LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Small Business

COURT OF FEDERAL CLAIMS INVALIDATES KEY COMPONENT OF THE SBA'S NONMANUFACTURER RULE

By Isaias "Cy" Alba

It has been the common understanding within the SBA, and the small business government contracting community as a whole, that the SBA's nonmanufacturer rule applies only to contracts for the provision of supplies (i.e., goods) and not to service contracts, regardless of whether or not such service contracts have a supply component. The SBA memorialized this understanding in a 2011 rulemaking. According to 13 C.F.R. § 121.406(b)(3), the nonmanufacturer rule does not apply to procurements that are assigned a services, construction, or specialty trade construction code.

The U.S. Court of Federal Claims (COFC) recently turned this common understanding about the nonmanufacturer rule on its head. In its September 19, 2014, decision in *Rotech v. United States*, COFC No. 14-502C (2014), the COFC invalidated 13 C.F.R § 121.406(b)(3). Specifically, the COFC found that the plain language of the nonmanufacturer rule in the Small Business Act indicates the rule applies to "any" supplies being procured via a small business set-aside contract. Thus, the COFC reasoned that "any" supplies means even those supplies procured as an ancillary part of a contract assigned a services or construction code.

In This Issue

As a result of the COFC's ruling in *Rotech*, small businesses must now comply with the nonmanufacturer rule for any supplies provided, even under a contract primarily for services. It is unclear how broad the reach of the decision could be but, in theory, it could have a massive impact on how small businesses perform federal contracts and how contracting officers solicit such contracts.

> ***It is unclear how broad the reach of the decision could be but, in theory, it could have a massive impact on how small businesses perform federal contracts and how contracting officers solicit such contracts.***

The nonmanufacturer rule requires eligible small businesses to meet requirements that are different from the standard limitation on subcontracting rules. Specifically, to qualify as a nonmanufacturer, a small business must:

1. Have 500 employees or less;
2. Be primarily engaged in the retail or wholesale trade and normally sell the items being supplied under the contract;
3. Take ownership or possession of the items being supplied with its own personnel or facilities; and
4. Supply the end item of a small business manufacturer unless the contracting officer obtains a waiver or a class waiver exists for the items being supplied.

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Based on *Rotech*, small businesses entering into service contracts where supplies are also being provided must apply this four-part test to the supply portion of the contract, in addition to meeting the standard performance of work requirements for the services portion of the project.

Further, contracting officers must now make a determination, prior to the issuance of any service contract where supplies are a component, as to whether a small business exists that can manufacture the supplies required by the contract. If there is a small business, the supplies being used under the service contract must come from a small business manufacturer. This means that, by way of example, an IT company providing certain computer components must provide components manufactured by a small business or it would be in violation of the rule and not qualify as "small" for the procurement. If there is no small business manufacturer for the supplies being used (i.e., say you need Cisco routers and no small business supplies the same or similar routers) then the contracting officer would have to check if the SBA has issued a class waiver to the nonmanufacturer rule for those items or whether a contract-specific waiver is required. If there is no class waiver, then the contracting officer will either have to issue the contract as a full-and-open procurement, likely excluding most or all small businesses, or he/she will have to prepare a written justification for the nonmanufacturer, contract-specific waiver and request said waiver from SBA. SBA will then review the issue, investigate whether any small businesses exist who manufacture the supplies requested, and then, if and only if, no small business exists, issue the requested contract specific waiver – thereby allowing small businesses to compete for the procurement. Thus, before even soliciting a service contact where supplies are required, the contracting officer will have to do substantial additional due diligence.

