February 15, 2024

Weekly Update for Government Contractors and Commercial Businesses – February 2024 #3

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GOVERNMENT CONTRACTS

Rule of Two Changes: OMB Memo Aims to Make Rule of Two Apply to Task and Delivery Orders and SBA's Proposed Rules, Coming Soon, Will Shape the Future Procurement Landscape, PilieroMazza Blog, Isaias "Cy" Alba, IV, Annie B. Hudgins

On January 25, 2024, the White House Office of Management and Budget issued a memo, Increasing Small Business Participation on Multiple-Award Contracts, calling for executive agencies to apply the FAR's Rule of Two to task and delivery orders competed under multiple-award contracts. Contractors should take note that this change has potential to significantly increase the number of small business set asides, and in turn, it could mean millions more dollars in contract opportunities for small businesses. In this blog, ***we examine changes to the Rule of Two and explore the potential impacts for contractors.*** Read more here.

PilieroMazza Annual Review: Key Insights from Recent Bid Protest Decisions Reshape Strategies for Future Government Contractor Success, PilieroMazza Webinar Replay, Katherine B. Burrows, Eric Valle. Click here to view the recorded session.

Department of Defense (DOD) Memorandum: Class Deviation—Section 890 Pilot Program to Accelerate Contracting and Pricing Processes

On February 8, DOD released a memorandum, effective immediately, rescinding a class deviation issued on January 17, 2023. For contract actions approved for participation in the Section 890 Pilot Program (the Pilot Program), the contracting officer may decide the extent, structure, and level of detail of the historical actual cost data the offeror or contractor will be required to submit in lieu of providing complete certified cost or pricing data. The full Memorandum is available here. Attachment 1 is available here, Attachment 2 is available here, Attachment 3 is available here, and Attachment 4 is available here.

Federal Acquisition Regulation (FAR) Council Notice: Semiannual Regulatory Agenda

On February 9, the Department of Defense (DOD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

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- Proposed Rule Stage
  - Controlled Unclassified Information
  - Improving Consistency Between Procurement & Nonprocurement Procedures on Suspension and Debarment
  - Rerepresentation of Size and Socioeconomic Status
  - Performance Ratings for Small Business Joint Venture Members and Small Business First-Tier Subcontractors
  - Limitations on Subcontracting
  - Certification of Service-Disabled Veteran-Owned Small Businesses
  - Preventing Organizational Conflicts of Interest in Federal Acquisition
  - Subcontracting Plans and Limitations on Subcontracting
  - HUBZone Program
  - Protests of Orders Set Aside for Small Business
  - Small Business Protests
  - Explanations to Unsuccessful Offerors on Certain Orders Under Task and Delivery Order Contracts
  - Prohibition on the Use of Reverse Auctions for Complex, Specialized, or Substantial Design and Construction Services
- Final Rule Stage
  - Reverse Auction Guidance

General Services Administration (GSA) Notice: Semiannual Regulatory Agenda

On February 9, GSA published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Proposed Rule Stage
  - Updated Guidance for Non-Federal Entities Access to Federal Supply Schedules
  - Additional Transactional Data Reporting Elements for Non-Federal Supply Schedule contracts
- Final Rule Stage
  - Standardizing Federal Supply Schedule Clause and Provision Prescriptions

Small Business Administration (SBA) Notice: Semiannual Regulatory Agenda

On February 9, SBA published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Proposed Rule Stage
  - Affiliation in Small Business Procurement Programs
- Final Rule Stage
  - Small Business Size Standards: Adjustment of Alternative Size Standard for SBA's 7(a) and CDC/504 Loan Programs for Inflation; and Surety Bond Limits: Adjustments for Inflation

Department of Education (ED) Notice: Semiannual Regulatory Agenda

On February 9, ED published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Proposed Rule Stage
    - EDGAR Revisions

Nuclear Regulatory Commission (NRC) Notice: Semiannual Regulatory Agenda

On February 9, NRC published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Proposed Rule Stage
    - Revision to the NRC's Acquisition Regulation (NRCAR)

Department of Defense (DOD) Advisory: Small Business and Industry Engagement Roundtable Announced with DOD and SBA Leaders

The DOD's Office of Small Business Programs, Small Business Administration, Michigan Economic Development Corporation, Michigan Small Business Development Center, and the Schoolcraft College APEX Accelerator, invites media representatives to attend the Small Business & Industry Engagement Roundtable on February 16 from 10 a.m. to Noon at the Schoolcraft College Vistatech Center, Livonia, Michigan. Read more here.

