Weekly Report for April 5, 2019

HEARING ON THE SMALL BUSINESS RUNWAY EXTENSION ACT

PilieroMazza's Megan Connor testified at the House Small Business Subcommittee on Contracting and Infrastructure's hearing on March 26, 2019, concerning the implementation of the Small Business Runway Extension Act (H.R. 6330) (the "Act"). The Act was signed into law in December 2018 and was designed to help small businesses successfully bridge the gap between competing in the small business space and the open marketplace against larger companies by changing the time period for determining a company's size based on average annual receipts from the previous three years to the previous five years. However, the Act contained no clear implementation date, and the SBA has yet to issue regulations regarding the same. According to the House Committee on Small Business's website and the hearing notice, the hearing considered "the current state of H.R. 6330's implementation and potential solutions to mitigate any challenges during the process and if steps may be necessary to expand its reach." Following her testimony, the Committee on Small Business sent follow-up questions to Ms. Connor, who provided written responses this week.

PILIEROMAZZA SUBMITS COMMENTS IN RESPONSE TO VA ACQUISITION REGULATION ON COMPETITION REQUIREMENTS

On April 2, 2019, PilieroMazza submitted comments to the U.S. Department of Veterans Affairs' proposed rule issued on February 1, 2019, RIN 2900-AQ21—VA Acquisition Regulation: Competition Requirements.

Our firm represents small businesses operating across the government contracting spectrum, and many of these companies are SDVOSBs verified to participate in VA's "Veterans First Contracting Program." In representing these firms and working with VA, we have received numerous comments from our clients and have become familiar with how VA and the VA Acquisition Regulation implement the "Vets First" mandate under the Veterans Benefits, Health Care, and Information Technology Act of 2006. We believe SDVOSBs and VOSBs, as well as VA contracting officers, will benefit from the clarity this rulemaking provides and the further strengthening of the "Vets First" requirements in the VAAR when conducting procurements. Read our full comments here.

GOVERNMENT CONTRACTING

The Department of Defense (DoD) issued several proposed rules and final rules this week amending the Defense Federal Acquisition Regulation Supplement (DFARS). According to Law360, the most consequential of three proposed rules would implement a statutory mandate

requiring a preference for fixed-price deals in defense contracting. Under that proposed rule, DoD contracting officers would have to first consider a fixed-price contract when determining an appropriate contract type for a particular procurement. Contracting officers would also have to obtain approval from the head of their particular contracting office when awarding any cost-reimbursement contract above a certain price threshold: $50 million through the end of Fiscal Year 2019 and $25 million thereafter. Per Law360, a second proposed rule would bring DFARS in line with a Small Business Administration final rule published in May 2016 regarding the applicability of the "non-manufacturer rule" for certain small businesses. That rule requires that items sold but not made by small business under federal contracts be made in the U.S. or "outlying areas." Previously, DFARS provided an exemption for contracts of less than $25,000 awarded to small businesses considered "disadvantaged" under the SBA's 8(a) program; the proposed rule would remove that exemption. The proposed rules and final rules can be found at the following citations:

- **Proposed Rules**: 84 Fed. Reg. 62, 12179; 84 Fed. Reg. 62, 12182; 84 Fed. Reg. 62, 12187.
- **Final Rules**: 84 Fed. Reg. 62, 12137; 84 Fed. Reg. 62, 12138; 84 Fed. Reg. 62, 12139; 84 Fed. Reg. 62, 12140; 84 Fed. Reg. 62, 12141;.

The Small Business Administration (SBA) issued final policy directives, effective May 2, 2019, amending the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) program Policy Directives. Specifically, the Small Business Administration (SBA) combines the two directives into one document, clarifies the data rights and Phase III preference afforded to SBIR and STTR small business awardees, adds definitions relating to data rights, and clarifies the benchmarks for progress towards commercialization. 84 Fed. Reg. 63, 12794.

LABOR AND EMPLOYMENT

According to Bloomberg Government, employers could be required to turn over their 2018 worker pay data to the Equal Employment Opportunity Commission (EEOC) by September 30, 2019. The EEOC opened the 2018 EEO-1 Survey in March, which 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, also known as Component 1 data. 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." Reports must be submitted and certified by Friday, May 31, 2019. The EEOC was also ordered to file a brief explaining its plan for pay data following the district court's order in *National Women's Law Center, et al., v. Office of Management and Budget, et al.*, Civil Action No. 17-cv-2458 (TSC), which vacated the Office of Management and Budget's stay on collection of Component 2 EEO-1 pay data; Component 2 EEO-1 pay data would require employers to break down pay data by race, gender, and ethnicity. In a submission to the district court filed this week, the EEOC said it would need to hire a data and analytics contractor to modify the agency's data collection capabilities in order to hit the September deadline—an undertaking it said would cost "in excess of $3 million."