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Another major concern for small businesses, due to the COFC's ruling, is whether small business service contractors would ever be able to qualify as small under the nonmanufacturer rule at all because they are service providers, not companies "primarily engaged in the retail or wholesale trade" or "normally sell[] the type of item being supplied" as the rule requires. Thus, if an IT service provider is not "primarily engaged in the retail or wholesale trade" of routers, they just install them and service them, but a procurement requires routers to be supplied (regardless of how small a portion of the contract that supply actual is) the IT service provider would not be an eligible small business under the nonmanufacturer rule and would, thus, no longer qualify as "small" for the entire contract. This is clearly not what was intended by Congress when drafting the Small Business Act, but due to imprecise drafting, it is now how the COFC is forced to interpret the Act. This is extremely unfortunate and, unless and until the recent decision is limited through future legislation, this could have a major impact on small business service contractors. ❒

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PilieroMazza News

Join PilieroMazza and Dixon Hughes Goodman for a complimentary government contracting seminar on staying ahead of the competition in a turbulent fiscal environment. Featured speakers are PilieroMazza Partners, Pam Mazza and Jon Williams, and DHG Partners, Gregg Funkhouser and Mark Burroughs. Topics to be covered include:

- Rate Structure - The Current Environment and How to Deal with It
- DCAA Update - Executive Compensation, DCAA Audit Guidance
- Legal Update - Bid Protests, False Claims and the Presumed Loss Rule, Current Enforcement Cases
- SBA Update - Size Standards, status of pending rule-makings and implementation of the National Defense Authorization Act

Registration for this December 9, 2014 seminar will open in late October at www.pilieromazza.com.

AT THE CROSSROADS OF M&A AND GOVERNMENT CONTRACTS – THE NOVATION PROCESS

By Kimi N. Murakami

When making a strategic acquisition, the central goal of a government contractor is to buy the target company's government contracts. Transferring government contracts, however, is prohibited under federal law by the Anti-Assignment Act enacted in the mid-19th century. The policy behind this basic tenet of public contracts law is the premise that the government has selected a particular contractor through the procurement process and that contractor is the party who will perform the work.

Where a subsidiary (contract-holder) merges into a sister-subsidiary, for example, it is not crystal clear whether the transfer of the contract from the subsidiary to its sister entity falls within the "by operation of law" exception.

To allow for the assignment and transfer of contracts, the Federal Acquisition Regulation (FAR) provides a process known as a novation by which the government will give its consent and waive the prohibition of the Anti-Assignment Act. Through a three-party novation agreement, the government expressly agrees to the transfer of a government contract from one contractor, as transferor, to another, as transferee. Securing the government's approval to transfer a government contract is mandatory under the FAR. According to the regulations:

> If a contractor wishes the Government to recognize a successor in interest to its contracts or a name change, the contractor must submit a written request to the responsible contracting officer.

48 C.F.R. § 42.1203(a) (emphasis added). A determination to grant such permission is completely within the government's discretion based on their finding of whether it is within the government's interest. 48 C.F.R. § 42.1203(c); 48 C.F.R. § 42.1204(a).

The regulations provide that if there has been an acquisition of "all [of] the contractor's assets" or "the entire portion of the assets involved in performing the contract" then a novation is required. 48 C.F.R. § 42.1204(a). Therefore, when structuring the asset acquisition it is important that the purchase of the subject assets include all of the assets necessary to perform the government contract. The purchased assets cannot be comprised solely of the government contract. The acquired assets must include the tangible and intangible assets needed to perform the contract such as any employees, the licenses for intellectual property, and any financial resources. Limiting the assets to the government contract alone can present issues in the novation process when the purchase agreement is reviewed. If a transaction is structured as a stock acquisition, then a novation generally will not be required. According to the regulations:

> A novation agreement is unnecessary when there is a change in the ownership of a contractor as a result of a stock purchase, with no legal change in the contracting party, and when that contracting party remains in control of the assets and is the party performing the contract.

48 C.F.R. § 42.1204(b). In addition to stock transfers, novations will not be required when there has been a transfer of the government contract "by operation of law." This "by operation of law" exemption cannot be found in the FAR but is well established by case law. The classic examples that fall within this exception are transfers of government contracts that arise as a result of intestacy and bankruptcy. Generally, certain types of corporate transactions such as corporate mergers, consolidations, or reorganizations also fall within the "by operation of law" exception. Standard mergers of a subsidiary into a parent, for example, fall within the "by operation of law" exception and novation is not required. In such cases, the parent company will take full responsibility for the contact and there will be no change in the day-to-day operations of the performance of the work. The contract essentially continues with the same corporate entity.

