Weekly Report for January 25, 2019

GOVERNMENT CONTRACTING

As reported in a Nextgov article, the Department of Homeland Security's (DHS) Chief Procurement Officer Soraya Correa issued a special notice extending the due dates for all unamended acquisition deadlines after December 22. The special notice also states that DHS, and most of its component parts, will not move forward with pending acquisitions until the shut down ends. The notice gives vendors up to seven days after the partial government shutdown is resolved to submit bid proposals if the deadline passes before DHS reopens. The deadline to submit questions on requests for proposals was also extended, but all questions must be submitted within five days of funding being restored to DHS. Responses to requests for information will be due three days after the shutdown ends. All other aspects of the process remain the same, including the time, place, and format for submissions.

A man from Kansas was charged with two counts of major program fraud against the U.S. and two counts of lying to federal investigators. The indictment alleges Troy Bechtel and other persons falsely represented that United Medical Design Builders, LLC (UMDB), and Kansas limited liability company, was controlled by Joseph Dial, Jr., a disabled veteran of the U.S. Army. However, UMDB was a pass-through company that Mr. Dial did not control. UMDB received a contract through the SDVOSB program awarded by the U.S. Army Corps of Engineers for the design and construction of healthcare facilities at multiple air force bases. The indictment alleges that Mr. Bechtel ran the daily operations for UMDB and made project decisions without reporting to or consulting with Mr. Dial, who allegedly was rarely in the office. For more, please see the article here.

Bloomberg Government reported that the Armed Services Board of Contract Appeals found that the Fluor Federal Services (Fluor), a unit of Fluor Corporation, is entitled to recover costs incurred after the U.S. Navy improperly modified its $41 million base support operations contract for work in or around Jacksonville, Florida. Specifically, the Navy did not comply with contract terms when it unilaterally extended Fluor's performance period. Fluor and the Navy will now have to negotiate the recovery amount.

LABOR AND EMPLOYMENT

According to Bloomberg Government, the U.S. Supreme Court will consider whether exhaustion of administrative remedies is a prerequisite for an employee bringing discrimination claims in federal court or whether an employee only needs to establish exhaustion of administrative remedies as an element of a discrimination claim. Federal law requires a worker to bring all discrimination claims to the Equal Employment Opportunity Commission or a similar state agency first before suing an employer, but courts disagree

whether that requirement is an absolute must-do before a court even has jurisdiction to consider the employee's claims or whether it is a defense employers' can lose by not raising it early enough. If exhaustion of administrative remedies is a prerequisite before bringing suit in federal court, then an employer could raise the issue at any time—even on appeal—because it would constitute a challenge to the court's jurisdiction, which is generally non-waivable. However, if a worker needs to establish exhaustion of administrative remedies as an element of their discrimination claim, then an employer would have to raise the issue with the court at the first available opportunity.

Law360 reported that, in an 8-4 *en banc* decision, the Seventh Circuit ruled that the Age Discrimination in Employment Act (ADEA) bars discrimination of older employees only, not older outside job applicants. The majority held in Dale E. Kleber v. CareFusion Corp., case number 17-01206, that the ADEA does not allow an unsuccessful job applicant to sue an employer for using a practice that has a disparate impact on older workers, saying the plain text of Section 4(a)(2) of the statute covers discrimination against employees—not outside applicants for employment. The majority relied on the language of the ADEA and Congress's use of the term "any individual" in reaching its decision.

According to Law360, the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) alleged in an expanded complaint that Oracle America Inc. allegedly underpaid its female and nonwhite workers by more than $400 million over a four year period. OFCCP wrote that Oracle's pay data showed it shorted thousands of female, black, and Asian workers by as much as five figures relative to their white colleagues every year from 2013 through 2016. OFCCP also alleged that Oracle unfairly passed over non-Asian job applicants, particularly Hispanic and black applicants. Though the case is two years old, the new complaint is based on data Oracle disclosed in October and November 2017, and it added allegations that Oracle depressed pay for female and nonwhite workers by assigning them to low-level positions with low starting salaries, which compounds over the years and culminates in "female, black and Asian employees with years of experience [being] paid as much as 25 percent less than their peers." The case, OFCCP v. Oracle America Inc., case number 2017-OFC-00006, is pending before the DOL Office of Administrative Law Judges.

