Weekly Report for February 1, 2019

GOVERNMENT CONTRACTING

According to a Washington Technology article, just because government agencies reopened after five weeks of a shutdown does not mean things return to business as usual. In fact, the article continues, service providers and other market observers advise that patience and empathy will both be virtues in this situation. Generally speaking, the 800,000 furloughed federal civilian employees were not allowed to check email or telephone messages during the shutdown, which includes many employees responsible for processing invoices to pay contractors for their work. Stop-work orders need to be lifted, and unpaid invoices need to be processed for work dating back to before the shutdown began. Matt McKelvey, President of a financial and proposal consulting firm, recommended that contractors give shuttered agencies one month for every week they have been closed to catch up, meaning that it would not be until the summer that operations at the agencies are back to normal.

According to Law360, federal contractors may be able to recoup some of the costs incurred during the partial government shutdown, but the article stated contractors need to act quickly and have a strategy that minimizes government pushback. Although some shutdown-related issues do not have the direct contractual connections needed to support a reimbursement claim, contractors who were required to stop work on a specific contract and incurred costs while that work was halted may be able to be reimbursed for some of those costs. Law360 reported that, while there are no shutdown-specific clauses in the Federal Acquisition Regulation (FAR), more general FAR and contractual clauses may apply, such as those covering suspensions or delays of work, stop work orders, or various contractual changes, all of which come with an opportunity for an equitable adjustment claim. Given the government's expectation that a contractor be up and running as soon as the shutdown was over, Law360 stated reimbursement claims could cover, for example, the costs related to winding down, resuming operations, idled facilities, laid-off staff, or warehousing operating equipment. Law360 recommended that contractors provide as much paperwork as possible to tie a cost to the work stoppage and to justify the necessity of that cost.

According to Law360, a Ninth Circuit panel affirmed a lower court's order vacating a $1.07 million arbitration award issued to an Afghan subcontractor, finding the award was properly canceled because the arbitrator's decision was "irrational." The dispute stemmed from two subcontracts ECC CENTCOM Constructors, LLC ("ECC") awarded to Aspic Engineering and Construction Co. ("AEC") for supporting construction services at Afghan National Police training facilities under ECC's prime contracts with the U.S. Army Corps of Engineers for various reconstruction projects. The prime contracts were eventually terminated, and ECC subsequently terminated the subcontracts. Afterward, ECC, having paid AEC more than $1 million, determined that it did not owe any additional sums, prompting AEC to launch the underlying arbitration. In September 2016, the arbitrator sided with AEC and awarded it

$1.07 million. The Ninth Circuit's three-judge panel held the arbitrator exceeded his authority when he found that AEC did not have to comply with the subcontract's Federal Acquisition Regulation (FAR) provisions because it was unreasonable to expect the Afghan company to understand contract regulations. The panel noted that if arbitrators were to routinely determine that parties to contracts were too "unsophisticated" to comply with contract regulations, it "would potentially cripple the government's ability to contract with private entities, and would violate controlling federal law." "By concluding that Aspic need not comply with the FAR requirements, the arbitrator exceeded his authority and failed to draw the essence of the award from the subcontracts," the panel said. "The award disregarded specific provisions of the plain text in an effort to prevent what the arbitrator deemed an unfair result."

According to Bloomberg Government, a recently-unsealed complaint filed by PCA Integrity Associates LLP in May 2015 alleged that multiple debt collection companies engaged in a conspiracy to defraud the Department of Education by falsely certifying compliance with small business requirements. PCA was a whistleblower and alleged that the defendants, comprised of prime contractors and purported small business subcontractors, violated the False Claims Act by falsely claiming credit for awarding millions of dollars in subcontracts to companies that lacked proper eligibility.

LABOR AND EMPLOYMENT

The Department of Labor's Wage and Hour Division (WHD) found that Marathon Electrical Contractors Inc.—an Alabama corporation—violated the Davis-Bacon and Related Acts, the Contract Work Hours and Safety Standards Act, and the Fair Labor Standards Act by failing to pay some employees the required, prevailing wage and overtime rates on a project subject to Davis-Bacon requirements. Marathon Electrical inaccurately classified employees as laborers instead of electrician apprentices and failed to pay them the correct percentage of the required journeyman wage. Marathon Electrical also violated Davis-Bacon requirements by claiming it made contributions to employees' 401(k) funds and showed those contributions on the payroll, but never actually made those contributions. Further, Marathon Electrical violated Davis-Bacon requirements when it claimed credit for vacation benefits that failed to meet the criteria for such a credit. As a result, Marathon Electrical paid $82,515 in back wages and fringe benefits to seventeen employees.

