandatory individual arbitration procedures, roughly 60 million American workers. Of those, 30 percent have signed agreements that include class-action waivers.

## **CAPITOL HILL**

### **Congress Passes Small Business Size Standards Legislation, Providing Five Year “Runway”**

On December 6, 2018, Senator Ben Cardin, the ranking member on the Senate Committee on Small Business & Entrepreneurship, [announced](#) that the Senate passed legislation amending the Small Business Act to ensure that small business size standards are calculated using average annual receipts from the previous five years; currently, size standards are calculated using average annual receipts from the previous three years. The bill, [the Small Business Runway Extension Act of 2018 \(HR 6330\)](#), passed in the House of Representatives in September and will now go to President Trump for signature.

## **PILIEROMAZZA BLOGS**

### **Limitations on LPTA Coming to DFARS**

By Megan C. Connor

On December 4, 2018, DOD issued a proposed rule amending the DFARS to impose limits on the use of the lowest price technically acceptable ("LPTA") source selection process. These changes are driven by the National Defense Authorization Acts ("NDAA") for Fiscal Years 2017 and 2018. Notably, the 2018 NDAA directed similar changes to the FAR, but there is no proposed change to the FAR yet.

[\[Read More\]](#)

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

By Emily 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 size standards to be prescribed on the basis of a 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 the legislation will now go to President Trump for his signature.

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### **Title VII's Protections Don't Extend That Far—4th Circuit Says Review and Copying of Confidential Files Not Protected Activity**

By Paul W. Mengel III

Catherine Netter, a 19-year employee of the Guilford County, N.C., Sheriff's Office, believed a disciplinary sanction she received in 2014, which impeded her ability to be promoted, was motivated by discrimination. Netter, who is African-American and Muslim, felt that other similarly situated officers who were neither African-American nor Muslim had not been disciplined in a similar manner, so she filed complaints with the Equal Opportunity Employment Commission ("EEOC") and the Guilford County Human Resources Department.

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