Variations on the classic parent/subsidiary merger, however, can muddy the water. Where a subsidiary (contract-holder) merges into a sister-subsidiary, for example, it is not crystal clear whether the transfer of the contract from the subsidiary to its sister entity falls within the "by operation of law" exception. In such a scenario, it could be argued that no novation is required because the government will continue to receive the benefit of the same management and financial resources for which it bargained for originally.

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The government would not be subject in such a case to multiple claimants and a full novation should not be required because this would simply be a corporate reorganization. By permitting this type of reorganization without a novation there is no subversion of the goals the Anti Assignment Act set out to establish.

The documents required to be submitted to the contracting officer as part of the novation process include, among other things, a novation agreement, the legal documents effectuating the purchase or transfer of the contracts, certain financial information of the parties, confirmation of security clearances, consent of any sureties, and an opinion of legal counsel. The novation agreement provides that both the transferor and transferee will be responsible for the obligations and liabilities arising under the contract for the entire period of performance. This means that the parties should therefore make sure in the purchase agreement to provide for strong indemnification provisions to protect itself and to cover the period when the other party is performing the work.

When beginning the novation process, contractors should keep in mind that approval for the transfer of a government contract is completely within the discretion of the contracting officer.

The novation process itself requires patience. The regulations do not specify time deadlines that contracting officers must comply with when evaluating a request for novation. This process, therefore, can take an extended period of time. It is important in any M&A transaction that will require post-closing novations of government contracts, therefore, to include provisions in the purchase agreement to account for performance of the contract during the period from the closing on the sale to the final novation approval. These transition period provisions could include, for example:

- The parties agreement to enter into a subcontract where the purchaser will perform the work under the newly purchased contract as a subcontractor until the novation is approved and the purchaser becomes the prime contractor, or

- A rescission provision which will allow for the unwinding of the transaction if the novation is not approved within a certain period of time

When novation is not required, the assignment of a contract may require compliance with the FAR regulations for a change of name procedure. The name change process requires a shorter agreement and legal opinion together with the merger documents or charter amendments effectuating the change of name of the contract holder. Generally, the name change can be accomplished by the government much more quickly than the novation procedure.

When beginning the novation process, contractors should keep in mind that approval for the transfer of a government contract is completely within the discretion of the contracting officer. Contracting officers, while very familiar with government contracts, are sometimes less familiar with corporate transactional matters. For any type of anticipated transfer of a contract it is prudent to contact the contracting officer in advance and let them know about the transaction. If it seems that the transaction may fall within the "by operation of law" exception, for example, it may require a more detailed and fulsome explanation of the circumstances to the contracting officer as they may not be familiar with any procedure outside of the novation process (such as the name change procedure) and the contracting officer may not be aware that the "by operation of law" exception to the novation process even exists.

In addition to the many general issues that arise in connection with the novation of government contracts, there are specific issues that arise depending on other unique facts such as the type of transaction structure, (joint ventures, for example) or the type of contract vehicle (8(a) contracts require recertification, STARS II and GSA schedules have special circumstances). These and other issues will be addressed in the firm's webinar on November 4th at 2:00 p.m. when Cy Alba and I will be discussing novations and answering any questions you have. Please join us. ❒

About the Author: Kimi Murakami is counsel with PilieroMazza and focuses her practice on corporate transactions with an emphasis on mergers and acquisitions. She has experience advising on intellectual property matters including trademarks and trade secrets. She can be reached at kmurakami@pilieromazza.com.

MORE ABOUT THE WEBINAR

Confused about the novation process and what it would mean to your company should you sell or merge with another company? Cy Alba and Kimi Murakami will discuss the novation process and answer your questions.

