LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Small Business

MORE SMALL BUSINESS SUBCONTRACTING PLAN CHANGES: SBA PROPOSES TO ALLOW SUBCONTRACTING PLAN CREDIT FOR SMALL BUSINESS SUBCONTRACTORS AT ANY TIER

By Katie Flood

Following recent proposed changes to the FAR's small business subcontracting plan requirements, on October 6, 2015, SBA issued its own Proposed Rule, which will allow prime contractors to take subcontracting plan credit for small business subcontractors performing at any tier. The Proposed Rule implements directives passed by Congress in the National Defense Authorization Act for Fiscal Year 2014.

Under the current regulations, prime contractors are only allowed to take small or socioeconomic goaling credit for those subcontractors performing at the first tier level. The proposed changes will allow prime contractors with individual (i.e., contract specific plans) subcontracting plans to receive credit towards their small business subcontracting goals for subcontract awards made to small businesses at any tier. As a result, the lower tier subcontracting performance will need to be incorporated into the prime contractor's goals. The Proposed Rule will not change the status quo for contractors that hold commercial plans or a comprehensive (master) subcontracting plan – these contractors will still only be allowed to take goaling credit for awards made at the first tier.

Under the Proposed Rule, lower tier subcontractors (except small business concerns) will still be expected to implement their own subcontracting plans when the subcontracting threshold amounts are met (those subcontractors who receive subcontracts in excess of $1.5 million in the case of a subcontract for the construction of any public facility, or in excess of $650,000 in the case of all other subcontracts). Additionally, SBA has clarified that subcontracting dollars are only to be reported once for the same award to avoid double and triple counting the dollars, notwithstanding the fact that a small business subcontract may be reported under more than one subcontracting plan. The Proposed Rule does not clarify how this will be accomplished or monitored.

In addition, where a prime contractor or subcontractor is required to have an individual subcontracting plan, the Proposed Rule will formalize their duties to actively monitor those plans. The prime contractor or the subcontractor will be required to review and approve subcontracting plans submitted by their subcontractors, monitor their subcontractors' compliance with the subcontracting plans, ensure that reports are submitted by their subcontractors, acknowledge receipt of subcontractors' reports, monitor subcontractor performance, and discuss subcontractor performance with subcontractors where necessary

In this vein, the Proposed Rule also requires that a subcontracting plan must contain a recitation of the types of records the prime contractor will maintain to demonstrate the procedures which have been adopted to ensure that subcontractors at all tiers comply with the requirements and goals in their respective subcontracting plans, including the establishment of source lists to identify small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by

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SUBCONTRACTING . . . . . .

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socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, and efforts to identify and award subcontracts to such concerns.

The Proposed Rule will also amend the size regulations to allow prime contractors to accept a subcontractor's electronic self-certification as to size, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size representations and certifications are accurate and complete. SAM certifications will count as a form of electronic submission.

Finally, and perhaps the most problematic aspect of the Proposed Rule, prime contractors will be required to issue a NAICS code and corresponding size standard for subcontract "solicitations," a requirement that may prove to be a practical hindrance. In its current form, the Proposed Rule says that "[t]he contractor must assign to the solicitation and the resulting subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract." (Emphasis added.) Of course, in practice, most subcontracts are not issued pursuant to a "solicitation," but result from informal partnerships or teaming arrangements. It is unclear whether the Proposed Rule will require prime contractors to issue solicitations for all subcontract opportunities, simply so a NAICS code may be assigned to it.

Comments on the Proposed Rule are due on December 7, 2015. While many of the proposed changes make sense, clarification is needed regarding how prime contractors should monitor reporting of subcontracting dollars and how the NAICS code solicitation requirement will practically work. If you have any questions regarding the Proposed Rule or would like to submit comments, please do not hesitate to contact us. ❒

About the Author: Kathryn V. Flood, an associate with PilieroMazza, practices in the areas of government contracts, small business administration programs, business and corporate law, and litigation. Ms. Flood counsels clients in a broad range of government contracting matters, as well as Administrative Procedure Act actions and complex civil litigation in federal forums. She can be reached at kflood@pilieromazza.com.

