LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Government Contracting

CHANGES COMING TO GSA SCHEDULE CONTRACTS IN 2013

By Megan C. Connor

Anyone monitoring government contracting in the last few years has noticed a surge in U.S. General Services Administration (GSA) Schedule contracts. As of fiscal year 2012, GSA had over 19,000 Schedule contracts. According to GSA, approximately 10% of federal procurement dollars went through GSA Schedule contracts last year representing nearly $50 billion in spending. Considering 80% of GSA Schedule contracts are with small businesses, proposed changes to the GSA Schedule program in 2013 will surely impact small businesses.

The first of these changes, spearheaded by SBA, intends to ensure more small businesses reap the benefits of the GSA Schedule program. While small businesses represent 80% of GSA Schedule contract holders, only 36% of contract sales go to small businesses. Recognizing the disconnect between the number of contract holders and actual sales, SBA issued a proposed rule in May 2012 to "maximize small business participation on multiple award contracts," including GSA Schedule contracts. Although no date has been set, this proposed rule likely will become final in 2013.

Under the new rule, every multiple award contract, including GSA Schedule contracts, and every order issued under these contracts must contain a NAICS code and corresponding size standard. Further, the new rule requires a firm to recertify its size after merger or acquisition without regard to whether the firm is the acquired concern or the acquiring concern. The new rule also places a greater onus on agencies to consider small business set-asides on GSA Schedule contracts (and other multiple award contracts) whenever possible. Contracting officers must document in the contract file why they decided not to use a partial contract set aside, a contract reserve, or contract clauses that commit the agency to set aside orders or at least preserve the right to set aside orders under a GSA Schedule contract (and other multiple award contracts) when the contract could be performed by small businesses. SBA hopes that these changes will provide agencies additional means of reaching more small businesses and increase awards of GSA Schedule contracts and orders to small businesses.

While SBA hopes to improve access to GSA Schedule contracts and orders for small businesses in 2013, GSA plans to streamline the program. There are reports that GSA is considering consolidating its 31 schedule contract vehicles into 8 groups or families. By grouping the Schedule contracts, GSA hopes agencies will find the supplies or services they need with greater ease. GSA has not taken any steps to formalize this change, but the issue is worth watching in 2013.

In addition, GSA has proposed modifying its current practice of a continuous open season for all Schedule contracts to a "Demand Based Model." Essentially, GSA plans to evaluate the demand for each Special Item Number (SIN) and whether there is an oversaturation of contract holders for those SINs. If GSA determines that supply far exceeds demand, it intends to temporarily close the Schedule or certain SINs on the Schedule or even cancel the Schedule or SINs. Importantly, holders of valid Schedule contracts that are temporarily closed during the period of performance would be able to continue to seek and perform

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orders. However, GSA may not exercise options after the temporary closure—but nothing currently requires GSA to do so anyway.

According to reports, GSA could phase out more than 8,000 Schedule contracts under the Demand Based Model, representing a savings of more than $24 million. The types of contracts GSA would likely phase out include typewriters, non-digital photographic equipment, and commemorative or promotional items. GSA's new Demand Based Model is not without critics. Congressman Sam Graves, Chairman of the House Small Business Committee, has repeatedly expressed his concerns to GSA's acting administrator that the Demand Based Model could harm small businesses. Congressman Graves characterized GSA's claimed savings as "wildly divergent estimates." Whether GSA actually implements its Demand Based Model will likely be resolved in 2013.

Lastly, a recent U.S. Court of Federal Claims decision regarding the U.S. Department of Veterans Affairs (VA) and GSA Schedule contracts will have ramifications through 2013. Generally, the Veterans First Contracting Program, created in 2006, requires the VA to give priority to service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) in VA acquisitions. However in *Kingdomware Technologies v. United States*, the Court of Federal Claims sided with the VA and held that the VA may procure goods and services through GSA Schedule contracts without first determining whether it can conduct an acquisition using restricted competition for SDVOSBs or VOSBs. With the Court of Federal Claims' imprimatur, VA may continue using GSA Schedule contracts in 2013 without jumping through the hoops of the Veterans First Contracting Program.

As the old adage goes, the only thing that is constant is change. And in 2013, changes are afoot for the GSA Schedule program. ❒

About the Author: Megan Connor, an associate with PilieroMazza, focuses her practice in the areas of government contracts, small business administration programs, business and corporate law, and litigation. Ms. Connor represents clients in bid protests to the U.S. Government Accountability Office as well as general commercial matters in state and federal courts. She may be reached at mconnor@pilieromazza.com.

