



Weekly Report for March 23, 2018

## **GOVERNMENT CONTRACTING**

### **McCaskill Pushes the Department of Homeland Security to Hold Government Contractors Accountable for Waste, Fraud, and Abuse of Taxpayer Dollars**

According to an article on [hsgac.senate.gov](http://hsgac.senate.gov), U.S. Senator Claire McCaskill, the top-ranking Democrat on the Homeland Security and Governmental Affairs Committee, is calling for answers after a recent [report](#) from the Department of Homeland Security Office of Inspector General highlighted problems with the department's Suspension and Debarment Program. The program is tasked with penalizing contractors that have engaged in waste, fraud, or abuse on previous projects.

### **Senate Sends Shutdown-Averting \$1.3 Trillion Spending Bill to Trump's Desk**

According to an article on [govexec.com](http://govexec.com), the Senate early March 23<sup>rd</sup>, passed a \$1.3 trillion funding package to set spending levels at every federal agency, sending the measure to President Trump for his signature. The vote took a dramatic turn as several senators threatened to hold it up and risk a shutdown, but they ultimately abandoned their symbolic efforts. The bill allocates \$63 billion more for domestic agencies than they would have received under previous spending caps thanks to a two-year budget deal President Trump signed into law earlier in the year. Agencies are operating under their fifth continuing resolution of fiscal 2018, which is set to expire March 23<sup>rd</sup>, 2018 at midnight.

## **DEPARTMENT OF DEFENSE**

### **Defense Federal Acquisition Regulation Supplement: Amendment to Mentor-Protégé Program (DFARS Case 2016-D011)**

The Department of Defense (DoD) issued a final rule amending the Defense Federal Acquisition Regulation Supplement to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that provides amendments to the DoD Pilot Mentor-Protégé Program. Section 861 of this rule provides several amendments to the DoD Pilot Mentor-Protégé Program, including new reporting requirements for mentor firms to provide supporting information to DoD's Office of Small Business Programs for decisions regarding continuation of particular mentor-protégé agreements. In addition, Section 861 adds new eligibility criteria; adds limitations on a protégé firm's participation in the Program; adds new elements to mentor-protégé agreements; and extends the program for three years to September 30, 2021. For more visit [83 Fed. Reg. 12683](#).

## **SMALL BUSINESS ADMINISTRATION**

### **Small Business Size Standards; Alternative Size Standard for 7(a), 504, and Disaster Loan Programs**

SBA is seeking public input to assist in establishing a permanent alternative size standard for its 7(a) and 504 Loan Programs. SBA also invites suggestions on sources of relevant data and information that SBA should evaluate in developing a permanent alternative size standard and assessing its impact. Finally, SBA also seeks input from interested parties on a potential proposal to apply the permanent alternative size standard as an alternative to using industry based size standards for small business applicants under its Economic Injury Disaster Loan Program. For more visit [83 Fed. Reg. 12506](#).

## **OFFICE OF MANAGEMENT AND BUDGET**

### **Lawmaker Pushes for OMB to Release Agency Downsizing Plans Now**

According to an article on [Govexec.com](#), a House overseer has renewed calls for the White House to release agencies' plans to downsize and reorganize, which were due last September to the Office of Management and Budget (OMB) but have been kept private as "deliberative" documents. In a letter on March 23<sup>rd</sup>, House Representative, Elijah Cummings, D-Md., the ranking member of the House Oversight and Government Reform Committee, argued that the reorganization plans are final and are already being implemented. He asked OMB Director Mick Mulvaney to reverse his decision to classify the plans as "deliberative" in light of the fact that the White House's fiscal 2019 budget proposal was completed and released last month.

### **GSA and OMB Finalize Joint Implementation Plan for Commercial e-Commerce Portal Program**

According to a news-release on [gsa.gov](#), the U.S. General Services Administration (GSA) and the OMB have issued their joint implementation plan for the 2018 National Defense Authorization Act Section 846 *Procurement Through Commercial e-Commerce Portals*, which directs GSA in consultation with OMB, to establish a program to procure commercial products through commercial e-commerce portals. The implementation plan satisfies phase one of the legislation. To inform the development of the implementation plan, GSA and OMB engaged industry stakeholders throughout the process, including hosting a public industry day with more than 200 in-person and more than 300 virtual attendees from a wide array of stakeholder groups. GSA also reviewed and incorporated key best practices from industry and engaged with several federal agencies to better understand their perspectives.

## **U.S. SUPREME COURT**

### **Opinion analysis: A "nexus" requirement for the tax code's obstruction felony**

In the case *Marinello v. United States*, the Supreme Court ruled yesterday in a 7-2 decision that the federal government must prove a "nexus" between a particular administrative proceeding and a taxpayer's conduct to secure a conviction under the "omnibus clause" in Section 7212(a) of the Internal Revenue Code, which makes it a felony "corruptly or by force" to "endeavor to obstruct or impede the due administration of this title." The proceeding, such as an investigation or audit, must be pending when the taxpayer's alleged obstruction occurs "or, at the least," must have been "then

reasonably foreseeable by the defendant.” For more information, please visit [tax.thompsonreuters.com](http://tax.thompsonreuters.com).