According to Bloomberg Government, the Department of Labor's (DOL) proposed rule to limit shared wage and hour liability for companies in franchise and staffing arrangements narrows the situations in which businesses can be considered "joint employers" of a group of workers. Bloomberg Government noted that the question often comes up when

workers at a franchise restaurant try to sue the franchisor for unpaid minimum wages and overtime. It has also been at the center of debates over whether companies should be required to bargain with workers provided by a staffing firm. The DOL plans to weigh four factors—the ability to hire and fire, supervise and control schedules, set pay rates, and maintain employment records—to determine whether one company is a joint employer of another company's workers and eases the liability franchisors face if a franchisee violates wage and hour laws. Per Bloomberg Government, the DOL's publication of the proposed rule comes as the National Labor Relations Board (NLRB) is working on its own regulation to limit joint employer liability for collective bargaining and unfair labor practices. Bloomberg Government reported that the NLRB generally would require a company to exercise direct control over workers to be considered their joint employer.

According to Law360, the Department of Labor (DOL) kicked off a new pilot program that aims to speed up the discretionary suspension and debarment process to protect the federal government from working with contractors involved in inappropriate or illegal activities. The program seeks to cut down the processing time for discretionary suspension and debarment actions from months to just days, the DOL said in a news release announcing the program. Discretionary suspensions and debarments make contractors involved in things like fraud, theft, and bribery temporarily ineligible for contracting and transactions with the government. Under the program, the agency's Office of Inspector General will include more information in its referrals to the Office of the Assistant Secretary for Administration and Management, a change that Law360 reported the DOL said will allow for quicker decisions.

According to Law360, the DOL issued opinion letters weighing in on Fair Labor Standards Act (FLSA) overtime exemptions for agricultural workers and teachers and on health industry employers' use of an overtime structure that calculates workers' pay across two weeks. Acting DOL Wage and Hour Division Administrator Keith Sonderling said in a letter that groups of farm workers may be ineligible for overtime under the FLSA's agricultural exemption, which says farms don't have to pay extra for excess time spent on certain agricultural work. He also said in a separate letter that "nutritional outreach instructors" at a West Virginia University are overtime-exempt, but claimed in a third letter that he did not have enough information to bless or reject a youth residential care facility's use of the "8 and 80" overtime system. Opinion letters offer the Wage and Hour Division's perspective on specific pay- and benefits-related questions posed by employers or other entities the DOL regulates. The letters, which do not bind judges but can bolster employers' defenses to workers' claims, do not name their recipients but provide circumstantial information about them.

CYBERSECURITY

According to Bloomberg Government, government spending on cybersecurity is likely to grow in Fiscal Year 2019 as well as Fiscal Year 2020. Bloomberg Government reported that the analytical perspectives section on cybersecurity funding released in the fiscal 2020 budget request shows that President Donald Trump is seeking $17.4 billion for cybersecurity at defense and civilian agencies, an increase of 5 percent from the projected $16.6 billion in fiscal 2019 agency spending, projected in the September 28 continuing resolution. Bloomberg Government noted that the number is even higher than the fiscal 2019 budget request of $15.1 billion, which means agencies will have more than initially expected to spend on cyber-related programs this year.

According to a Nextgov article, the General Services Administration (GSA) expanded its cybersecurity service offerings to help federal agencies and state and local governments to protect their most valuable data. GSA announced the modernized Highly Adaptive Cybersecurity Services Special Item Number Tuesday, adding services that can help agencies meet administrative mandates to secure high-value assets on mission-critical systems. The HACS SIN debuted on GSA's IT Schedule 70 contract in 2016 so agencies could access penetration testing, incident response, cyber hunt, and risk and vulnerability assessments from pre-vetted contractors. GSA consulted with the Department of Homeland Security and the Office of Management and Budget (OMB) to identify which services to add.

PILIEROMAZZA BLOGS

Cybersecurity's Increasing Impact on Prime Contract and Subcontract Awards

By Jon Williams

Since last year, I have been writing about the increasing impact of cybersecurity on contract awards. DoD has issued guidance on how it will evaluate system security plans, and it has indicated that, along with cost, schedule, and performance, cybersecurity is the "fourth pillar" of its acquisitions. As a result, contractors need to shift their view of cybersecurity compliance as a cost center to a business driver and an increasingly important factor in gaining a competitive advantage.
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DoD Proposes to Apply Non-Manufacturer Rule to All 8(a) Contracts

By Samuel Finnerty

Nearly three years ago, the U.S. Small Business Administration ("SBA") issued a final rule that standardized the limitations on subcontracting and the non-manufacturer rule ("NMR") that apply to small business concerns, including participants in SBA's 8(a) Business Development Program. In a step toward regulatory conformity, the Department of Defense ("DoD") is now proposing to implement the revised NMR for 8(a) participants that contract with DoD. These entities should familiarize themselves with the proposed rule ("Rule"), which is summarized below.
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