Date: Tuesday, November 4, 2014
Time: 2:00 - 3:00 p.m. EDT
Location: Online webinar
Cost: Complimentary - Register on the Events page at www.pilieromazza.com.

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WHAT EVERY BUSINESS OWNER NEEDS TO KNOW ABOUT IMPLEMENTING THE NEW TANGIBLE PROPERTY REGULATIONS

By Eric Fletcher

Over the last several years, the IRS has published a series of regulations and rulings that dramatically change how taxpayers must account for the costs of acquiring, repairing, improving and even disposing of tangible property. These new rules represent some of the most significant changes in tax law since the Tax Reform Act of 1986 and they must be adopted no later than the tax year beginning on or after January 1, 2014. While these rules are intended to minimize confusion in determining which expenditures related to tangible property are allowable as immediate deductions and which expenditures must be capitalized and depreciated, there are still many complicated considerations in their application. Furthermore, because most of these new standards are being implemented as changes in accounting methods, the mandatory adoption requires the analysis of expenditures made in prior years, possibly extending 30 or more years into the past. Business owners who have not already begun this process should seek the advice of their CPA or tax advisors immediately in order to have time to properly plan for the implementation of the new rules.

How are the new rules adopted?

All businesses purchase tangible property. Tangible property includes materials, supplies, machinery, equipment, furniture, leasehold improvements and real property. Every business will need to change their accounting methods in order to reflect the final tangible property regulations. Unfortunately, this change, in most instances, cannot be applied simply by changing the way new expenditures are expensed or capitalized. In order to make a change in accounting method, the impact of the new rules on prior years must be determined and the resulting income or deduction must be included in taxable income in the year the accounting method is changed.

For example, suppose that a business made repairs in 2005 to the roof of a building that they own. At the time, the business determined that the cost of these repairs should be capitalized and depreciated over 39 years. Under the new rules, because the scope of the repairs was not a restoration, a betterment, an improvement, or an adaptation to a new use of the property, the costs are deductible in the year incurred. As such, the business is entitled to deduct the remaining undepreciated cost of the roof repairs in the current year as part of the change in accounting method.

Unfortunately, not all changes will result in deductions. Where a business expensed costs in prior years, under the new rules they must be capitalized and depreciated. The difference between the prior expense and the depreciation allowable up to the date of the adoption of the new regulation must be taken into income. Fortunately, the IRS allows income recognized from a change in accounting method to be spread over four taxable years.

While it may be tempting to continue business as usual and not make the required changes in accounting method to adopt the final tangible property regulations, this decision could be very detrimental. Failure to properly implement the new rules and calculate the impact of the change in accounting method may result in the loss of current and future tax depreciation or the potential write-off of previously capitalized expenses.

Reconsider the example of the roof repair previously capitalized, which is a deductible expense under the new regulations. If the business in this situation does not make the change in accounting method and claim the deduction it is entitled to, it may forfeit future depreciation deductions. If the business is audited by the IRS in a year past the statute of limitation for the year of the expenditure (generally three years), the IRS could disallow the depreciation deductions for the year under exam, all future years, and all years not closed by the statute of limitations. Because the original expenditure was made in a year beyond the statute of limitations for amending the return, a properly filed change of accounting method is the only way to claim the additional deduction for the undepreciated cost of the repairs. While many tax practitioners have become accustomed to almost benign neglect from the IRS with respect to the examination

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of fixed assets and depreciation in recent years, the IRS has clearly indicated that with the advent of the final tangible property regulations they plan to make these areas a significant part of examinations.

Making a change in accounting method requires that a taxpayer request permission from the IRS to make the change. This request is made by filing Form 3115. In some instances, permission must be received from the IRS before the change in accounting method can be adopted. Luckily, the IRS has provided automatic consent for the implementation of the new tangible property regulations. However, taxpayers must still file Form 3115 for each accounting method change and each activity. Most businesses will be required to file multiple 3115's in the year they adopt the new regulations. For example, if a business owns three different rental properties reported as separate activities, a separate 3115 must be filed for each change of accounting method for each of the separate rental property activities. Performing the analysis to determine the impact of a change in accounting method and accumulating the necessary support and documentation is a time consuming process. Due to the complications of the new regulations, a qualified CPA or tax professional should be engaged to assist the business with the process of implementation. Even with outside professional assistance, businesses should anticipate that a significant investment of internal time and resources will still be required to complete the project.

