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E-ALERT | Government Contracts

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THE GOVERNMENT CONTRACTS UPDATE

On a semi-monthly basis, Covington & Burling LLP's Government Contracts practice delivers its update of major news, notes, and trends relevant to government contractors.

SEQUESTRATION & WARN ACT LIABILITY

The threat of spending cuts triggered by sequestration on January 2, 2013, persists, and may eventually lead contractors to lay off certain employees. The Obama Administration has recently downplayed the Worker Adjustment and Retraining Notification ("WARN") Act, which otherwise requires at least 60 days' notice of lay-offs. In that regard, on September 28, 2012, OMB advised that contractors' WARN Act liabilities, including attorneys' fees and litigation costs, will qualify as allowable costs. Republicans on the Hill have objected to the OMB guidance. For example:

- Rep. Darrell Issa (R-Calif.), Chair of the House Oversight and Gov't Reform Committees, sent a letter to OMB and ten large defense contractors, claiming the OMB advice encouraged contractors to "flout" employment laws and ignore their legal obligations. Rep. Issa also asked for any communications between OMB and the contractors on the topic, and for contractors' internal analyses of potential liabilities.
- Sens. John McCain (R-Ariz.) and Lindsey Graham (R-S.C.) have stated that notwithstanding the OMB guidance, they would try to prevent any payments to contractors for WARN Act liabilities.

Although the OMB and other executive branch guidance appears to provide contractors with a basis for concluding that WARN Act notices in advance of the January 2 start of sequestration are unnecessary, contractors still should be planning for sequestration -- in particular, assessing their potential liabilities should the spending cuts take effect and the steps that can be taken to protect existing contracts.

FAR UPDATES

The Federal Funding Accounting and Transparency Act ("FFATA") requires contractors to report certain information including the names and total compensation of each of the five most highly compensated executives at first-tier subcontractors.

- The previous definition of "first-tier subcontract" provided in FAR 52.204-10(a) was very broad and excluded only vendor "arrangements for materials or supplies that would normally be applied to a Contractor's general and administrative expenses or indirect cost."
- Now, the new definition excludes a contractor's "supplier agreements with vendors" more broadly and also specifically excepts contracts for materials or supplies that benefit multiple contracts (costs that are normally indirect expenses).

This broader exclusion, which appears retroactive, is welcome news for contractors with both government and commercial businesses whose suppliers source materials and supplies for general use by the contractor.

RECENT CASES

- **TRICARE Retail Pharmacy Rebates Challenged.** On October 17, in an oral argument before the U.S. Court of Appeals for the D.C. Circuit, a government contractor trade group (The Coalition for Common Sense in Government Procurement) challenged the Department of Defense ("DoD")'s authority under the 2008 NDAA to require rebates from pharmaceutical manufacturers for amounts received in excess of the Federal Ceiling Prices established by the Veteran's Health Care Act ("VHCA") of 1992 for pharmaceuticals paid for by DoD in the retail pharmacy program. The Coalition claimed that DoD's regulations implementing the 2008 NDAA were invalid because they effectively created price controls in lieu of utilizing the voluntary agreement system of the VHCA and other federal drug pricing programs. The Coalition also emphasized that failing to participate in the rebate program could bar a company from selling products directly to certain government agencies and from participating in Medicaid and Medicare Part B. During argument, the D.C. Circuit appeared to agree that the NDAA provisions lack clarity, but the court easily could find that although the Coalition's arguments are a reasonable way to construe the statute, Congress has not "spoken directly" to the issue and the government's interpretation is permissible (and thus withstands *Chevron* scrutiny).
- **COFC Enjoins Nonresponsibility Determination.** On October 15, the U.S. Court of Federal Claims found that the government unreasonably relied on allegations contained in a Notice of Proposed Debarment in making a nonresponsibility determination, vacated the determination, and remanded to the Army for reevaluation. *Afghan Am. Army Servs. Corp. v. U.S.*, No. 11-520C (Fed. Cl. Oct. 15, 2012). Judge Williams ordered the Army to reevaluate the contractor's responsibility because the Contracting Officer never provided the contractor with any details of the charges or afforded it an opportunity to respond. By putting the onus back on the agency, this decision appears to offer contractors and their counsel an additional weapon against unsubstantiated, disputed, or ultimately untrue allegations regarding contractor responsibility.
- **Source Selection Plans Do Not Give Rights to Offerors.** On October 11, the U.S. Court of Federal Claims affirmed that "[i]t is well settled that source selection plans and other guidelines do not give any rights to offerors." *Atlantic Diving Supply, Inc. v. U.S.*, No. 11-894C (Fed. Cl. Oct. 11, 2012). The Court rejected the plaintiff's argument that, because the Technical Evaluation Panel did not follow its internally established procedures, the award decision based on the TEP's improper evaluation lacked a rational basis. If there is any lesson in this decision, it is that internal, non-public agency guidelines do not give private parties rights to challenge an award; rather, the propriety of agency evaluations hinge on the agency's compliance with the objective solicitation evaluation criteria.

TRENDS

- **False Claims Act ("FCA") Covers Wage Violations.** The U.S. Court of Appeals for the Sixth Circuit recently affirmed a ruling that a contractor was liable under the FCA for failing to pay the required minimum wage for electrical work on a subcontract. *U.S. ex rel. Bran Wall v. Circle C Construction LLC,* No. 10-5645 (6th Cir. Oct. 1, 2012). The Department of Labor ("DoL") set the minimum wage requirement under the Davis-Bacon Act, but the ruling rejected the contractor's attempt to have the allegations resolved by the DoL. This is significant for two reasons: (1) DoL remedies are limited to contract termination, debarment, and forced payment of back wages, whereas the FCA provides for trebled damages; and (2) this suggests FCA relators (and potentially the U.S. Government) will attempt to recast contract claims and regulatory violations

as false claims within the scope of the FCA. Although just four days later, in a different case, the Sixth Circuit pronounced that "[t]he False Claims Act is not a vehicle to police technical compliance with complex regulations," *U.S. ex rel. Julie Williams v. Renal Care Grp.*, No. 11-5779 (6th Cir. Oct. 5, 2012), it is likely that ever-expansive interpretations of the FCA will continue to ensnare contractors.

- **Federal Information Technology Acquisition Reform Act ("FITARA").** FITARA, which is circulating in Washington as draft legislation, would constitute a dramatic departure from current IT acquisition standards. The bill would change current IT acquisition by giving CIOs budget authority over IT programs; making the federal government's CIO Council responsible for creating shared services and shared IT platforms; establishing a Federal Commodity IT Center under OMB to coordinate acquisition; creating Assisted Acquisition Centers of Excellence at certain agencies to implement low-cost acquisition practices for specialty or complex IT requirements; and bolstering the federal acquisition workforce to address the loss of retiring mid-level officials.
  - Contractors with good memories will recall that IT procurements previously were concentrated in this manner, but were made more decentralized, to our current policies—which apparently goes to show that the more things change, the more they stay the same.
  - Industry has voiced significant concerns with FITARA, including that the legislation, if enacted, would reduce competition for federal IT contracts by (1) concentrating IT decision-making and acquisition authority within a new federal IT acquisition center—likely within GSA; (2) shifting the focus of IT procurements towards lowest-price bidders rather than competitors that offer the best overall value; and (3) creating duplicative and burdensome levels of bureaucratic requirements. Contractors can expect congressional hearings on FITARA in January 2013.

If you have any questions concerning the material discussed in this Update, please contact any of the following members of our Government Contracts practice:

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