Labor and Employment Law

MASTERING PRICE ADJUSTMENTS FOR INCREASES IN THE CONTRACTOR MINIMUM WAGE

By Nichole D. Atallah

The Department of Labor (DOL) recently announced that the applicable minimum wage rate to be paid to workers performing work on or in connection with Federal contracts covered by Executive Order 13658 (the "Order") will increase from $10.10 to $10.15 per hour beginning January 1, 2016. The intent of the Order was not that contractors would have to bear the increase but that they would be eligible for an adjustment to their contract price based on the resulting increase in wages. In preparation for the wage increase, it is important to understand the FAR requirements for submitting a price adjustment to the contracting officer.

FAR 52.222-55 implements the Order and applies to most prime contractors and subcontractors who received "new" federal contracts after February 13, 2015, and employ hourly, non-exempt workers. It also applies to those working "in connection with" a federal contract, but who are not necessarily billed to or working directly on contract deliverables, as well as to unionized employees that are being paid at rates below the required minimum pursuant to a collective bargaining agreement. If the Order is applicable to a contractor, the contractor must pay at least the prescribed minimum wage or, if applicable, the wage rates required by the Service Contract Act or the Davis-Bacon Act, whichever is higher. If the prescribed wages increase during the term of the contract, the contractor may request a price adjustment only after the effective date of the new applicable rate, in this case on or after January 1, 2016.

To facilitate an adjustment, it is important that contractors understand the amounts eligible to be included in a price adjustment request and which documents may be helpful in supporting the request. Calculating the adjustment due is not as simple as taking the difference between the old rate and the new rate, doing some math and then adding general administrative costs, overhead and/or profit. Like price adjustments under the Service Contract Act, contractors must look at the hourly rate they are currently paying each employee, compare it to the newly issued rate and determine if the labor costs will increase as a result of the change.

For example, if a contractor is currently paying an employee $10.25 per hour, there will be no increase in labor costs because the new rate issued by the DOL is $10.15 per hour, below that which the contractor is currently paying. However, if the contractor is paying $10.10 per hour, labor costs will increase by $.05 per hour as a result of the DOL's change in the minimum rate. In this example, the contractor would be entitled to an adjustment of $.05 per hour.

In addition to the actual labor hour increase, the contractor may include in the adjustment request associated labor costs as a result of changes in social security and unemployment taxes, and workers' compensation insurance. However, a contractor may not request adjustments for general administrative costs, overhead and/or profit. It is best to include a description of how the adjustment amount was calculated to ensure that the contracting officer can easily understand the basis. Contractors should also be prepared to submit calculations and other documentation that support the amounts requested. Being proactive and clear with respect to increased labor costs will decrease the likelihood that the contracting officer will reject your request and delay the contractor's receipt of payment.

Prime contractors should be aware that they are ultimately responsible for subcontractor compliance and may be held liable for a subcontractor's failure to pay at least the required minimum rates. Likewise, subcontractors are also entitled to an adjustment and prime contractors are required to consider any such subcontractor requests. To avoid conflicts over payment or rate adjustments, contractors must ensure their subcontracts anticipate a process for any claims or adjustment requests. Prime contractors may want to include language committing to pass through such requests to the government client and make payment or rate changes contingent upon approval and payment by the government client. Subcontractors, on the other hand, may want to ensure that the prime contractor is obligated to take all reasonable and expedient measures to pass through and assist in processing of the request.