Labor and Employment

EXECUTIVE ORDER 13495 NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

By Nichole DeVries

On December 21, 2012, the Department of Labor (DOL) announced that January 18, 2013 will be the long-awaited effective date of Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts (Order). The Order establishes that where a service contract expires and a follow-on contract is awarded for the same or similar services at the same location, a successor contractor must grant a right of first refusal to the predecessor contractor's employees, other than management and supervisory employees, before offering the positions to non-predecessor employees.

Although DOL published the final rule on August 29, 2011, implementation of the Order was delayed until the Federal Acquisition Regulatory Council (FARC) issued its final rule amending the Federal Acquisition Regulation (FAR), which is to be included in solicitations and contracts for services subject to the Order. The FARC has established January 18, 2013 as the effective date for its final rule and the rule will apply to solicitations issued on or after that date.

As with all new regulations, there are sure to be bumps in the road while contracting officers and contractors begin application of the regulations. However, DOL had made it clear that a contractor is not excused from following the regulations if non-displacement provisions are omitted from the FAR clause in the contract and may require the retroactive application of the non-displacement requirements.

The regulations implementing the Order are complex and many of the requirements are not intuitive. Should your Company have any questions regarding the requirements of the regulations issued by DOL and/or how the rule may impact hiring and termination decisions, please contact us for guidance. ❒

About the Author: Nichole DeVries, an associate with PilieroMazza, primarily practices in the areas of labor and employment law and general litigation. Ms. DeVries counsels clients in a broad range of employment matters including compliance with Title VII, ADA, ADEA, FLSA, FMLA, SCA, and EEOC. She may be reached at ndevries@pilieromazza.com.

GUEST COLUMN

The Guest Column features aricles written by professionals in the services community. If you would like to contribute an original article for the column, please contact our editor, Jon Williams at jwilliams@pilieromazza.com.

PROPER PLANNING FOR GOVERNMENT ACCOUNTING REQUIREMENTS IS KEY TO GROWTH AND SUCCESS FOR SMALL BUSINESSES IN 2013

By *Eric S. Sobota, Partner,* BDO USA, LLP

As the United States continues to expand its service-based economy and heavily rely on technological advancements, the Federal marketplace has become increasingly attractive to small, entrepreneurial companies. Statistically, the Federal government is the largest purchaser of goods and services in the world and is forecasted to remain in this role for the foreseeable future. The realities and austerity of the new economy have forced agencies to embrace technology and rapidly adapt to the benefits and rewarding challenges technology offers, steadily requiring additional cutting edge equipment and services that the producing tech companies did not have as a main focus at the time.

To many small businesses, the option of selling in this environment seems daunting and filled with red tape, in particular navigating the complex maze of accounting requirements. The reality is that, with proper planning within your organization, doing business with the Federal government can be a strategic way to bolster revenue without the fear of suffocating under onerous compliance requirements. To help you plan, this article provides some accounting best practices that will help you maximize your growth potential and minimize compliance risk in selling to the Federal government.

A key component of success for contractors is to understand the nature of the government contracts you perform. For example, commercial item acquisitions generally require the least compliance post-award as the government uses market-based pricing to determine the reasonableness of an award. GSA schedule contracts are often used to establish commercial prices and to enable the acquisition of these goods and services. One of the key requirements in these awards is the monitoring of the "Most Favored Customer" class or category in order to ensure compliance with the Price Reductions Clause. This clause requires contractors to establish a baseline of customers that are similar to the Federal government and monitor all discounts given to those customers. If a discount is given to one of those customers that is greater than the discounts given to the government, that same discount must also be established in the government rates. In addition, a fee (the Industrial Funding Fee) must be included within the published prices. This fee (.75%) must be refunded to the GSA on a quarterly basis.

Fixed-price contracts can take many forms including fixed price per unit such as hourly, per product, or solution. These contracts can have more stringent compliance requirements if the procurement is not based on adequate price competition per FAR Part 15, but for purposes of this article, that will not be assumed. In general, the government focuses on the determination of the number of units billed for compliance purposes. For instance, if a contractor has a labor-hour contract with fixed hourly rates, after the contract is awarded the scrutiny will be on the determination of the number of hours worked and not the costs associated with the fixed hourly rates themselves. Contractors will need to ensure they have adequate timekeeping practices in place. These requirements can generally be managed with simple processes and may not require any sophisticated software depending on the company's size.

With proper planning within your organization, doing business with the Federal government can be a strategic way to bolster revenue without the fear of suffocating under onerous compliance requirements.

Flexibly-priced procurements generally have the most complex requirements as the government bears most of the performance risk in the case of any contract overruns.

