Weekly Report for March 1, 2019

GOVERNMENT CONTRACTING

The Department of Defense (DoD) updated its list of product categories for which the Federal Prison Industries' (FPI) share of the DoD market is greater than 5%, as required by statute. The product categories and the products within each of the identified product categories must be procured using competitive procedures in accordance with the Defense Federal Acquisition Regulation Supplement (DFARS) 208.602-70. Contracting officers must consider a timely offer from FPI for any of the product categories on the list when conducting the competition, and FPI must be included even if the procurement would have been a set aside under the Federal Acquisition Regulation (FAR) Part 19. The list that applies to new solicitations and resulting contracts/orders effective as of March 28, 2019 can be found here. The revised list is also posted on the Defense Pricing and Contracting website.

According to Bloomberg Law, the U.S. Court of Federal Claims held that the Transportation Security Administration (TSA) unlawfully overrode an automatic stay of performance that is triggered when a protest is filed. Technica LLC protested the award of a $48 million contract to Aviation Security Management LLC to provide airport security services for the TSA at the Government Accountability Office (GAO). Judge Loren A. Smith explained that allowing TSA's override of the automatic stay to stand would pull the Competition in Contracting Act's "teeth from the GAO, rendering it a government body with a bark but no ability to bite," which was not what Congress intended. "As such, th[e] Court must invalidate the [TSA's] decision to override the stay." The full decision can be found here.

According to Law360, the GAO rejected IBM's claims over an alleged leak of its bid on a $47.8 million IT support deal to Accenture Federal Services, LLC, the company that won the task order, saying that it does not weigh in on disputes between private parties. The decision comes after the government watchdog agency ruled in April that IBM failed to show that the TSA misevaluated bids for the deal. At that time, the GAO advised IBM to wait for the completion of a related TSA investigation before filing its claims over the alleged leak. IBM said that an employee of one of its subcontractors had obtained the company's bid and other information from a restricted TSA website and passed the information along to Accenture. Following its probe, however, the TSA again selected Accenture, leading IBM to challenge the investigation and the agency's decision to move forward with the award, the decision said. The GAO dismissed IBM's allegations that Accenture violated a ban on knowingly obtaining information about a bid, proposal or source selection, according to the decision. The full GAO decision can be found here.

LABOR AND EMPLOYMENT

According to Bloomberg Government, the U.S. Supreme Court remanded a case to the Ninth Circuit Court of Appeals for further determination which asks whether an employer can use an employee's salary from a prior job as a factor when setting the worker's starting pay. Per Bloomberg Government, a three-judge panel of the Ninth Circuit ruled in April 2017 that prior salary may be a valid basis for setting pay as long as there is a reasonable business reason, even if it results in a difference in pay between male and female workers. In April 2018, the Ninth Circuit, sitting *en banc*, vacated the panel ruling and held that using a worker's prior salary to set pay is not job-related and "perpetuates the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end." However, the late Judge Stephen Reinhardt authored the Ninth Circuit's majority opinion but passed away before the Ninth Circuit issued its opinion. The U.S. Supreme Court, in remanding the case, found that because Judge Reinhardt had passed away by the time of the full court's April 2018 publication of its opinion, his participation was unlawful, and the Ninth Circuit erred in counting him as a member of the majority. As explained by Bloomberg Government, until the Ninth Circuit re-visits the case, the precedent that prior-pay history can be used as a factor other than sex in establishing salary is restored.

According to Law360, the U.S. Supreme Court declined to hear an appeal from In-N-Out Burger in a case regarding the wearing of pro-union buttons. The Court rejected without comment the burger chain's petition for certiorari after the Fifth Circuit Court of Appeals upheld the National Labor Relations Board's (NLRB) finding that In-N-Out unfairly barred workers at an Austin, Texas location from wearing buttons supporting the "Fight for $15" campaign to increase minimum wages. In-N-Out reportedly had a "no pins or stickers" rule, but the NLRB found that the rule violated that National Labor Relations Act (NLRA). The Fifth Circuit upheld the NLRB's ruling and noted that Section 7 of the National Labor Relations Act allows workers to wear pro-union buttons and other paraphernalia, and that the company failed to show that its button ban qualified as the sort of special circumstance that would exempt it from the NLRA's rule. The Fifth Circuit's decision from July 2018 can be found here.

According to Bloomberg Government, a bill was introduced in the Senate that could lower one of the hurdles workers must overcome to prove that an employer engaged in age or disability discrimination or retaliated against them based on their race, sex, religion, color, or national origin. The bill, titled the "Protecting Older Workers Against Discrimination Act" (S.433), seeks to clarify congressional intent that mixed-motive claims shall be available for age discrimination claims under the Age Discrimination in Employment Act (ADEA) and similar civil rights provisions and clarify that a complaining party does not have to provide that a protected characteristic or protected activity was the "but for" cause of an unlawful employment practice. As explained by Bloomberg Government, courts expanded the application of the but-for standard for employment discrimination claims based on age or retaliation claims after two U.S. Supreme Court decisions. The bill would reject the Supreme Court's rulings and require courts to use the less-stringent motivating factor framework for ADEA and Title VII retaliation claims, as well as the Americans with Disabilities Act and the Rehabilitation Act.

According to Bloomberg Government, at least 18 states have introduced paid family leave bills in 2019. These states, which are reportedly home to over 90 million Americans, are considering bills that generally provide leave benefits for new parents and for workers dealing with their own serious illnesses or a family member's serious illness. Although the bills vary somewhat, Bloomberg Government reports that the bills typically grant workers 12 weeks of

paid leave at a percentage of annual wages and are funded through a combination of employee and employer payroll deductions. To date, the District of Columbia and six states have passed paid family and medical leave programs—California, Massachusetts, New Jersey, New York, Rhode Island, and Washington. According to Bloomberg Government, paid-leave advocates are watching the bills in Oregon, Connecticut, New Hampshire, Maine, and Virginia, where the bills may progress under the states' Democratic leadership.

PILIEROMAZZA BLOGS

Small Business Subcontractor Recertifications
By Megan C. Connor

I spoke at the TRI-Association Small Business Advisory Panel (TRIAD) Winter Meeting a couple weeks ago in Nashville, and a number of attendees asked me questions about how often a large prime contractor must require its small business subcontractors to recertify size/status during the term of a subcontract. SBA's regulations and the FAR indicate that a subcontractor's status for a particular subcontract is established at the time the subcontractor submits its offer for the subcontract, and a prime contractor may rely on that representation for the life of the subcontract.
[Read More]

PilieroMazza Litigation Team Wins Long-Odds Appeal of New York Stock Exchange Delisting Decision
By Pamela J. Mazza

Recently, PilieroMazza had the privilege of representing India Globalization Capital, Inc. (NYSE: IGC) on its appeal of a decision by the New York Stock Exchange ("NYSE American" or "the Exchange") to delist IGC's common stock from trading on the Exchange. Victories in NYSE appeals are rare and extremely difficult to come by, particularly when the Exchange's delisting decision is based on subjective and discretionary criteria. In these types of proceedings, the odds are always stacked against the company. But ultimately, even against those odds, truth wins out; the Exchange's delisting procedures allow for a meaningful presentation of evidence to rebut the decision, and under the right circumstances, a company can be vindicated.
[Read More]