For contractors whose employees are entitled to at least the prescribed minimum wage, it is critical to understand which employees are entitled to increases, and when, and to submit clear and accurate requests for adjustment to minimize any preventable delays. Many times price adjustment requests are unnecessarily denied because the contracting officer cannot verify the contractor's entitlement to the adjustment based on the information submitted. While this is not always the case, contractors who understand the FAR requirements and submit clear and concise calculations and supporting documentation have a greater likelihood that the adjustment will be processed without issue. When a contracting officer rejects a price adjustment request, the contractor may want to consider informally negotiating with the contracting officer to provide additional information or moving toward a formal claims process. ❒

About the Author: Nichole Atallah, an associate with PilieroMazza, primarily practices in the areas of labor and employment law and general litigation. Ms. Atallah 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 natallah@pilieromazza.com.

Attorney in the Spotlight

Julia Di Vito just celebrated her one-year anniversary as an associate at PilieroMazza—and with it came many victories for our clients in both government contracts and litigation matters.

Born in Los Angeles and a native of Yorktown, VA, Julia attended the University of Virginia earning Bachelor degrees in English and Italian in 2008. She graduated from Wake Forest University School of Law in 2011.

Her initial goal was to utilize her Italian degree and work in international law. However, Julia found her calling while working in the world of litigation. Advocating on behalf of clients, persuasive writing and performing research were all things that made litigation a perfect fit for Julia. But she did not stop there. Julia added government contracts law to her portfolio when joining PilieroMazza. The specialized nature of bid protests, small business regulations, and other aspects of government contracts provide a new dimension to her work.

What Julia likes most about PilieroMazza is the camaraderie, collaboration and dedication among the firm's attorneys and staff, all of which she attributes to be a major factor in positive results for our clients. She is excited that every day for her is different, and the unexpected issue popping up is an expected occurrence. She prefers it this way.

Julia loves to be active, whether it is training to run her ninth half-marathon, or when she bikes to work from her Washington, DC home. She roots for the Washington Nationals and attends one of their games at least every other week. A look into her office corroborates her love of the team—Julia has a growing collection of 10th anniversary Nationals bobble heads. She hopes to soon snag all five. Julia can be reached at jdivito@pilieromazza.com.

GUEST COLUMN

The Guest Column features articles 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.

HAPPY NEW YEAR!

By Mark Burroughs and Bill Walter, Partners
Dixon Hughes Goodman LLP

As we begin the new fiscal year, government contractors need to identify risks that affect both revenue and costs. The unsettled federal budget creates uncertainty for revenue. On the other hand, changes in DCAA and DCMA practices create the certainty of additional costs that should be considered when preparing your forecast for the coming year.

Risks to Revenue

A government shutdown is still possible. There was a slight reprieve entering FY2016 with a continuing resolution extending the 2015 budget. However, the extension is only temporary, lasting until December 11, 2015. Unless Congress passes a budget or another continuing resolution, a risk of another shut down remains. A government shutdown was once unthinkable. Now the threat of a shutdown has become an annual ritual. With no budget in place, no new programs can be awarded and only essential government employees can report to work.

A shutdown can have effects beyond immediate programs. The inability of government employees to report to work can lead to secondary issues. For example, despite having a fully funded program, Sikorsky was forced to shut down its helicopter production line. They had to lay off 2,000 employees. Why? The government's inspectors were deemed non-essential and were not able to inspect the ongoing helicopter production which resulted in a need to shut down the facility[1].

To mitigate negative impacts, a company should consider the following steps to address potential impacts that could result from a December 11 shutdown:

1. Evaluate contracts, subcontracts, and task orders to understand funding requirements.
2. Evaluate contracts, subcontracts, and task orders to understand ability to perform without access to government facilities or employees.
3. Communicate with Contracting Officers (COs) and Primes to discuss potential steps to alleviate impact.
4. Develop plans for potential work stoppages.
5. Communicate with employees and subcontractors regarding potential impacts and steps to consider.
6. Be proactive! Develop plans for developing requests for equitable adjustments and potential claims.

