



Weekly Report for March 22, 2019

HEARING ON THE SMALL BUSINESS RUNWAY EXTENSION ACT

The House Small Business Subcommittee on Contracting and Infrastructure is holding a hearing on Tuesday, March 26, 2019, at 10:00 a.m., 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 will “consider 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.” PiliroMazza’s Megan Connor will testify at the hearing, which will take place in the Rayburn House Office Building, Room 2360.

GOVERNMENT CONTRACTING

The Office of Management and Budget (OMB) released a [memorandum](#), “Making Smarter Use of Common Contract Solutions and Practices,” which provides guidance on the use of category management. “Category management” refers to the business practice of buying common goods and services as an enterprise to eliminate redundancies, increase efficiency, and deliver more value and savings from the Government’s acquisition programs. Teams of experts in each category of spending help agencies increase their use of common contract solutions and practices and bring decentralized spending into alignment with organized agency- and Government-level spending strategies by sharing market intelligence, Government and industry best practices, prices paid data, and other information to facilitate informed buying decisions. To implement category management, OMB will require agencies to carry out a set of tailored management actions and provide updates on these management actions to evaluate their progress in bringing common spending under management. The expected result is more effectively managed contract spending through a balance of Government-wide, agency-wide, and local contracts; reduced unnecessary contract duplication and cost avoidance; and continued achievement of small business goals and other socioeconomic requirements.

The Office of the Under Secretary of the Defense released a [memorandum](#) regarding reporting Department of Defense (DoD) use of Other Transactions (OTs) for prototype projects. The memorandum follows the data collection and reporting requirements established under 10 U.S.C. § 2371b, which covers the DoD’s use of OTs for prototype projects during Fiscal Year 2018 and provides a spreadsheet as a template to enable standardized collection of

the required information. The report will include a list of each active OT characterized by Service or Agency, major command, contracting activity, award date, award value, appropriation, budget line item, consortium, period of performance, dollars obligated, and total expenditures for the reporting period, product service code, quantities, awardee/vendor, purpose/program goal/description and status of project. Reports are due April 18, 2019.

According to Bloomberg Government, the General Services Administration's (GSA) OASIS on-ramps have been delayed at least until April due to protests. The main issue being disputed is how much past performance a small business (protégé) can rely on from a large business (mentor) that uses additional subcontractors when the mentor-protégé parties have established a joint venture. Bloomberg Government reported that GSA will likely need to make modifications to the RFP to comply with the Government Accountability Office's (GAO) conclusions and recommendations in the Ekagra Partners LLC protest. The GSA also issued an [update](#) on March 8, 2019, indicating that it was reviewing the GAO's recommendations that impacted the OASIS SB On-Ramping procurements. The GSA expects to complete its analysis of the GAO's findings and share with industry next steps on OASIS SB on ramping by late March 2019. The GSA will post updates regarding next steps on both GSA's Interact and FBO postings supporting this procurement activity.

According to Washington Technology, the Navy issued a sources-sought notice seeking support for how it maintains and procures submarines. More specifically, the Navy seeks help desk, operations, cybersecurity, software development, database management, and NMCI support. Notably, the [notice](#) also states that the Navy will determine the availability and technical capability of HUBZone firms to provide the required products and/or services. Per Washington Technology, the current contract is held by Trowbridge & Trowbridge, a woman-owned small business in McLean, Virginia, but the Navy is considering a HUBZone contract depending on whether HUBZone businesses respond to the notice and show they are qualified. The article also reports that at the top of the list of things the Navy is looking for is the ability to provide IT support services at the Portsmouth Naval Shipyard. Businesses also need to be able to support 3,400 users, operate a help desk operation, and have a capability maturity model integration (CMMI) level of level 3 or higher. Comments to the notice are due April 3, 2019, by 4:00 p.m. ET.

The Department of Justice (DOJ) Office of the Inspector General (OIG) completed an [audit](#) of 16 sole-source contract actions awarded to nine small businesses by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Seven of the nine small businesses included in the review were designated Alaska Native Corporations under the 8(a) program. The objectives of the audit were to assess ATF's: (1) processes for soliciting small businesses for contract opportunities, (2) procedures and decisions for selecting and awarding sole-source contracts to small businesses, and (3) subsequent oversight of these types of awards. The DOJ/OIG identified several concerns and included 11 recommendations to improve how ATF competes, administers, and oversees awards to small businesses.

According to Law360, the General Services Administration ("GSA") awarded Ernst & Young (EY) a \$41.75 million deal to validate federal contractors and grant awardees, marking a significant shift away from a decades-long relationship with Dun and Bradstreet and the company's proprietary DUNS numbers. Under the deal, professional services firm EY will provide entity validation services for the federal award process for at least a year, and up to five years in total with options. All entities that want to do business with the federal government, or receive grants or similar payments, must be validated through the System for Award Management, or SAM. Per Law360, tracking entities has been carried out

through DUNS—a proprietary system developed by commercial data and analytics firm Dun and Bradstreet Inc.—since 1978. The Law360 article reported that although the GSA's contract with EY marks a move away from D&B, the new deal will not completely sever the relationship, and the agency noted in its [award announcement](#) that "[d]uring the transition to the new provider, the government will receive continued service from Dun & Bradstreet to maintain award reporting and data integrity."

