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E-ALERT | Government Contracts

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THE GOVERNMENT CONTRACTS UPDATE

NEW RULE REVISES AND EXPANDS DPAS REGULATIONS (79 FED. REG. 47560)

On August 14, 2014, the U.S. Commerce Department's Bureau of Industry and Security ("BIS") issued a final rule clarifying the existing standards and procedures for, and expanding the reach of, the Defense Priorities and Allocations System ("DPAS") regulations – the "rated order" system. The rule implements the provisions of the Defense Production Act Reauthorization of 2009 which requires agencies with priorities and allocations authorities—the two principal components of DPAS—to issue rules establishing standards and procedures by which those authorities would be used. Under the priorities component, certain "rated" government contracts and subcontracts are required to be given priority over a contractor's or subcontractor's other contracts (including its purely commercial operations) in order to facilitate expedited deliveries in promotion of the U.S. national defense. Under the allocation component, materials, services, and facilities may be allocated by the government to promote the U.S. national defense.

The final rule adopts a proposed rule that was issued on January 31, 2014. It implements a number of changes to the existing DPAS system, as it:

- Expands the scope of reasons for which rated orders may be issued to include homeland security, emergency preparedness, and critical infrastructure protection and restoration activities;
- Authorizes agencies to require acceptance or rejection of rated orders for emergency preparedness activities in as little as six hours after receipt of an order in response to a hazard that has occurred (e.g., a natural disaster or terrorist event), or 12 hours if the order is to prepare for an imminent hazard (as compared to the 10 to 15 working days allowed for responses to other rated orders);
- Requires a contractor's written confirmation that an order will be delayed to be transmitted within one working day of the contractor or subcontractor providing verbal notice of the delay (versus five days under the previous version of the DPAS regulations);
- Provides a procedure for requesting assistance in obtaining rated items or priority rating authority for homeland security, emergency preparedness, and critical infrastructure protection and restoration assistance programs within the United States; and
- Permits allocation orders to be issued by constructive notice through a publication in the Federal Register (which may refer generally to all manufacturers of a specified product and is not required to name every manufacturer of that product).

Congress had required federal agencies with priorities and allocations authority to work together to develop a consistent and unified federal priorities and allocations system. Thus, BIS worked with the Departments of Agriculture, Defense, Energy, Health and Human Services, Homeland Security, and Transportation to develop common provisions that can be used by each Department in its own regulations.

The final rule will become effective on September 15, 2014. In the interim, contractors should review their policies and procedures related to the handling of rated orders to, among other things, ensure that they are prepared to respond to rated orders in the new compressed timeframes outlined above.

AGENCIES CONTINUE TO LAG IN REPORTING CONTRACTOR PAST PERFORMANCE

Experienced contractors understand the importance of positive contract past performance assessments and strive to ensure that successful contract efforts are accurately reflected in the Contract Performance Assessment Report System ("CPARS") and the Past Performance Information Retrieval System. An August 7 Report by the Government Accountability Office ("GAO"), however, highlights the struggles of federal agencies to properly report contract past performance information.

The GAO Report found that while agencies have taken some positive steps to improve their reporting of contractor past performance information, federal agencies are still falling far short of the reporting compliance targets set by the Office of Federal Procurement Policy ("OFPP") in March 2013. OFPP set tiered compliance requirements for FY 2013, 2014, and 2015, giving agencies time to achieve 100% reporting compliance by FY 2015. However, as the excerpted chart below illustrates, federal agencies are falling well short of the 100% reporting target.

	Compliance Rate as of	
Agency	**Apr-2013**	**Apr-2014**
Defense	76%	83%
Treasury	47	71
Interior	15	51
Homeland Security	34	45
Justice	21	29
Agriculture	13	27
Veterans Affairs	4	25
Health and Human Services	10	24
State	3	15
General Services Administration	3	13
Other agencies	32	47
Total federal government	**32%**	**49%**

While the GAO Report did not make any recommendations, it did note that steps are being taken to improve reporting compliance, including the issuance of the government-wide CPARS Guide in November 2012. Unfortunately for contractors, the GAO Report notes that one of the major steps being taken to improve compliance is to drastically decrease the amount of time contractors are afforded to provide comments on a CPARs report. The FAR Council's recent amendment to FAR 42.1503, implementing section 853 of the 2013 National Defense Authorization Act, reduced the

contractor response period from 30 days to 14 days effective July 1, 2014. By taking time away from the contractor, the cognizant agency would have additional time to meet its 120-day deadline under the CPARS Guide.