Sequestration is still the law. The budget Super Committee put in place budget cuts once considered too draconian to be practical where if spending was above specified limits across-the-board cuts are put in place. Previous congressional and presidential 2016 budgets were all above the imposed sequestration cap. If this pattern continues, a budget passed by December 11 can trigger across-the-board cuts that could be enforced in January 2016. With these across-the-board cuts, companies should anticipate reductions in scope or partial terminations of contracts. Contractors must consider plans for dealing with either.

Other trends in 2016 can affect revenue and profits. We see a trend toward simplified acquisition procedures, which drives down the size of the awards to less than $150,000. Also, the government appears to be continuing to push for Low Price Technically Acceptable, which drives down profits. Incumbency has turned from an advantage to a liability. We see the potential for a ten-year high in incumbents losing contracts.

Risks of Additional Oversight Costs

Government oversight continues to increase and become more expensive to companies. DCAA's priorities are shifting. First, DCAA's 2016 Plan identifies that business systems will be the focus of a significant number of auditor hours this coming year. This additional work puts a greater burden on the contractor and increases the DCAA workload. Second, DCAA's backlog and delays continue to push the boundaries of the Statute of Limitations. DCAA is now pushing to catch up. The result is rushed audits with incomplete or inaccurate findings that rely less on judgment and more on strict contract compliance. As a result, we can expect greater focus and a need to incur additional costs to support:

- Business system audits
- Incurred cost audits
- More questioned costs issues and audit challenges.

[1] "Connecticut-Based Sikorsky Plans 2,000 Layoffs Due to Government Shutdown," *The Daily Voice*, October 2, 2013.

The focus of many contractors may need to shift from the DCAA to the DCMA to deal with negative DCAA audit reports. The interagency conflict between DCAA and DCMA, which began in 2009, appears to continue and often the contractor is caught in the middle. Many entities still feel the effects of the DCAA mission change. In 2009, DCAA shifted from advisory role to the CO to becoming the watchdog for the taxpayer. The result is a bigger chasm between the contractor and the auditor as a direct result of increased frequency and amount of questioned-cost issues and DCAA recommendations to disapprove contractor's business systems.

DCAA continues to be more aggressive. DCAA continues to have direct access to the Inspector General (IG) in cases where their findings are not supported. As a result, during an audit you may expect minimal support from your customer or CO, who prudently wish to avoid a confrontation with DCAA and the IG.

Do not underestimate the effects of DCAA's changed mission. Although DCMA is the decision maker, the advisor, DCAA, often has greater influence in determining pricing values. Unfortunately, the measure of value does not come from results in the field as determined by the customer; rather, value is strict contract compliance determined by DCAA audits. At the same time, the reduced interaction between the customer, CO and contractor typically lessens the real value.

Today, more than ever, our strongest piece of advice is that the most important step the contractor can take is to read the contract. You need to understand that the DCAA judges value and compliance solely by the contract. Here is a typical scenario. Your contract calls for a senior engineer with a BS, a Master's degree, and ten years' experience. You deliver a senior engineer with a BS and 25 years' experience. Your customer loves your engineer and the product is exceptional. DCAA will determine that the person providing the service is not qualified to perform because your engineer's credentials (i.e. no Master's degree) do not match precisely the text in the contract. In addition to reading and understanding the contract, you need to document verbal discussions and agreements, scope changes and other requests.

As we move into FY2016, we can prepare to face uncertain revenues and increased costs. When faced with uncertain revenue, the temptation is to cut costs. You need to resist the temptation to cut costs that put you at greater risk for non-compliance as defined by a more aggressive DCAA. ❐

About the Authors: Mark Burroughs and Bill Walter are partners at Dixon Hughes Goodman, a public accounting firm headquartered in Charlotte, NC. They can be reached at Mark.Burroughs@dhgllp.com and Bill.Walter@dhgllp.com.

