



Weekly Report for April 26, 2019

### **GOVERNMENT CONTRACTING**

As reported in a Government Executive [article](#), President Trump announced in a tweet that he intended to nominate Jovita Carranza, currently the Treasurer of the United States, to serve as Administrator of the Small Business Administration (SBA). Ms. Carranza worked as a Senate-confirmed deputy administrator at SBA during the George W. Bush administration and previously had a 20-year career at the United Parcel Service, ending as president of Latin America and Caribbean operations.

According to Bloomberg Law, the U.S. Army Corps of Engineers (USACE) will host an industry day on May 22, 2019, to identify potential partners to support its enterprise information management and information technology modernization efforts. USACE's goal is to acquire innovative, customer-focused, and cost-effective solutions to support its 39,000 users based in the United States and abroad at more than 1,500 sites and two data centers. Bloomberg Government projects this opportunity could generate \$250 million to \$500 million over five years.

According to Bloomberg Law, the Naval Facilities Engineering Command Engineering & Expeditionary Warfare Center (NAVFAC EXWC) is seeking 8(a) Program participants to provide a variety of information technology services in support of its offices both in the United States and overseas. The work will include systems development lifecycle support, cybersecurity support, business systems operations and support, IT operations management, and enterprise analysis and management services. The Navy intends to issue more than one indefinite-delivery/indefinite quantity, fixed-price and labor-hour contract, which will replace four existing contracts with a total value of \$125 million. The contracts will be for 60 months with an additional six-month option period. Awards will be limited to qualifying 8(a) companies.

According to Bloomberg Government, the Department of Defense is looking for a contractor to manage, develop, enhance, integrate, test, deploy, and maintain its Secure Unclassified Network, or SUNet. Bloomberg Government estimates the opportunity is worth about \$185 million over five years. SUNet was created as a platform for housing and sharing "For Official Use Only" information and related analysis with other agencies and partners. The contract, SUNet Infrastructure, will support SUNet and develop new requirements using commercial-off-the-shelf products and new data. Responses to the RFI are due on May 9, 2019, but Bloomberg Government reported that, in order to participate, contractors must submit security clearance information to the contracting officer before the Pentagon will provide the solicitation documents. Bidders must have a facility clearance of Top Secret, Secret storage capability, and technical personnel with Top Secret/Special Compartmented Information clearances.

**According to a Government Executive [article](#), attorneys representing the Trump Administration have asked a federal judge to dismiss a lawsuit alleging that agencies violated the Anti-Deficiency Act during the 35-day partial government shutdown on the grounds that the claims brought by a federal employee union and a group of five federal employees are now moot.** In January, the National Treasury Employees Union, the National Air Traffic Controllers Association (NATCA), and a group of five federal workers filed lawsuits contesting how federal agencies determined that federal employees should be forced to work without pay during the lapse in appropriations. After the government reopened, NATCA dropped its lawsuit, but the others continued to seek review of their claims. Per Government Executive, the heart of the case is the plaintiffs' assertion that the Trump Administration's interpretation of the Anti-Deficiency Act was overly broad, allowing agencies to require employees to work without pay regardless of whether they are needed to protect life and property.

**The Department of Justice [reported](#) that Oregon aluminum extrusion manufacturing companies have agreed to pay \$46 million to NASA, the Department of Defense, and others to resolve criminal charges and civil claims relating to a 19-year fraud scheme.** According to court documents, Hydro Extrusion Portland, Inc., formerly known as Sapa Profiles Inc., and its corporate parent, Hydro Extrusion USA, LLC, formerly known as Sapa Extrusions Inc., admitted to providing customers, including U.S. government contractors, with falsified certifications after altering the results of tensile tests designed to ensure the consistency and reliability of aluminum extruded at the companies' Oregon-based facilities.

**The Department of Justice [reported](#) that a South Carolina contracting executive was sentenced to 51 months in federal prison after pleading guilty to involvement in a decade-long scheme to defraud the government in the acquisition of military construction contracts.** Thomas Brock was an executive with Boykin Contracting and used various straw-owners within the company to pose as a female, an African American, a disabled person, and a veteran in order to qualify for over \$160 million worth of government construction contracts. Based on the information presented in court, Mr. Brock illegally acquired the contracts and siphoned money from the company to support a lavish lifestyle. The scheme fell apart when Mr. Brock fraudulently acquired loans to cover the company's losses and fell behind on the repayments, prompting a civil lawsuit and a criminal investigation.

