



Weekly Report for December 21, 2018

GOVERNMENT CONTRACTING

According to a Bloomberg Government article, more than 30,000 federal contracting opportunities at twenty-eight (28) agencies are coming up for competition in the coming fiscal years. In a webinar, Bloomberg Government identified the top opportunities at nineteen (19) selected agencies, identified 27,751 opportunities at seventeen (17) civilian agencies, and identified 3,281 opportunities at eleven (11) defense agencies. Importantly, however, each agency reports acquisition forecast details differently; some agencies provide more details than others.

President Trump signed the Small Business Runway Extension Act of 2018 (H.R. 6330) into law on December 17, 2018. As explained in the PilieroMazza [blog](#), the law amends the Small Business Act by changing the time period for determining a company's size based on average annual receipts. Initially, the Small Business Act required a company's compliance with the size standards to be prescribed on the basis of the company's average annual receipts from the previous three years; the new law extends this time to the previous five years. The text of the law can be found [here](#). Because it was signed by the President, the law is now effective. It is unclear, however, how the Small Business Administration and agencies will view this change absent regulations. If the change impacts your size status as of January 1, 2019, we would be happy to discuss this with you, as the change could impact small business size representations made in SAM or on proposals you are submitting.

The United States filed a complaint against YRC Freight Inc. (YRC), Roadway Express Inc. (Roadway), and Yellow Transportation Inc. (Yellow), alleging that these companies systematically overcharged the government for freight carrier services and made false statements to the government that hid their misconduct. The lawsuit alleges that the defendants reweighed thousands of shipments and suppressed the results whenever they indicated that a shipment was actually lighter than its original estimated weight. Thus, instead of charging the Department of Defense (DoD) for shipments based on the correct weight, the defendants knowingly billed the government (and their other customers) based on weights that they knew to be inflated. The defendants also allegedly made false statements to induce the DoD to use them as freight carriers and further knowingly made or used false statements to improperly avoid their obligations to correct inflated invoices and return overpayments. The Department of Justice news release can be found [here](#).

The U.S. Attorney announced a \$110,000 settlement with a technology company and its CEO to resolve allegations of false claims on a defense procurement contract. Progressive Technology Federal Systems, Inc. and its Chief Executive Officer have paid a combined \$110,000 to settle allegations that the corporation and its CEO made false statements

concerning a consultant's security clearance and failed to disclose an organizational conflict of interest when bidding on a defense procurement contract. More information can be found [here](#).

The Government Accountability Office (GAO) reported that agencies need to take action to improve their waiver and exception reporting. The Buy American Act requires federal agencies to buy domestic products. However, federal agencies can buy foreign products sometimes, e.g., when domestic items are not available at a reasonable cost or when international trade agreements waive the Buy American Act restrictions. According to the federal procurement database, foreign products comprised less than 5% of what the government bought in Fiscal year 2017. The real amount could be higher than that, however, in part, because of data errors. For example, some agencies had inaccurately recorded waiver information. The GAO recommends that the Office of Management and Budget take steps to improve Buy American Act data and that the Department of Health and Human Services, Department of Homeland Security and the Department of Veteran's Affairs improve agency guidance and training on implementing the Act. All of the agencies either concurred or generally concurred with GAO's recommendations. More information can be found [here](#).

The Securities and Exchange Commission (SEC) is starting a review of how often U.S. public companies report financial results. As reported by Bloomberg Government, this apparently heeds President Donald Trump's call for the agency to consider letting businesses open their books less frequently. The SEC will seek public comment on the quarterly reporting process. President Trump, in an August tweet, had said that moving to semi-annual reports would save companies money and increase flexibility.

According to a Bloomberg Government article, the SEC may issue lower fines to businesses and banks because Kara Stein, the SEC's lone Democratic commissioner, has to leave the SEC at the beginning of next year. Until President Donald Trump nominates a successor—something the article believes his administration may have little incentive to do given its pro-business stance—Republican commissioners will have outsize influence and may block cases.

According to a Government Executive [article](#) involving an internal Pentagon report, most jobs in the DoD are cheaper with civilian employees as compared to contractors, though the cost comparisons differ based on location, pay grade, and job function. A report compiled by the Office of the Secretary of Defense found that civil service workers are most likely to be less expensive than contractors performing the same work in the Washington, D.C. region and in the Southeastern United States. In the Southeast, more than 75% of comparisons that the Pentagon ran between government and contract workers showed a higher cost for the private sector, and the capital region was not far behind. Government Executive obtained the never-before reported-on document through a Freedom of Information Act request.

The DoD issued a class deviation on December 14, 2018 requiring contracting officers to use the procedures and clauses provided in the attachment to the class deviation in lieu of the procedures and clauses in the Defense Federal Acquisition Regulation Supplement (DFARS) 225.7703, 252.225-7023, 252.225-7024, and 252.225-7026 when acquiring products or services in support of military or stability operations in Afghanistan. The class deviation and attachment can be found [here](#).