Litigation

IF YOU SNOOZE, YOU MAY LOSE – BE MINDFUL OF THE STATUTES OF LIMITATIONS IF YOU INTEND TO ENFORCE YOUR RIGHTS IN A COURT OF LAW

By Paul Mengel

Let's say you are a company performing on a contract and a dispute arises with regard to a payment. You insist that you have fully performed, but the client disagrees and refuses to pay all or a portion of what you contend you are due. Or perhaps you are a subcontractor who has performed and are awaiting payment under the terms of a "pay when paid" contract, but payment has not been forthcoming, despite the fact that you know the prime contractor has been paid by the client. And further assume that both of these failures to pay are breaches of the underlying contracts, but you continue to perform, with the intent to resolve the dispute "at the end of the day," perhaps by way of a mediation provision in the contract. Another possible scenario: your company has been bad-mouthed to potential clients by an over-served competitor at a convention, and you are convinced that the slanderous comments caused you to lose out on an opportunity.

You need to be aware that there is an invisible clock that is ticking away, and it started at the moment of the non-payment, or at the time of the slander. That clock is going to continue to tick, absent an express written (tolling) agreement between the parties. And on a date in the not-too-distant future, your right to sue for your damages is going to vanish, forever. This article is designed to make you mindful of statutes of limitations in general, and some that are specific to the Maryland-DC-Virginia area, so you will remember to mark your calendar with these critical, and absolute, deadlines.

Statutes of limitation date back thousands of years, to the times of Roman Law, and arose from the desire to provide for a reasonably limited period of time within which a legal action can be brought, which, among other things, protects defendants from defending stale claims. The Europeans incorporated such statutes into their legal systems, and thus they found their way into U.S. law. By definition, these are statutes, meaning they are enacted by the legislature of the states. As a result, unlike federal laws whose requirements apply uniformly to all states, statutes of limitations can, and do, vary from state-to-state. And being statutes, in the

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888 17th Street, NW, 11th Floor, Washington, DC 20006

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IF YOU SNOOZE . . .

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absence of a circumstance that cause the running of the statutes to be put on hold, or "tolled," a court is powerless to extend them once the date has passed.

As a result, companies whose contracts contain choice-of-law provisions, and those that may be performing in several different states under contracts that do not contain such provisions, need to be mindful of the particular state statute that will control how long they will have to file suit in the event or a breach or other cause of action, such as slander, libel, or fraud. Sometimes ascertaining the applicable statute of limitations is not as simple as referring to the underlying contract, as the document may be silent on that term, thus requiring an examination of the facts related to place of performance, or place of execution of the contract, in order to make that determination. In such instances it is especially important to confer with counsel promptly, in order to ensure that the drop-dead date for filing an action is calculated and noted for future reference.

Some examples of commonly-encountered limitations periods are as follows (all stated in years):

- Breach of written contract: VA: 5; DC: 3; MD: 3 (all run from the date of the breach).
- Breach of oral contract: VA: 3; DC: 3; MD: 3 (all run from the date of the breach).
- Fraud: VA: 2; DC: 3; MD: 3 (from the date when discovered, or should have been discovered).
- Libel/slander: VA: 2; DC: 1; MD: 1 (from the date of the libelous/slanderous act).

The foregoing briefly illustrates the variance in statutes of limitation from state-to-state, and reiterates the importance of being mindful on the provisions in your contracts and the execution and performance factors that can determine when your right to bring an action will be extinguished. And remember that statutes of limitation are "deadlines" in the truest sense: once the date to file has come and gone, if you have not preserved your right by filing suit, your claim is dead. So make note of the applicable provisions, act diligently in the event of a breach or other wrong you have suffered, and contact counsel early on if you have any question about the date by which you must act, or be forever barred from doing so. ❐

About the Author: Paul W. Mengel III, counsel with PilieroMazza, leads the Litigation Group. He is a seasoned trial attorney with a broad range of experience in all aspects of civil litigation as well as complex commercial disputes. He can be reached at pmengel@pilieromazza.com.