According to Law360, the U.S. Supreme Court grappled with when the "government knowledge" statute of limitations should apply in False Claims Act (FCA) cases during oral argument this week. The justices and parties reportedly explored the context, clarity, and congressional intent underlying the statute. In addition to an overarching, hard 10-year limit for claims, the FCA requires cases to be filed within either six years of the alleged violation or three years after material facts were or should have been known by "the official of the United States charged with responsibility to act in the circumstances," whichever is later. In the case before the Court, Relator Billy Joe Hunt sued Parsons Corp. accusing it of defrauding the Department of Defense on a contract to dispose of excess and abandoned munitions in Iraq but filed suit seven years after the alleged fraud and within three years of alerting FBI agents. Mr. Hunt's suit was initially dismissed as time-barred but was revived by the Eleventh Circuit, which found that the "government knowledge" statute of limitations applies even when the government does not intervene in a case. The transcript of the oral argument can be found [here](#), and the Court will issue its decision in the coming months. The Court typically decides cases before it recesses for the summer at the end of June or beginning of July.

LABOR AND EMPLOYMENT

The Department of Labor (DOL) published its [proposed rule](#) amending overtime eligibility requirements on March 22, 2019. Under currently enforced law, employees with a salary below \$455 per week (\$23,660 annually) must be paid overtime if they work more than 40 hours per week. Workers making at least this salary level may be eligible for overtime based on their job duties. This salary level was set in 2004. The proposed rule increases the standard salary level to \$679 per week (equivalent to \$35,308 per year). Above this salary level, eligibility for overtime varies based on job duties. The proposed rule also increases the Highly Compensated Employee annual compensation level from \$100,000 a year to \$147,414 per year. Comments on the proposed rule are due May 21, 2019.

The Equal Employment Opportunity Commission (EEOC) [opened](#) the 2018 EEO-1 Survey. The agency [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. 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, to the EEOC Office of Enterprise Data and Analytics' Employer Data Team. Importantly, according to the EEOC's [website](#), it is working "diligently on next steps in the wake of the 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." The EEOC further noted that it will provide further information as soon as possible. According to Bloomberg Government, employers do not have to turn over employee pay data for Fiscal Year 2018 at this time, but—also per Bloomberg Government—a federal judge has reportedly ordered the EEOC to file a brief with the court explaining its plan for collecting pay data by April 3, 2019.

The Department of Labor's Wage and Hour Division [issued](#) a Field Assistance Bulletin (FAB) reiterating employers' responsibilities under the H-1B visa program. The Field Assistance Bulletin confirms that if an H-1B employer chooses to provide notice through electronic media, the employer must ensure that affected American workers, including those employed by a third-party, have access to, and are aware of, the electronic notification. This guidance describes the conditions under which electronic notice satisfies these requirements and provides examples of different methods of posting.

PILIEROMAZZA BLOGS

Does SBA's New Recertification Rule Apply to My Contract? Recent OHA Decision Provides Some Clarity

By Samuel S. Finnerty

The U.S. Small Business Administration's ("SBA") regulations require a concern to recertify its socio-economic (e.g., SDVO SBC, HUBZone, WOSB/EDWOSB) and/or small business size status (1) within 30 days of an approved contract novation; (2) within 30 days of a transaction becoming final in the case of a merger, sale, or acquisition, where contract novation is not required; and (3) no more than 120 days prior to the end of the fifth year of a contract exceeding five years in duration (including options) and no more than 120 days prior to exercising any option thereafter. See 13 CFR §§ 121.404(g), 125.18(e)(1), 126.601(h)(1), and 127.503(h)(1). While these timelines are clear, the effect of recertification is subject to different interpretations.

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OFCCP Investigations on the Rise: How Should You Prepare?

By Meghan F. Leemon

The number of Office of Federal Contract Compliance Programs (OFCCP) investigations is on the rise, and OFCCP has stated a continued focus on enforcement. OFCCP enforces the contractual promise of equal employment opportunity and affirmative action required of those that do business with the federal government. Between fiscal years 2015–2017, the OFCCP received an average of 648 complaints annually. However, in fiscal year 2018, this number more than doubled, jumping to 1,418 complaints received. And, in the first quarter of fiscal year 2019, 349 complaints were received.

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Misclassifying Employees Can Have Major Consequences

By Anthony M. Batt

Today's economy is saturated with new ways to earn money without being subject to a set schedule or traditional employer demands. With so many individuals working part-time jobs with more autonomy than ever, companies are struggling to determine whether to classify those workers as independent contractors or employees. The distinction between those two categories is extremely important and can affect all aspects of your business, including benefits, overtime pay, and workers' compensation.

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