



Weekly Report for October 14, 2016

GOVERNMENT CONTRACTS

Implementing Category Management for Common Goods and Services

The Office of Federal Procurement Policy (“OFPP”) in the Office of Management and Budget (“OMB”) has proposed the issuance of a new OMB Circular, Implementing Category Management for Common Goods and Services, to codify category management, a strategic practice where Federal contracting for common goods and services is managed by categories of spending across the Government and supported by teams of experts. The Circular establishes key principles, and strategies and policies, roles and responsibilities, and metrics to measure success, [81 Fed. Reg. 69860](#). Comments are due on, or before, November 7, 2016.

Procurement of Commercial Items – Extension of Comment Period

The Department of Defense has proposed an amendment the Defense Federal Acquisition Regulation Supplement to implement sections of the National Defense Authorization Acts for Fiscal Years 2013 and 2016 relating to commercial item acquisitions. The comment period on the proposed rule is extended 30 days, from August 11, 2016 to November 10, 2016, [81 Fed. Reg. 70067](#).

DEPARTMENT OF LABOR

Procedures for the Handling of Retaliation Complaints

The DOL has provided the final text of regulations governing employee protection (retaliation or whistleblower) claims under section 1558 of the Affordable Care Act, which added section 18C to the Fair Labor Standards Act, to provide protections to employees who may have been subject to retaliation for seeking assistance under certain affordability assistance provisions or for reporting potential violations of the Affordable Care Act's consumer protections. This rule establishes the final procedures and time frames for the handling of retaliation complaints under section 18C, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (“OSHA”), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (“ALJ”) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board, and judicial review of the Secretary of Labor's (Secretary's) final decision. It also sets forth the Secretary's

interpretations of the Affordable Care Act whistleblower provision on certain matters, [81 Fed. Reg. 70607](#). This final rule is effective October 13, 2016.

SMALL BUSINESS ADMINISTRATION

Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

The SBA has proposed an amendment to the rules of practice of its Office of Hearings and Appeals (“OHA”) to implement Section 869 of the National Defense Authorization Act for Fiscal Year 2016. This legislation authorizes OHA to decide Petitions for Reconsideration of Size Standards and adds a provision to section 3(a) of the Small Business Act to authorize OHA to hear and decide Petitions for Reconsideration of Size Standards (Size Standard Petitions or Petitions). A Size Standard Petition may be filed at OHA after SBA publishes a final rule in the Federal Register to revise, modify, or establish a size standard. This proposed rule would create a new subpart I in OHA's regulations (13 C.F.R part 134) to set out detailed rules of practice for Size Standard Reconsideration Petitions, revise OHA's general rules of practice in subparts A and B of part 134 as required by the new legislation, and amend SBA's small business size regulations (13 C.F.R part 121) to include Size Standard Reconsideration Petitions as part of SBA's process for establishing size standards, [81 Fed. Reg. 69723](#). Comments to this proposed rule are due on December 6, 2016.

OTHER GOVERNMENT CONTRACTING NEWS

“DOD wants to limit size of protégé firms.” *Set-Aside Alert*. Oct. 7, 2016: 2.

The *Set-Aside Alert* reported new proposed DOD amendments requiring protégé firms to be less than half the size of its primary NIACS code for eligibility in the DOD's mentor-protégé program.

“Analysis: No Harm, No Fraud if U.S. Continues to Pay?” *Federal Contracts Report*. Oct. 2016: 361-384.

The Supreme Court in *Universal Health Svcs. Inc. v. United States ex rel. Escobar* (U.S. No. 15-7. 6/16/16) said successful false claims must meet a high materiality standard. Justice Clarence Thomas's four page materiality discussion suggested the government's payment of claims despite actual knowledge of a violated requirement with no change in the government's position can be construed as those requirements not being material. However, Barbara Taylor of Sheppard Mullin Richter & Hampton LLP suggested prior case law in district courts has consistently shown “that government knowledge is not a complete defense with respect to the element of falsity.”