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The inclusion of the Allowable Cost and Payment Clause (FAR § 52.216-7) requires, among other things, that contractors establish indirect rates each year through the submission of an incurred-cost submission. This type of contract also typically requires the establishment of an adequate accounting system. Many smaller companies can meet these requirements through manual processes and can continue to use their existing accounting software. The general requirements are as follows:

- Accumulation of costs under general ledger control.
- A timekeeping system that identifies employees' labor by intermediate or final-cost objective.
- A labor distribution system that charges direct and indirect labor to the appropriate cost objectives.
- Interim (at least monthly) determination of costs charged to a contract through routine posting of books of accounts.
- Exclusion from costs charged to government contracts of amounts that are not allowable in terms of FAR 31, Contract Cost Principles and Procedures, or other contract provisions.
- Identification of costs by contract line item and by units (as if each unit or line item were a separate contract) if required by the proposed contract.
- Segregation of preproduction costs from production costs.

Although they may seem overwhelming, a small business can meet these requirements without implementing a complex compliance organization. Many small companies can use accounting software such as QuickBooks and still meet the criteria. For most, the establishment of accounts within the system to accommodate direct, indirect, and unallowable costs is required. Training is also very important. Employees will need to understand these regulations to a certain degree and be responsible for charging their time appropriately as well as potentially reviewing expense reports and identifying the amounts that are unallowable pursuant to FAR Part 31. A contractor may also consider establishing a separate division or entity to execute Federal contracts if it makes sense. This isolates the compliance requirements for the rest of the organization and will enable maximum cost recoverability in the new entity if the right policies and procedures are enacted.

One of the most pressing concerns for small businesses is cash flow and profitability. Federal contracts require the organization to accurately project costs for the foreseeable future in proposals, specifically fixed price or T&M. It is important to assess the compliance requirements both presently and in the next few years so that these costs can be included in the forward-pricing rates or other direct-cost projections.

As contractors continue to grow, other requirements and system reviews may become an issue. These include the Cost Accounting Standards and DCAA audits of 10 systems including purchasing, billing, and compensation among others. This typically would not be a concern for most small businesses, but may quickly become relevant depending upon growth. With decreasing Federal spending, organizations should focus on the viability of the sale to an Agency and not on the compliance requirements. Through the implementation of policies and procedures, these requirements are not only manageable, but easily achieved in most organizations that are able to adapt. ❒

About the Author: Eric Sobota, Managing Director, BDO USA, LLP, consults with government contractors on a wide range of business issues and regulatory compliance matters, including cost allowability and allocability matters, indirect rate structuring issues, cost accounting matters, GSA and other commercial procurements and DCAA approved system implementations and management. He has also been admitted to the GAO as a cost expert on many bid protest matters. He may be reached at esobota@bdo.com or 703-770-6395.

Government Contracting

RECENT DECISIONS UNDERSCORE THE IMPORTANCE OF TIMELY AND PROPER SUBMISSION OF CLAIMS

By Brian F. Wilbourn

The majority of claims arising under contracts with the federal government are governed by the Contract Disputes Act (CDA) and related provisions of the Federal Acquisition Regulation (FAR). Under the CDA, as implemented by FAR § 33.206, claims, whether asserted by contractors or the government, must be submitted or issued "within 6 years after accrual." While this six year period is seemingly forgiving, several recent decisions from the Court of Federal Claims and the Armed Services Board of Contract Appeals (ASBCA) have expounded upon when a claim "accrues" under the CDA, and have highlighted the importance of timely and proper submission of claims.

Sikorsky Aircraft Corp. v. United States, 105 Fed. CL. 657 (2012), involved a government claim against a contractor for violation of cost accounting standards. The contractor's cost

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accounting practices had been disclosed to the Government in 1999, but the Government did not issue a claim until 2008. While the *Sikorsky* Court did not ultimately determine whether the Government's claim was untimely, the decision, which rejected the Government's motion for summary judgment, is important in that it expounded on the standard for claim accrual. Specifically, the Court explained that "accrual of a claim means the date when all events, that fix the alleged liability … and permit assertion of the claim, were known or should have been known." Significantly, the Court went on to suggest that a claim may accrue once events have transpired and a party has enough information to conduct further inquiry into whether it has a potential claim.

TMS Envirocon, Inc., ASBCA No. 57286 (2012), involved a contract for the replacement of water piping at Langley Air Force Base. During the course of performance, the prime contractor and its subcontractor identified numerous differing site conditions and submitted several letters and change order requests to the Government. In response, the Government allegedly advised the contractor that it could submit its claims after contract completion, at which time they would be "mature and final." Prior to contract completion, on March 17, 2004, the contractor submitted a request for equitable adjustment (REA) related to the differing conditions. The Government rejected the REA, which had not been certified as a claim, and further delays in the submission of a formal claim ensued due to litigation between both the contractor and the Government, and the contractor and its subcontractor. Ultimately, the contractor submitted another REA on March 8, 2010, and a certified claim on March 30, 2010. The Government rejected the certified claim and the contractor appealed to the ASBCA. The ASBCA dismissed the appeal, holding that at the very latest, the contractor's claim had accrued by March 17, 2004, and that the March 30, 2010 claim was therefore untimely. Moreover, the board held that neither the March 17, 2004 REA nor the March 8, 2010 REA were sufficient to constitute a claim under the CDA, even if they had been timely submitted.