So what's the good news?

Despite the burden that implementing the new tangible property regulations places on businesses, they also present some potential tax saving opportunities.

- **De Minimis Safe Harbor Election**
  It is common practice for most businesses to expense items that fall under a certain cost threshold. Until now, there was no support for this practice under the tax law. The final tangible property regulations now provide a "*de minimis* safe harbor election" which allows taxpayers to follow this capitalization policy for tax as well as "book" accounting. Any taxpayer that prepares a "qualified audited financial statement" can deduct expenses for tax as well as book up to a limit of $5,000 per item or invoice, provided that they have a written capitalization policy in place to that effect as of the first day of the fiscal year. Taxpayers without an audited financial statement can elect to deduct expenditures up to $500 per item or invoice. In order to take advantage of the $5,000/$500 safe harbor, the taxpayer must apply the same policy for both tax and book purposes and file an annual election with their tax return. In addition to these safe harbor amounts, the regulations also address taxpayers utilizing a capitalization policy that deducts expenditures greater than the safe harbor amounts. The regulations indicate that such policies will be allowable provided they do not materially misstate income. The caveat for this expanded deduction is that upon examination, the burden lies with the taxpayer to prove to an examining agent that the deductions are not excessive.

- **Partial Asset Disposition Election**
  In the past, when a taxpayer replaced a significant component of an asset such as a roof, an HVAC unit, or the flooring in a building, they added the cost of the replacement as a new depreciable asset and began claiming depreciation deductions. The cost of the component that was replaced remained as part of the capitalized cost of the asset and continued to be depreciated over the remaining useful life of the asset. The final tangible property regulations provide that when a taxpayer capitalizes the cost for the replacement of a component of an asset, they can elect to write-off the remaining undepreciated cost of the replaced property. If the taxpayer cannot specifically identify the cost of the replaced component, the regulations go on to provide the taxpayer may utilize a reasonable method to allocate cost, such as rollback of the cost of the replacement using the Producer Price Index for the year the original asset was placed in service. The IRS allows taxpayers to make late partial asset disposition to claim deductions for components replaced in prior taxable years. However, the window for late partial asset disposition elections closes with the filing of the tax return for tax years beginning on or after January 1, 2014.

- **Routine Maintenance Safe Harbor**
  In the past, many taxpayers capitalized the cost of routine maintenance activities because of the size of the expenditure. Under the final tangible property regulations, taxpayers may adopt a routine maintenance safe harbor. The cost of cleaning, testing, inspecting and replacing worn components can be expensed provided the activities are expected to be performed more than once during the asset's depreciable class life, or within 10 years for buildings and their systems. Taxpayers can write-off the remaining undepreciated cost of routine maintenance capitalized in prior years as part of their change in accounting method.

The final tangible property regulations represent a seed change in the tax law that has far-reaching impact. Every business owner needs to be aware of this change and work with competent professional advisors to determine the impact of the new rules. The implementation process will be time-consuming and possibly involve additional costs, but with effective planning, may yield substantial tax saving opportunities. Whatever the impact of the new rules may be, good or bad, they must be properly addressed by all taxpayers before a tax return is filed for tax year 2014. ❒

About the Author: Eric Fletcher is a principal with Thompson Greenspon and has more than 19 years of public accounting experience as a tax professional. His expertise includes all aspects of tax and business planning including mergers and acquisitions, private equity, succession and estate planning, capital budgeting and investment analysis, as well as IRS representation. He can be reached at esf@tgccpa.com or 703-385-8888.