## **LABOR AND EMPLOYMENT**

**According to Bloomberg Government, the Department of Labor (DOL) continues to go after home care companies for minimum wage and overtime pay violations.** The DOL recently won a nearly \$130,000 judgment against a Virginia home care company that DOL lawyers said misclassified workers as independent contractors and failed to pay them overtime. Moreover, the court made the owner of the company—At Home Personal Care Services LLC—personally liable for the unpaid wages and additional liquidated damages. The DOL also recently secured a \$1.2 million victory against another home care business and filed similar lawsuits against at least three other providers. Per Bloomberg Government, the DOL's Wage and Hour Division seeks to hold the owners of those companies personally liable for unpaid overtime, and all of the lawsuits cite an Obama-era regulation that extended wage-and-hour protections under the Fair Labor Standards Act to a majority of home health and personal service aides working across the country.

**According to Law360, the U.S. District Court for the District of Columbia accepted the Equal Employment Opportunity Commission's (EEOC) proposal and will require mid-size and large employers to submit 2018 Component-2 employee pay data by September 30, 2019.** The EEOC [requires](#) private employers with 100 or more workers and federal contractors or first-tier subcontractors to file EEO-1 forms breaking down the employers' workforces by race, ethnicity, gender, and job title. That data is [used](#) "to support civil rights enforcement and to analyze employment patterns, such as the representation of women and minorities within companies, industries or regions." Component-2 requires employers to also submit detailed data on employee compensation and hours worked sorted by job category, pay band, race, ethnicity, and gender. The district court gave the EEOC until April 29 to put a statement on its website informing employers of the decision and until May 3 to decide on which second-year dataset it will collect—either data from 2017 or 2019. Further, the court ordered the EEOC to take all necessary steps to meet the September 30 deadline.

**According to Law360, the U.S. Supreme Court agreed to hear a trio of closely watched cases dealing with the question of whether gay and transgender workers are protected from discrimination under Title VII of the Civil Rights Act.** The Supreme Court granted petitions for certiorari in three cases—*Altitude Express v. Zarda*; *Bostock v. Clayton County, Georgia*; and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*—giving the Justices a chance to settle debated questions around the scope of the federal anti-bias statute. The three cases each pose similar questions about Title VII of the Civil Rights Act of 1964. *Zarda* and *Bostock* ask the Court to decide whether the law's existing ban on sex discrimination protects workers from bias based on their sexual orientation, and *Harris Funeral Homes* ask whether workers are protected from gender identity discrimination under the statute.

**According to Law360, the U.S. Supreme Court ruled that arbitration agreements must explicitly call for class arbitration for that process to be invoked, handing lighting retailer Lamps Plus Inc. a win in its challenge of a Ninth Circuit ruling that allowed a worker's data breach class arbitration to move forward.** The Court, by a 5-4 vote, overturned the appellate court's decision that Lamps Plus' arbitration agreement with worker Frank Varela let him pursue class claims, even though the deal was vague on the issue of class arbitration. Lamps Plus sought to make Mr. Varela bring his claims in individual arbitration under the Supreme Court's 2010 *Stolt-Nielsen* ruling, which bars class arbitration when there is no "contractual basis for concluding" that the parties agreed to it. That ruling, however, did not address whether courts can infer that such a contractual basis exists in situations like Mr. Varela's, where an agreement doesn't explicitly block class arbitration and the language is ambiguous. In its [ruling](#), the majority found that *Stolt-Nielsen* does not permit lower courts to make such an inference. "Under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration. . . . Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice the principal advantage of arbitration.' This conclusion aligns with the court's refusal to infer consent when it comes to other fundamental arbitration questions."

## **PILIEROMAZZA BLOGS**

### **BLOG: An Agency's Corrective Action Decision Is Not Immune to Protest—What Does It Take to Win?**

By Michelle E. Litteken

Corrective action is a common outcome of a bid protest. Indeed, the U.S. Government Accountability Office (GAO) reported that 29% of the protests filed in FY 2018 resulted in corrective action. If you are a protester, that may be great news. In the case of a post-award protest, it likely means that you have another shot at award. However, if you are an intervenor, it means the agency chose not to defend your award, and you could lose the contract. What can an intervenor do?

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