According to Bloomberg Government, the National Labor Relations Board (NLRB) recently determined that Alstate Maintenance, LLC did not violate labor law by firing skycaps working at John F. Kennedy International Airport. The skycaps were asked to assist a soccer team with their equipment but complained that they did not receive tips the last time they assisted with a similar job. When the soccer team's equipment arrived, the skycaps did not respond to instructions to help. Baggage handlers assisted with the team's equipment before the skycaps ultimately helped finish the job. That evening, Alstate Maintenance decided to terminate the skycaps' employment for providing subpar service and acting indifferently to customers. One of the skycaps brought a claim at the NLRB, which was dismissed by the regional judge. The NLRB ruled the skycaps were not involved in protected concerted activity under the National Labor Relations Act because the statements and complaints made by the skycaps did not have mutual aid or protection as their purpose. Specifically, the use of the word "we" by one skycap in voicing complaints in front of supervisors and other skycaps did not qualify the statement as protected concerted activity. Bloomberg Government noted this ruling is the latest example of the NLRB rolling back its definition of concerted activity.

According to Bloomberg Government, the partial government shutdown may spell trouble for the Department of Labor's overtime rule, which is pending review at the Office of Information and Regulatory Affairs (OIRA). OIRA, however, is largely closed. To properly review a rule, OIRA must reach out to other federal agencies that may be affected by the proposal and ensure there is no overlap with similar work being done by the agency promulgating the rule; that, however, is not supposed to happen during the shutdown, when OIRA's career experts are likely furloughed.

Law360 reported that a Senate Finance Committee member questioned the legality of the Internal Revenue Service (IRS) plan to recall 46,000 furloughed workers next week, which the agency would execute if the partial federal government shutdown remained in effect. On January 15, 2019, the IRS announced that if the shutdown remained in effect, more than 46,000 workers will be recalled from furlough on January 28 to begin the tax filing season. However, the Anti-Deficiency Act states that only certain classifications of federal workers, those whose service involves emergencies affecting human life or the protection of property, can volunteer their time.

Government Executive reported that unemployment filings among furloughed federal employees doubled over the past week in Maryland, Virginia, and D.C. According to David Berteau, the head of the Professional Services Council, the shutdown is costing contractors an estimated $1.5 billion per week, and companies that primarily serve the government have already lost tens of thousands of people. Mr. Berteau further commented that unemployed government contractors are likely to join the 9,000 furloughed federal employees who have been added to unemployment rolls in the capital region. The government is stopping contracts daily across the Departments of Treasury, Agriculture, Homeland Security, Interior, State, Housing and Urban Development, Transportation, Commerce and Justice, as well as other agencies including NASA. In Fiscal Year 2018, services contracts at those agencies—the contracts most likely to be halted due to lack of appropriated money—were valued at more than $70 billion.

The Department of Labor Secretary Alex Acosta rejected an effort by Washington, D.C. Mayor Muriel Bowser to allow federal employees working without pay during the shutdown to be eligible for unemployment benefits while agencies remain closed. Currently, furloughed federal workers and idle contractors in a number of states can apply for unemployment, but they are expected to return the money when they return to work and Congress has approved back pay. In contrast, excepted employees—who are currently working without pay but whose pay is guaranteed once the government reopens—cannot apply for unemployment.