LABOR AND EMPLOYMENT

On December 14, 2018, a Texas federal judge, Reed O'Connor, struck down the Affordable Care Act (ACA) as unconstitutional. Judge O'Connor held the ACA's individual mandate requiring people to buy health insurance was no longer an exercise of Congress's power to tax, was now unconstitutional under the interstate commerce clause, and was essential to and inseverable from the remainder of the ACA such that the rest of the ACA cannot stand without that provision. Last year, the tax law passed by Congress removed the ACA's penalty for not having health insurance, which went into effect in January 2018. Thereafter, Republican officials in twenty (20) states sued and argued that the elimination of the health insurance requirement eliminated the tax, and therefore, the ACA loses its constitutionality. Judge O'Connor agreed and now the case will likely be appealed to the U.S. Court of Appeals for the Fifth Circuit. The case may ultimately reach the U.S. Supreme Court. Until the case is resolved on appeal, employers will still need to comply with the ACA's requirements. More on the decision can be found [here](#) and [here](#).

The U.S. Supreme Court agreed to hear a case that could dial back workplace oversight. Specifically, the Court agreed to hear a case that could be a vehicle for striking down administrative agencies' *Auer* deference, which dictates that courts must defer to agencies' interpretations of ambiguous rules. According to a Bloomberg Government article, some lawyers and legal scholars have commented that workplace agencies—i.e., the Department of Labor's (DOL) Wage and Hour Division, Occupational Safety and Health Administration, and the Equal Employment Opportunity Commission (EEOC)—have the most leeway to lose. If the Court were to limit the deference agencies are afforded, employers may face less aggressive oversight but also miss out on guidance published by the agencies. According to Paul DeCamp, who led the DOL's Wage and Hour Division under President George W. Bush, *Auer* buttresses most of what that division does; "[o]n dozens if not hundreds of issues, the controlling standard is an interpretation of an ambiguous regulation." Robert Glicksman, an administrative law professor at George Washington University, commented that if *Auer* is overturned, agencies' might stop issuing guidance—potentially leaving regulated parties in the dark—or start lengthy and expensive rulemakings whenever they want to clarify regulations.

RULES AND REGULATIONS

Final Rules

The DoD, General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) issued a final rule amending the Federal Acquisition Regulation (FAR) to provide a definition of "recruitment fees" to further implement the FAR policy on combating trafficking in persons. One element in combating trafficking in persons is to prohibit contractors from charging employees recruitment fees. The rule is effective January 22, 2019. [83 Fed. Reg. 244, 65466](#).

The EEOC issued a final rule removing the incentive section of a previously-published final rule, "Regulations Under the Americans With Disabilities Act," in response to a decision by the U.S. District Court for the District of Columbia vacating such section in the ADA rule. The removal of the incentive section will be effective January 1, 2019. [83 Fed. Reg. 244, 65296](#).

The DoD issued a final rule on amending the DFARS to change the entity to which contractors submit Summary Subcontract Reports in the Electronic Subcontracting Reporting System

(eSRS) and to change the entity that acknowledges receipt of, or rejects, the reports in eSRS. [83 Fed. Reg. 245, 65562](#).

The DoD issued a final rule amending the DFARS to implement sections of the NDAA for Fiscal Year 2019 that modifies the limitations on awarding single-source task or delivery order contracts exceeding \$112 million. [83 Fed. Reg. 245, 65559](#).

The DoD issued a final rule amending the DFARS to clarify policies and procedures for submission of payment requests and receiving reports in electronic form. [83 Fed. Reg. 245, 66062](#).

Proposed Rules

The Environmental Protection Agency (EPA) issued a proposed rule revising its “Submission of Invoices” clause to add electronic invoicing requirements. In 2019, the EPA will begin using the Invoice Processing Platform (IPP), which is a secure web-based service provided by the U.S. Treasury that efficiently manages government invoicing. [83 Fed. Reg. 244, 65328](#).

The DoD issued a proposed rule amending the DFARS to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year 2018 to require that inflation adjustments of statutory acquisition-related thresholds apply to existing contracts and subcontracts in effect on the date of the adjustment that contains the adjusted clauses. [83 Fed. Reg. 245, 65618](#).

Interim Rules

The DoD issued an interim rule amending the DFARS to implement sections of the NDAA for Fiscal Years 2017 and 2018. One section imposes additional prohibitions with regard to acquisition of certain foreign commercial satellite services, such as cybersecurity risk and source of satellites; launch vehicles used to provide the foreign commercial satellite services, and expand the definition of “covered foreign country” to include Russia. Another section prohibits the purchase of items from a Communist Chinese military company that meets the definition of goods and services controlled as munitions items when moved to the Commerce Control List of the Export Administration Regulations of the Department of Commerce. [83 Fed. Reg. 245, 66066](#).