Labor & Employment Law

THE IMPACT OF THE FAIR PAY AND SAFE WORKPLACES EXECUTIVE ORDER ON CONTRACT PROCUREMENT

By Nichole Atallah

This year has ushered in numerous new labor requirements for federal government contractors. The new executive orders and regulations include new hiring standards for veterans and the disabled, disclosing pay data for all employees to the Office of Federal Contract Compliance Programs (OFCCP) and implementing a new minimum wage; all on top of the tangled web of existing labor regulations. It is exactly this complicated web of labor laws, and the associated compliance challenges, which makes The Fair Pay and Safe Workplaces Executive Order (Fair Pay EO), issued by the White House in July, so worrisome.

The Fair Pay EO introduces new pre-award "responsibility" determinations for contractors with federal contracts over $500,000 under a wide range of statutes including: the Service Contract Act (SCA), the Davis-Bacon Act (DBA), the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act; Title VII of the Civil Rights Act (Title VII); the Americans with Disabilities Act, the National Labor Relations Act, the new federal contractor minimum wage and state wage and hour laws, among others. Under the Fair Play EO, contractors are required to disclose any "administrative merits determination, arbitral award or decision, or civil judgment" rendered against it within the preceding three years with respect to various covered labor laws. The language of the Fair Play EO excludes civil settlements, likely because a civil settlement by its nature is not an admission of liability. These disclosures must be updated every six months. Should a contractor have even one violation, a contracting officer may deny a contractor the award as part of the responsibility determination. The contracting officer may also require contractors to take remedial measures to avoid future violations as a condition of award or continuing performance. Companies with federal contracts over $1 million dollars are additionally prohibited from requiring employees to enter into pre-dispute arbitration agreements.

There are also significant concerns regarding the Fair Play EO requirement to flow down the provisions to subcontractors. Given that contracting officers are unlikely to police subcontractor compliance, the Fair Play EO creates interesting questions about the extent to which a contractor is responsible for making responsibility determinations based on subcontractor labor violations and disclosures.

While the Fair Play EO clearly intends civil judgment and arbitral awards to be disclosed, it is unclear what type of action will be considered an "administrative merits determination." This is important because the Department of Labor (DoL) often resolves wage and hour claims through initial administrative action. Many employers decide to pay assessed back wages, regardless of whether they believe they violated the law, in order to avoid the cost of proceeding to an administrative hearing. It is unclear whether payment of an administrative determination at the investigatory level would necessitate a disclosure. However, if it does, contractors may well decide to litigate the case, as opposed to resolving claims with DoL early, because of the risk that such a determination could lead to the loss of contract opportunities.

The implementation of the Fair Play EO will require an extensive undertaking. DoL and agency labor advisors do not yet know how they will incorporate yet another level of bureaucracy into their already full workloads. In response to added uncertainty in the contracting environment and fair contract administration concerns, there are efforts underway to challenge the Fair Play EO and prevent it from being implemented. However, while certain aspects of the Fair Pay EO will likely be challenged, contractors cannot afford to risk non-compliance. The stakes are simply too high.

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The President directed the FAR Council to amend the FAR accordingly, with implementation expected in 2016. Assuming the FAR is amended by 2016, contractors need to be concerned about how they are handling labor violation complaints now as they will be required to disclose violations dating back to 2013. Whether the Fair Pay EO applies to your organization now or may in the future, you should take the following measures to prepare for its implementation:

1. Review internal labor compliance controls;

2. Evaluate current compliance with covered labor laws and determine areas of weakness, including employee classifications, overtime polices and auditing, and identifying SCA and/or DBA risks;

3. Identify any current arbitration agreements and evaluate their validity in spite of the Fair Play EO;

4. If you are currently involved in litigation, arbitration or agency investigations related to covered labor laws, you should carefully analyze how resolving the claim will impact contract procurement; and

5. Advocate for changes and/or elimination of the Fair Play EO before the FAR is amended by engaging the DoL, Congress and advocacy groups. ❒

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.

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