The Office of Personnel Management (OPM) issued new guidance that allows "excepted" employees to "request time off based on their personal circumstances." As described in a Government Executive article, this marked a sudden reversal from OPM and the Trump administration, which had previously directed agencies to label any employee who did not show up for work as "absent without leave" and apply appropriate consequences. As described by Government Executive, OPM's new guidance had a vastly different tone. Excepted employees are those that are required to report to work because they protect life or property. Per the new guidance, these workers have two avenues for calling out of work: (1) they can request leave, which they will be paid for once the government reopens, or (2) they can take approved periods of absence without requesting leave. Employees who select the latter option will be placed in furlough status, too, and will receive retroactive pay. Those employees will also not have their leave balances docked once their agencies reopen. OPM also encouraged agencies to

consider leave requests as they would during their normal course of business and also allow excepted employees to work remotely and/or have flexible start and stop times. OPM Acting Director Margaret Weichert noted that excepted federal employees working without pay have often lost their subsidies for child care and transit benefits.

OPM's change in leave policy for excepted employees comes as more employees are being furloughed from agencies. As Government Executive reported, federal agencies have forced home many employees that had been working, and the number is likely to continue to grow as agencies that had leftover appropriated funds or fee-collected funds see those resources depleted. For example, the General Services Administrations (GSA) has now furloughed over 40% of its workforce, and the Department of Justice (DOJ) furloughed an additional 1,200 employees since the beginning of the shutdown. GSA may soon be forced to furlough some of the 3,200 employees currently working at the Federal Acquisition Service (FAS). FAS employees are exempted at this time, meaning their salaries are drawn from sources other than annually appropriated funds, but that could change if their alternative funding becomes impacted by the shutdown.

As the partial government shutdown continues into a second pay period, Government Executive reported that food banks from Washington, D.C. to Kansas have served an increased number of federal workers and anticipate another increase in those needing help. Only 15% of civilian, full-time federal employees live in the D.C. region, so representatives and senators from across the country could hear from increasingly anxious constituents well beyond the Beltway. For example, Government Executive noted that Senator Mitt Romney, in his first town hall as a senator, received nervous questions from some of Utah's 26,000 government employees. A federal union also began daily demonstrations at the Senate Hart Office Building this week.

LITIGATION

As reported by Law 360, a putative class action lawsuit was filed on Friday in New York State court against New York University's teaching hospitals for failing to fully compensate security guards for overtime work and pay for required duties before and after shifts. The case, Ivan Arroyo v. NYU Langone Hospitals, case number 150525-2019, filed in New York Supreme Court for the County of New York, alleges that the unpaid time worked "includes but is not limited to, time spent changing in the locker room, time spent assembling for roll call before each shift, time spent waiting for relief workers to appear at the end of each shift, and time spent at the end of the shift going back to the locker room to change and store the security uniform." Recently, similar suits brought by airport security guards and a class of ABM Security Services workers resulted in multimillion-dollar settlements for the employees.

PILIEROMAZZA BLOGS

A Five-Year Measuring Period for Economic Dependence Affiliation

By Peter B. Ford

Earlier this month, we wrote about the internal SBA Information Notice (Information Notice), which clarifies that the changes made by the Small Business Runway Extension Act (Runway Extension Act) are not effective immediately. The Runway Extension Act requires that receipts-

based size standards be based on annual average gross receipts over five years. SBA's regulations currently require a three-year lookback for size standards based on annual receipts. And, according to the Information Notice, until SBA revises its regulations through the rulemaking process, businesses must continue to report their receipts based on a three-year average. [Read More]

GAO Sustains Protest Alleging Misrepresentation in Proposal Regarding Availability of Incumbent Staff
By Patrick T. Rothwell

It is generally difficult to win a bid protest by arguing that the awardee proposed personnel that it did not have a reasonable expectation would be available for performance. Such allegations are normally difficult to prove, particularly at the outset of a protest, because the protestor is unlikely to know which personnel the awardee proposed. As a result, these protest grounds have a high risk of being dismissed as speculative. Winning such a protest is, however, possible. [Read More]