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E-ALERT | Government Contracts

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THE GOVERNMENT CONTRACTS UPDATE

Covington & Burling LLP's Government Contracts practice regularly delivers an update on major news, notes, and trends relevant to government contractors.

PROPOSED RULEMAKING AND AGENCY ACTIONS

GAO Walks Back OMB Guidance Relating to WARN Act Liability Reimbursement

On September 12, 2013, the Government Accountability Office ("GAO") addressed the effect of previous Office of Management and Budget ("OMB") guidance relating to government reimbursements for liability under the Worker Adjustment and Retraining Notification ("WARN") Act. The WARN Act requires employers with at least 100 employees to provide written notice to employees, state agencies, and local governments 60 days before ordering a reasonably foreseeable plant closing or mass layoff. As we reported previously, prior to the anticipated January 2, 2013 sequestration, the Department of Labor ("DOL") advised federal contractors that the WARN Act did not require blanket notices in advance of sequestration, because its impact on particular programs and contracts was not necessarily foreseeable. Federal contractors had voiced concern about potential liability for their failure to issue WARN Act notices. On September 28, 2012, OMB advised that if a contractor had not provided WARN Act notice based upon DOL guidance and the sequestration resulted in the termination of a government contract triggering a plant closing or mass layoff, any resulting employee compensation costs for WARN Act liability, assuming they were reasonable and allocable, would qualify as reimbursable.

In response to subsequent questions from the Chairman of the House Appropriations Committee, GAO clarified OMB's guidance regarding a contracting officer's ability to determine whether costs incurred by a contractor for failure to provide WARN Act notifications were reimbursable. Specifically, GAO explained that (1) OMB's guidance does not require contracting officers to treat WARN Act liability costs as allowable or otherwise alter a contracting officer's responsibility to apply the Federal Acquisition Regulation's ("FAR") cost allowability requirements to a contractor's reimbursement request; (2) a contracting officer has discretion to determine the reasonableness of a contractor's costs incurred for WARN Act noncompliance; (3) OMB's guidance does not alter the operation of a contract's limitation of cost or funds clause, which provides a ceiling on government liability under a cost reimbursement contract; and (4) OMB's guidance does not prohibit reimbursement of WARN Act-related costs arising under circumstances not specified under the guidance. GAO's advice makes clear that that costs for failure to provide WARN Act notifications are not necessarily reimbursable. As such, federal contractors should continue to carefully analyze the point at which they possess sufficient information to conclude that specific closings or mass layoffs are reasonably likely.

New Proposed Rules to Enhance Contractors' Responsibilities in the Fight Against Human Trafficking

On September 26, 2013, the FAR Council and Department of Defense ("DoD") published new proposed rules to amend the FAR and the Defense Federal Acquisition Regulation Supplement ("DFARS") to strengthen protections against human trafficking in the federal supply chain. As detailed in our September 27, 2013 update, the new requirements in the proposed FAR and DFARs amendments will significantly expand the substantive and reporting obligations of all federal contractors, subcontractors, and the agents of contractors. The rule also will require certain federal contractors and subcontractors to provide detailed compliance plans. The proposed DFARS amendment also would create supplementary requirements to ensure that all employees of DoD contractors are aware of their labor rights and have a means of reporting suspected labor violations directly to the DoD Inspector General's office.

Comments are due by November 25, 2013.

New Affirmative Action Regulations Take Effect in March 2014

On September 24, 2013, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") published two new broad-reaching rules requiring covered federal contractors and subcontractors to establish hiring benchmarks for individuals with disabilities and military veterans. The rules take effect on March 24, 2014. As summarized in our September 6, 2013 update, these rules, issued pursuant to Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act, set goals and data collection requirements related to the hiring of individuals with disabilities and protected veterans.

NIST Reopens Public Comment on Encryption Standards

On September 10, 2013, the National Institute of Standards and Technology ("NIST") announced the reopening of a public comment period on three encryption standards relating to Random Bit Generators to "ensure that the recommendations are accurate and provide the strongest cryptographic recommendations possible." NIST reopened the comment period in response to questions about the National Security Agency's role in NIST's cryptographic standards development process. NIST issued a statement that it "wanted[ed] to assure the IT cybersecurity community that the transparent, public process used to rigorously vet our standards is still in place."

Comments are due by November 6, 2013.

OTHER RECENT DEVELOPMENTS

India Delays Decision to Join WTO Government Procurement Agreement

On September 10, 2013, India informed members of the World Trade Organization ("WTO") that it will consider whether to join the WTO's Agreement on Government Procurement ("GPA") only after pending domestic legislation on procurement reform is passed by its parliament. India has held observer status to the GPA since February 2010. The GPA is a plurilateral agreement that provides a framework for international trade in government procurement markets among participating countries, particularly with respect to non-discrimination and national treatment. India has significant government procurement expenditures and its membership in the GPA would bring increased transparency, competitiveness, and standardization to its procurement process. Indian contractors would also be expected to be low-cost competitors in U.S. government procurement markets.

CASE DIGEST

Federal Circuit Expands Definition of "Procurement" to include DOI Precedent Agreement (Rockies Express Pipeline LLC v. U.S. Department of the Interior, Nos. 12-1055, -1174 (Fed. Cir. September 13, 2013))

In a cross-appeal from the Civilian Board of Contract Appeals ("Board"), the United States Court of Appeals for the Federal Circuit rejected the Department of the Interior's ("Interior") argument that the Board lacked jurisdiction under the Contract Disputes Act ("CDA") to hear a challenge related to a "precedent agreement" between Interior and Rockies Express Pipeline LLC ("Rockies Express"). The Federal Circuit also expanded Interior's damages liability in the matter by reversing the Board's decision that had limited those damages to the time period prior to a change in federal policy that required Interior to withdraw from Royalty-in-Kind ("RIK") arrangements.

Rockies Express and Interior had entered into a precedent agreement as required by the Federal Energy Regulatory Commission before Rockies Express' construction of a natural gas pipeline. The agreement obligated the parties to enter into follow-on agreements, including transportation agreements. Pursuant to the precedent agreement, Rockies Express agreed to build the pipeline, and Interior agreed to pay Rockies Express reservation charges for gas shipments on the pipeline for ten years. Interior would receive the gas as a RIK for gas Rockies Express extracted from federal land.

Rockies Express subsequently sued for breach of contract after Interior refused to enter into a transportation agreement required by the precedent agreement. In response, Interior argued that the precedent agreement was not a procurement contract subject to the CDA because it was an "agreement to agree," and no services would be procured until after the execution of later agreements. The Federal Circuit disagreed, stating that for purposes of the CDA, a "procurement" included "all stages of the process of acquiring property or services" and the precedent agreement was a "traditional contract" obligating the parties to enter into the transportation agreement, which itself was incorporated into the precedent agreement.

In addition, the Federal Circuit agreed with Rockies Express that the Board improperly limited damages for lost payments to only a portion of the ten year time period. The Federal Circuit reversed the Board's determination that the Secretary of the Interior's 2009 announcement that it would phase out RIK contracts was "change in policy" satisfying the conditions under which the agreement could be terminated. As a result, the Court concluded that Rockies Express was entitled to damages for the full ten year term of the agreement.

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