VA AND DOD ANNOUNCE NEW IT CONTRACTING OPPORTUNITIES

The Department of Veterans Affairs ("VA") has published a request for information ("RFI") in anticipation of replacing its $12 billion IT modernization contract, the Transformation Twenty-One Total Technology ("T4") contract, which is scheduled to expire in 2016. The new contract vehicle, referred to as T4 Next Generation, or T4NG, retains the 11 task areas from the existing T4 contract, including program management, enterprise architecture and planning support, systems and software engineering, data migration, cybersecurity, and training. Unlike the T4 contract, however, the T4NG contract will include a single five-year option in addition to the basic contract ordering period of five years. Companies interested in participating in the contract must note their interest and provide a submission outlining their respective capabilities to perform the work described in the draft PWS. Responses to the RFI are due at 3:00 p.m. EST on August 28 via the Virtual Office of Acquisition (VOA) at https://www.voa.va.gov/.

The Department of Defense's ("DoD") Defense Health Agency ("DHA") is also expected to award two large defense health information technology contracts in the next 18 months: the $11 billion single-award DoD Healthcare Management System Modernization ("DHMSM") contract, and a new $20 billion contract vehicle to replace the Defense Medical Information Systems/Systems Integration, Design, Development, Operations, and Maintenance Services ("D/SIDDOMS III") vehicle, which we highlighted in our June 30, 2014 e-alert. The DHMSM contract is aimed at modernizing DoD's electronic health record system while sustaining advances that the DoD has made with respect to its interoperability with the VA during transitions of care. The D/SIDDOMS III contract provides the Military Health System, its components, and the VA with the ability to order services, equipment, materials and facilities to design, test and operate IT systems and system components. The DoD issued a final Request for Proposals for the DHMSM contract on August 25, 2014. Bids for the DHMSM contract are due by October 9, 2014. A draft RFP for the D/SIDDOMS III replacement vehicle was released in July 2014.

DEPARTMENT OF LABOR ISSUES PROPOSED RULE REQUIRING CONTRACTORS TO SUBMIT PAY DATA (79 FED. REG. 46562)

On August 8, 2014, the Department of Labor ("DOL") issued a proposed rule that would require certain federal contractors and subcontractors to supplement their Employer Information Report ("EEO-1 Report") submitted to the Office of Federal Contract Compliance Programs ("OFCCP") with summary information on compensation paid to employees by sex, race, ethnicity, and job category, and to provide other relevant data, such as the hours worked by those employees. The proposed rule was issued at the direction of the President, who issued an April 8 memorandum instructing the Secretary of Labor to propose a rule within 120 days to collect such summary compensation data from federal contractors and subcontractors. We discussed the President's April 8 in our e-alert of April 24.

The proposed rule would require employers with more than 100 employees that hold federal contracts, subcontracts, or purchase orders amounting to $50,000 or more that cover a period of at least 30 days, including modifications, to report the compensation data described above. In addition to prime contractors or first tier subcontracts, this rule would also typically include private employers that serve as a depository of federal government funds in any amount, or financial institutions that serve as issuing and paying agents for U.S. Savings Bonds and Notes.

According to the DOL, the compensation information required under the proposed reporting requirement is already available to employers in employees' Form W-2 Wage and Tax Statement. Employers would be required to report data for an entire year (January 1 through December 31) with reports due by March 31 of each year (which differs from the September 30 filing deadline for the EEO-1 Report). The DOL is seeking comments on any additional costs that may be incurred as a result of these dates not aligning.

The DOL states in the proposed rule that it intends to use the collected data, along with existing standards such as labor market survey data, to create objective industry standards against which it will compare employers to determine which contractors it will prioritize and schedule for compliance evaluations. The proposed rule states that this data collection effort "is a critical tool for eradicating compensation discrimination . . . [and] would enable OFCCP to direct its enforcement resources towards entities for which reported data suggest potential pay violations . . ." The DOL also hopes that the objective industry standards will lead employers to assess their own compliance with the standard and undertake voluntary measures to change their employment policies and practices, noting that "contractors will rightfully assume that OFCCP is strengthening its enforcement in the area of compensation discrimination . . ." The DOL is specifically seeking comments on its proposed approach to use objective industry standards to focus or prioritize contractors for compliance evaluations. Comments on the proposed rule are due by November 6, 2014.