## **LABOR AND EMPLOYMENT**

### **Rollback of Obama NLRB's Legacy Hits Speed Bump**

According to an article in Law360.com, allegations that National Labor Relations Board (NLRB) members are biased against unions or employers are nothing new and usually don't gain much traction, but the recent withdrawal of a landmark ruling because of perceived conflicts stemming from NLRB member Bill Emanuel's Big-Law background shows that such concerns may hamper the Trump NLRB's efforts to undo President Barack Obama's pro-labor legacy. Though it will likely have little effect on the board's handling of run-of-the-mill labor complaints, NLRB Inspector General David Berry's finding that Emanuel's work at the former firm, Littler Mendelson PC, should have disqualified him from voting to overturn the Obama-appointed board's joint employment theory in December's Hy-Brand Industrial Contractors decision suggests he and nominee John Ring, of Morgan Lewis & Bockius LLP, may have to sit out more often in cases involving their former firm's clients, potentially slowing efforts to undo other pieces of NLRB precedent.

## **CAPITOL HILL**

### **Knight, Espaillat introduce accelerated payment legislation**

On Tuesday, March 20, 2018 Representative Steve Knight and Representative Adriano Espaillat introduced H.R. 5337, the Accelerated Payments for Small Businesses Act of 2018. This bill would require the government establish a goal of paying all small business contractors within 15 days of receiving a proper invoice. The bill also establishes a similar goal for government contractors that have small business sub-contractors. H.R. 5337 is cosponsored by House Small Business Committee Chairman Steve Chabot and Ranking Member Nydia Velázquez. For more information, please visit [knight.house.gov](http://knight.house.gov).

### **Fiscal Year 2019 Budget for Veterans' Programs and Fiscal Year 2020 Advance Appropriations Request**

On Wednesday, March 21, 2018, the Senate Committee on Veterans' Affairs held a hearing to consider the VA's 2019 fiscal year budget. Witnesses included VA Secretary David Shulkin and Veterans of Foreign Wars Legislative Director Carlos Fuentes. Archived video footage of the hearing can be viewed [here](#).

## **RECENTLY ISSUED GAO DECISIONS**

### **Award of Costs—Undue delay in agency's corrective action, Centurum, Inc., B-415070.2**

**(March 8, 2018):** The protester submitted a request for costs, arguing that the agency unduly delayed taking corrective action in response to a clearly meritorious protest ground. The protester filed its initial protest of the agency's solicitation under the OASIS program. Specifically, the protester argued that, since the OASIS program is limited to services that are “executive, administrative, or professional,” the requirement was beyond the program's scope because the agency's solicitation requirements consisted mainly of “blue collar jobs.” While the protest was under review and after the agency promised its Agency Report, the GAO attorney highlighted an issue in the agency's labor hour

estimates, and the agency decided to take corrective action. GAO granted the request for costs on the basis that the protester's first protest ground was clearly meritorious, and because the agency's corrective action was unduly delayed, given that the action was taken nearly two (2) months after the due date for the agency report. The protester sought costs associated with all of its protest grounds, and GAO found that, even though the second protest ground was not clearly meritorious, the protest grounds were not clearly severable as they arose from a similar core set of facts. To read the public decision, please visit [www.GAO.gov](http://www.GAO.gov).

## **PILIEROMAZZA BLOGS**

### **[ASBCA Confirms That It Has Jurisdiction to Entertain Fraud-Based Defenses](#)**

By Kathryn Kelley

The Federal Circuit's holding in *Laguna Construction Co. v. Carter* seemed, when the case was decided in 2016, to scale back the Armed Services Board of Contract Appeals' ("ASBCA") jurisdiction to entertain fraud-related defenses. 828 F.3d 1364. In that case, the government asserted a defense that Laguna could not recover in its claims because several of the company's officials had pled guilty to a kickback scheme involving those contracts. The ASBCA found in the Government's favor, relying on the guilty pleas as having established the underlying fraud. On appeal of that decision, Laguna argued that the ASBCA lacked jurisdiction to hear fraud-based defenses under the Contract Disputes Act.

### **[Cybersecurity Update—Round II](#)**

By Kimi Murakami

As part of our continuing effort to keep you updated with new developments relating to compliance with the Department of Defense Federal Acquisition Regulation Supplement 252.204-7012, this blog post provides a link to the long-anticipated template for a system security plan and other key information related to implementation of the security controls set forth in the National Institute of Standards and Technology Special Publication 800-171.