

LEGAL ADVISOR



A PilieroMazza Update for Federal Contractors and Commercial Businesses

PilieroMazza's Bold Predictions for 2018

By Megan Connor



For our first *Legal Advisor* of the year, we decided to forecast for readers what to expect in 2018. So, this issue provides our hot takes on corporate, employment, litigation, and government contracting matters that we believe will impact our clients this year. You can track these bold predictions and see others we are making in our [blog](#) and [Weekly Newsletter](#) as we focus at the outset of 2018 on the year ahead for our clients.

As we enter 2018, there is no hotter issue in contracting than **cybersecurity**, thanks to DFARS 252.204-7012, which requires DoD contractors with nonfederal information systems that contain controlled unclassified information ("CUI") to implement the security requirements in National Institutes of Standards and Technology ("NIST") Special Publication ("SP") 800-171. Defense contractors with contracts containing DFARS 252.204-7012 and nonfederal information systems containing CUI were required to implement these requirements by December 31, 2017. Therefore, compliance with NIST SP 800-171 may be a new expense your company is contending with in 2018. We predict these cybersecurity requirements will trickle down to civilian contractors. NIST SP 800-171 itself indicates that a single FAR clause is planned to apply the requirements of NIST SP 800-171 to all contractors with nonfederal information systems containing CUI. In the **cybersecurity** vein, **Kimi Murakami** and **Jonathan Bush** highlight the ways in which cybersecurity issues are becoming increasingly important in the mergers and acquisitions due diligence process in 2018.

Also on the acquisitions front, Sharon B. Heaton of sb LiftOff predicts that 2018 will be a **good year for**

business owners looking to sell, based on recently published data. Sharon explains why in her guest article in this edition.

In the federal procurement world, we predict a **narrowing of opportunities for small businesses**, thanks to recent legislation. In particular, we will be watching how agency use of commercial e-commerce portals, as directed by Section 846 of the National Defense Authorization Act ("NDAA") for Fiscal Year 2018 (known as the "Amazon Amendment"), will impact small business contractors providing commercial items under GSA Schedule contracts and Governmentwide Acquisition Contracts. For more information about Section 846, check out **Patrick Rothwell's recent blog**. In addition to e-commerce portals, the NDAA also encourages use of Other Transaction Authority for prototype projects and doubles the dollar limits for this authority, which effectively allows DoD to award very large prototype projects to developers without competition, potentially closing the door on small businesses. **John Shoraka's** article in this issue highlights other impacts the NDAA will have on small businesses and what these changes reveal about contracting trends.

Another contracting trend we are watching is **investigations** in the area of employee leasing. **Cy Alba** and **Nichole Atallah** discuss in this issue how the confusing definition of "employee" can lead to big trouble for contractors. We also predict that agency procurement officials will inject themselves into the internal employment matters of contractors by, for instance, launching their own investigations of harassment allegations, which **Sarah Nash** explains in her [blog post](#). For guidance on how to handle sexual

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harassment claims as an employer, be sure to check out **Matt Feinberg's** [blog](#). We expect an increase in such claims in 2018. And our Litigation Group will be continuing to monitor the impact of e-Discovery on litigation and how such costs may lead to resolution of claims through litigation alternatives.

We also predict **an increase in the sustain rate and effectiveness rate in GAO's bid protests**. The sustain rates in 2016 and 2017 were higher than in past years, as **Julia Di Vito** noted recently in her [blog](#). The effectiveness rate also has seen an increase—up to 47% in 2017. The effectiveness rate represents the protests that ended in either GAO sustaining or an agency taking voluntary action. Based on recent history, we believe the sustain rate and effectiveness rate will remain higher than prior years. There are many factors at play for these increasing percentages, but one explanation we see is the retirement of experienced contracting officials and their replacement by younger, inexperienced personnel. The knowledge gap between these two levels of contracting officers creates increased errors in procurements, leading to more sustains and corrective actions in bid protests.

As always, PilieroMazza will be there to guide and assist you. We look forward to working with you in 2018.

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