The Department of Labor's Office of Federal Contract Compliance (OFCCP) found that beginning in 2015, Asplundh Tree Expert Co.—a federal contractor—discriminated against 124 African American applicants in the hiring and selection process for a grounds person, tree trimmer, and equipment operation positions. Asplundh Tree agreed to pay $55,000 in back wages and make job offers for specific positions to eligible class members who express an interest in employment and meet qualifications. To ensure further compliance, Asplundh Tree is obligated to evaluate and revise its hiring and selection policies and ensure that it applies selection criteria uniformly and train personnel involved in hiring to ensure use of nondiscriminatory practices.

Law360 reported that the National Labor Relations Board (NLRB) made it easier for employers to show their workers are independent contractors who cannot unionize and made workers' entrepreneurship a pillar of the board's employment classification test. The NLRB's ruling rejected a 2014 NLRB decision and returned to a traditional common-law test. The NLRB emphasized that entrepreneurial opportunity, like employer control, was a principle by which to evaluate the overall effect of the common-law factors on a putative

contractor's independence. Law360 opined that the ruling could stymie unions' future efforts to organize drivers for Uber, Lyft, FedEx, or others that classify their workers as contractors.

According to Law360, while the Seventh Circuit's recent ruling adopting a narrow view of the Age Discrimination in Employment Act (ADEA) may seem like a win for employers, experts say it could result in more state court suits where heftier damages are possible. In an 8-4 ruling, the *en banc* Seventh Circuit held that the text of Section 4(a)(2) of the ADEA covers only discrimination against current employees and that outside job seekers cannot sue businesses for disparate impact claims alleging that they use practices that adversely affect older individuals. Law360 reported four takeaways from the ruling:

(1) The ruling results in a narrower view of the ADEA;
(2) Since the ruling limits job applicants' ability to sue for disparate impact discrimination, attorneys said it could boost their reliance on state statutes if they believe they were victims of age bias; and
(3) The ruling runs largely counter to the Equal Employment Opportunity Commission's longstanding position that the ADEA allows older job applicants who feel they have been unfairly passed over because of a hiring policy to file charges with the agency and later sue.

Additionally, the Seventh Circuit's decision brought it into harmony with the Eleventh Circuit, which decreases the chances the U.S. Supreme Court will take this issue up on appeal.

According to Bloomberg Government, which obtained documents through a Freedom of Information Act request, the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) sent notices of violation (NOVs) to more than 200 federal contractors between 2016 and 2018, including Wells Fargo & Co., Deloitte, and Huntington Ingalls Industries Inc. At least sixty-four of the NOVs included hiring or pay discrimination claims, and at least two companies were accused of both. The most common offense in the NOVs was a violation of record-keeping obligations. Companies are required to maintain records of their hiring, pay, and other employment practices while doing business with the government.

HEALTHCARE

According to Washington Technology, the Centers for Medicare and Medicaid Services (CMS) made 58 awards on a potential 10-year, $25 billion contract vehicle to help carry out efforts aimed at improving the quality of health care in various settings and programs. Washington Technology reported that CMS' Network of Quality Improvement and Innovation Contractors program seeks industry support in creating new data-driven methodologies for doctors to help patients make healthcare decisions and providers to build up the quality of care. Awardees for the indefinite-delivery/indefinite-quantity contract were unveiled in a notice. Topic areas of focus for the contract include behavioral health, patient safety, care coordination, nursing homes, long-term care, chronic disease self-management, and public health. Specific work will include health information technology, direct technical assistance, recruitment, community coalitions, learning and action networks, continuous improvement, measurement, data collection, reporting, and analytics.

PILIEROMAZZA BLOGS

In the Weeds: Testing Federal Contractor Employees for Marijuana Use
By Sarah L. Nash

Consider the following scenario: Janie is employed as a help desk clerk to perform work on a federal government contract and is a model employee. She has a perfect attendance record, performs her job responsibilities with enthusiasm, and is always a team player. Pursuant to company policy, one day Janie is subjected to a random drug test. The results show she tested positive for THC, consistent with the use of marijuana. What options does her employer have? [Read More]

Facing Costly Litigation? An Offer of Judgment May Save You Money in the Long Run
By Matthew E. Feinberg

"[I]n this world, nothing can be said to be certain, except death and taxes." This oft-cited quote attributed to Benjamin Franklin may be timeless, but it fails to tell the whole story in the modern world—at least for businesses facing unwelcome litigation. As companies conduct more and more of their business digitally, the cost of defending a lawsuit is increasing, due in large part to the impact of electronic discovery obligations. Electronic discovery, or e-discovery, generally involves the identification, collection, and production of all electronically stored information (such as e-mails, document drafts, spreadsheets, electronic archives, instant messages, and the like) that may be even remotely relevant to a dispute. For many companies, this means they are paying lawyers to review and produce hundreds upon hundreds of thousands of documents, substantially increasing the costs and attorneys' fees incurred for even minor suits. [Read More]