General Services Administration (GSA) News Release: General Services Administration and Department of Defense seek industry input on potential record-setting federal purchase of clean electricity

GSA and the Department of Defense (DOD) are seeking suppliers that could provide federal facilities in several mid-Atlantic and Midwest states with 100% carbon pollution-free electricity (CFE) by 2030. The clean electricity procurement – slated for later this year – would be one of the federal government's largest-ever clean electricity purchases. Read more here.

Biden Administration Preps Potential Largest Ever Federal Carbon-Free Electricity Purchase, *Government Executive*

New efforts are part of an aggressive timeline for agencies to reduce their emissions. The Biden administration is preparing what could become the federal government's largest-ever purchase of carbon-free electricity as it looks to deliver on the president's ambitious goals to reduce the carbon footprint of federal agencies. Read more here.

Court of Federal Claims Protest: *Rockwell Collins, Inc. v. United States*

On January 22, Judge Dietz issued an opinion granting Rockwell Collins, Inc.'s (Rockwell) Motion for Judgment on the Administrative Record (MJAR). GWFA protested a decision by the Department of the Air Force (Air Force) canceling its solicitation for proposals. Rockwell argued that the Air Force lacked reasonable justification and the Air Force failed to consider Rockwell's proposal compared to the solicitation requirements. The Court agreed with Rockwell that the Air Force unreasonably canceled the solicitation. The Court found that Rockwell is entitled to injunctive relief, the Air Force's cancellation of the solicitation is vacated, and the Air Force is ordered to reinstate the solicitation. The full decision is available here.

Upcoming Government Contracts Presentations

WEBINAR: Small Business Year In Review, February 21, 2024, Jon Williams. Read more here.

WEBINAR: Past Performance: How to Use Yours, Benefit from Others', and Defend It from Attacks, February 22, 2024, Samuel S. Finnerty, Daniel Figuenick, III. Read more here.

CONFERENCE: Empowering Small Business Panel, February 29, 2024, Jon Williams. Read more here.

WEBINAR: Joint Venture and Mentor-Protege Bidding Strategies, February 29, 2024, Peter B. Ford, Meghan F. Leemon. Read more here.

CYBERSECURITY & DATA PRIVACY

Federal Acquisition Regulation (FAR) Council Notice: Semiannual Regulatory Agenda

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- Proposed Rule Stage
  - Federal Acquisition Supply Chain Security Act of 2018
  - Cyber Threat and Incident Reporting and Information Sharing
  - Standardizing Cybersecurity Requirements for Unclassified Information Systems
  - Supply Chain Software Security
- Final Rule Stage
  - Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Exclusion Orders
  - Prohibition on a ByteDance Covered Application

Department of Defense (DOD) Notice: Semiannual Regulatory Agenda

On February 9, DOD published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Proposed Rule Stage
  - Cybersecurity Maturity Model Certification (CMMC) Program Assessing Contractor Implementation of Cybersecurity Requirements

Some 6,600 Current and Former Employees Impacted in a January GAO Data Breach, *Government Executive*

The breach, which also included some companies doing business with GAO, may further galvanize concerns about the federal government's ability to defend itself from cyber intrusions. Read more here.

GSA Updates Technology Modernization Fund Repayment Policy Following Lawmakers' Proposal, *FedScoop*

The revised policy for repayment comes after Reps. Nancy Mace, R-S.C., and Gerry Connolly, D-Va., in September 2023 issued a bill that would require federal agencies to repay TMF funds in line with the original legislation that created the program. Read more here.

CISA Releases 2024 Priorities for the Joint Cyber Defense Collaborative, *CyberScoop*

The Cybersecurity and Infrastructure Security Agency on Monday released the 2024 priorities for the Joint Cyber Defense Collaborative, an operational-focused government and private collaborative which has faced recent criticism. Read more here.