CASE DIGEST

Pharmacies Avoid False Claims Act Suit ((*Fox Rx Inc. v. Omnicare Inc. et al.*, Case No. 1:12-cv-00275 (SDNY))

On August 12, 2014, Judge Denise Cote of the U.S. District Court for the Southern District of New York dismissed a suit against three pharmacies (Omnicare, Inc., Neighborcare, Inc., and PharMerica Corp.) and one pharmacy benefits administrator (MHA Long Term Care Network) brought by *qui tam* relator Fox Rx, Inc. ("Fox")—a Medicare Part D program sponsor—for violations of the False Claims Act and various state pharmacy laws. Fox asserted that the defendants (1) failed to substitute generic drugs for brand-name drugs in states that have laws mandating such substitution, and (2) dispensed drugs after the termination date of the national drug code ("NDC") in states that have laws prohibiting pharmacies from dispensing drugs beyond their shelf-life expiration dates. The plaintiffs argued that, by engaging in such practices, the defendants falsely indicated in submissions to a federal agency that the drugs they dispensed were "covered" by Medicare, and that they overcharged Medicare and Medicaid.

Judge Cote disagreed. Noting that "[n]oncompliance with regulations that are 'irrelevant' to the Government's disbursement decisions . . . do not constitute legally false certifications . . .," Judge Cote dismissed the claims on the grounds that the plaintiff did not identify any federal statute or regulation that conditioned reimbursement of Medicare Part D claims on the substitution of a generic drug or brand name equivalent, on not dispensing drugs beyond the NDC's termination date, or even on complying with the specific state pharmacy laws recited in the complaint. Judge Cote distinguished between compliance with statutes or regulations as prerequisite to governmental payment, versus compliance with statutory or regulatory provisions that establish conditions of participation in a federal health care program. She noted that "asserting that pharmacists should not have been dispensing branded drugs in those state jurisdictions with statutes mandating the use of generic drugs . . . does not constitute a false statements claim, a violation of the FCA, or a violation of the [Medicare Modernization Act]." She further found that, because Fox failed to

adequately plead that the termination date of an NDC number and the expiration date of a quantity of manufactured drugs are the same, that the claim that the drugs were worthless because the NDC had expired must be dismissed. She also noted that, while in some cases the NDC termination date and expiration date are the same, termination of the code may also be the result of a "simple change" such as changing the quantity of pills in a package.

Ultimately, Judge Cote dismissed the claims against MHA because MHA was not a pharmacy with a duty to comply with the state laws cited, and thus had not assumed any duty to comply with those laws.

Failure To Submit an Original Bid Guarantee at Bid Opening Is Not a "Minor Informality" (*Hamilton Pacific Chamberlain LLC*, No. B-409795 (August 11, 2014))

On August 11, 2014, the GAO sustained a protest on grounds that the winning contractor's bid was nonresponsive because the contractor provided only a copy of the required bid guarantee with the bid. Hamilton Pacific Chamberlain LLC ("HPC") had protested the award of a service-disabled veteran-owned small business set-aside contract for steam trap replacement and installation of a new steam trap monitoring system at the VA Medical Center in Baltimore, Maryland to Utility Systems Solutions, Inc. ("US2"). US2 itself had protested to the agency contracting officer's initial decision that US2's bid should be rejected because it had not provided the required bid guarantee. The VA had upheld US2's protest after determining that US2 had submitted a copy of its bid guarantee with its bid, and it had concluded that US2's failure to provide an original bid guarantee should be considered a minor informality or irregularity that US2 cured after bid opening.

However, the GAO concluded that US2's submission of a photocopied bid guarantee without original signatures was not a "minor informality or irregularity" that may be waived or cured after bid opening. In coming to this conclusion, the GAO noted that a bid guarantee was a material condition of the Invitation for Bid with which there must be compliance at the time of bid opening, and that precedent established that copies of bid guarantee documents generally do not satisfy the requirement for the submission of a bid guarantee. Accordingly, the GAO recommended that the VA reject US2's bid as nonresponsive.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our government contracts practice group:

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