Similarly, in *Boeing Co.,* ASBCA No. 57490 (2012), the ASBCA rejected a Government claim as untimely. There, the contractor submitted a Cost Accounting Standards Disclosure Statement providing that it was revising its accounting practices. Based on a DCAA audit, by letter dated September 17, 2003, the contracting officer notified the contractor that the accounting change was not desirable and that the Government would not bear the resulting increased costs. More than six years later, on October 25, 2010, the contracting officer issued a final decision demanding increased costs attributable to the accounting change. In dismissing the Government's claim, the ASBCA held that at the latest, the claim had accrued by September 17, 2003, and that the October 25, 2010 claim was therefore untimely.

For contractors, the significance of these decisions is two-fold. First, it is critical that contractors understand that as soon they know or should have known of the events giving rise to a potential claim, the clock begins ticking on the limitations period for the submission of claims. While it is often preferable to attempt to resolve disputes without the submission of a formal CDA claim, during intervening administrative steps or informal settlement negotiations, contractors must keep the limitations period in mind in order to ensure that claims are filed well before they become time-barred.

Second, in both *TMS Envirocon* and *Boeing*, in order to avoid the effect of the expired limitations period, the claimants argued that submissions such as letters or REAs, which were submitted within six years of when the claim accrued, constituted claims under the CDA. In both cases, these arguments were rejected, as the board held that these submissions were not sufficient to constitute claims under the CDA. Accordingly, once a contractor determines that a claim is to be submitted, it is critical that the claim submission comply with the requirements of the CDA and the FAR. Generally, this means that the contractor's claim should not only be timely, but should: (i) be submitted in writing to the contracting officer; (ii) definitively state the amount sought; (iii) provide enough supporting information to enable the contracting officer to undertake a meaningful review of the claim; (iv) request a final decision from the contracting officer; and (v) include the certification required by FAR § 33.207 if the claim exceeds $100,000.

In sum, in order to ensure that they preserve their rights with respect to prospective claims, contractors must be aware of when such claims accrue and when they will become time-barred, and must timely and properly submit their claims in accordance with the requirements of the CDA and the FAR ❐.

About the Author: Brian Wilbourn, an associate with PilieroMazza, focuses his practice in the area of government contracts law. Mr. Wilbourn counsels clients in a broad range of contract disputes, with a focus on Contract Disputes Act claims and construction litigation. He may be reached at bwilbourn@pilieromazza.com.

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Attorney in the Spotlight

PATRICK T. ROTHWELL

Patrick Rothwell is an associate in our Government Contracts Group working closely with partners Pam Mazza and Jon Williams. What Patrick finds most interesting about his work is the incredible diversity of issues that our government contractor clients bring to the firm. And naturally, the most rewarding aspect is being a part of the solution.

Although Patrick calls Chapel Hill, North Carolina home, his family's roots are firmly grounded in Washington, D.C. After graduating from the University of North Carolina with a bachelor's degree in religious studies, Patrick headed to the District and began his legal career as a paralegal with a large law firm. Intrigued by the ins and outs of the legal world, Patrick went from there to Catholic University of America where he earned his Juris Doctorate at the Columbus School of Law. After law school Patrick clerked at the Court of Federal Claims for Judges Edward J. Damich and Mary Ellen Coster. There he discovered the world of government contracts law and his professional niche.

Patrick is an avid reader of history and biographies with a strong leaning to the Tudor and Stuart periods of English history. Like many a Washingtonian, Patrick avidly follows Washington Nationals baseball and has high hopes for the 2013 season.

To learn more about Patrick's professional credentials, visit his attorney page at www.pilieromazza.com. He may be reached at prothwell@pilieromazza.com. ❒

Seminars and Events

National Native American 8(a) Conference, January 28-29, 2013, Cabazon, CA - Tony Franco is speaking at this event.

GovConNet Institute - Training for Government Contractors, February 8 - Arpil 12, 2013, Rockville, MD - PilieroMazza is an event sponsor.

2013 MTA CEO Roundtable Small Business Sustainability Briefing on Capitol Hill, February 13, 2013 - Pam Mazza is speaking at this event.

Veterans in Business Conference, March 21, 2013 - Jon Williams is speaking at this event. PilieroMazza is an event sponsor.

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