LABOR & EMPLOYMENT

Department of Veterans Affairs (VA) Office of Inspector General (OIG) Report: Noncompliance with Contractor Employee Vetting Requirements Exposes VA to Risk

On February 8, VA's OIG released an audit report assessing VA's compliance with executive orders, federal regulations, and VA requirements for vetting contractor employees to serve on VA contracts. The audit team found VA officials had a high rate of noncompliance. The team found that 94 percent of contract files reviewed did not include position designations establishing the investigative requirements for the contract. In addition, 90 percent did not include language to communicate vetting requirements to the contractor. Ultimately, 75 percent of employees under the contracts reviewed did not have a fingerprint check, and about 79 percent did not have a formal background investigation. Noncompliance stemmed from differences among offices concerning roles and responsibilities for the suitability program and from incorrect guidance. Many subagencies had outdated and conflicting or inaccurate policies and/or directed their staff to the wrong policies. OIG recommended the VA Deputy Secretary mediate their efforts to collaborate on developing and publishing updates to the policies and procedures for vetting contractors. OIG also recommended OALC direct acquisition professionals to the correct policies for vetting contractor employees. The full report is available here.

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- Final Rule Stage
    - Use of Project Labor Agreement for Federal Construction Projects
    - Nondisplacement of Qualified Workers Under Service Contracts

Department of Labor (DOL) News Release: DOL Announces Employee Benefits Security Administration (EBSA) Recovered Over $1.4B for Workers, Families, Benefit Plans

On February 13, EBSA published an overview of its enforcement activities in fiscal year 2023 in a new fact sheet. The fact sheet provides details about the recovery of workers' benefits through various enforcement, outreach, and assistance programs, including the voluntary fiduciary correction program, the abandoned plan program, and monetary recoveries from informal complaint resolutions through EBSA's benefits advisors. A total of $1.4B was recovered for workers in fiscal year 2023, with more than half resulting from the agency's enforcement actions. Read more here.

DOL Seeks to Ax Challenge to New Davis-Bacon Rule, *Law360*

The U.S. Department of Labor has asked a Texas federal judge to toss the Associated Builders and Contractors' lawsuit to stop the agency from enforcing a final rule about prevailing wage rates for federal construction projects, saying the group did not show how the rule would harm its members. Read more here (subscription required).

Special Salary Rate Gives VHA 'More Robust,' Longer-Term Tools to Hire and Keep HR Staff, *Federal News Network*

The Department of Veterans Affairs gave its IT workforce significant pay raises last summer, in the hopes of bringing more private-sector tech professionals into government. Read more here.

Déjà Vu for Federal Contractors with Salary History Ban? *The National Law Review*

On January 30, 2024, the Biden administration proposed a rule (the Salary Rule) that would amend the Federal Acquisition Regulation (FAR) to "prohibit contractors and subcontractors from seeking and considering information about a job applicant's compensation history when making employment decisions for certain positions." The new rule would also require contractors and subcontractors to disclose compensation information publicly for open positions. Read more here.

Upcoming Labor & Employment Presentations

WEBINAR: Nuts and Bolts of the SCA, February 26, 2024, Nichole D. Atallah, Sarah L. Nash. Read more here.

BUSINESS & TRANSACTIONS

Consumer Financial Protection Bureau (CFPB) Notice: Semiannual Regulatory Agenda

On February 9, CFPB published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Proposed Rule Stage
    - Required Rulemaking on Personal Financial Data Rights

Upcoming Business & Transactions Presentations

WEBINAR: Understanding the Corporate Transparency Act: Implications and Compliance Strategies, February 20, 2024, Isaias "Cy" Alba, IV. Read more here.

CORPORATE & ORGANIZATIONAL GOVERNANCE

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On February 9, the Department of Defense (DOD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Proposed Rule Stage
    - Disclosure of Beneficial Owner in Federal Contracting
    - Policy on Joint Ventures

Securities and Exchange Commission (SEC) Notice: Semiannual Regulatory Agenda

On February 9, SEC published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Final Rule Stage
    - Prohibition Against Conflicts of Interest in Certain Securitizations

Department of the Treasury (Treasury) Notice: Semiannual Regulatory Agenda

On February 9, the Treasury published its Semiannual Regulatory Agenda, which is a summary and description of regulations being developed. Notable regulations include:

- Final Rule Stage
    - Beneficial Ownership Information Access and Safeguards

MERGERS & ACQUISITIONS

EU Updates Longstanding Guidance on Defining Markets, *Law360*

Europe's competition enforcer released new guidance on Thursday for how the agency views the markets at issue when assessing merger and antitrust conduct cases, the first update to the policy since its adoption more than two decades ago. Read more here (subscription required).

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