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Domain Expertise

Navy Signs a Memorandum of Understanding (MOU) for use of GSA's Reverse Auction eTool

On January 18, 2017, the U.S. General Services Administration (GSA) and the Naval Supply Systems Command (NAVSUP) signed a Memorandum of Understanding (MoU) for the Department of the Navy (DoN), including the U.S. Marine Corps, to use GSA's government developed and managed Reverse Auction (RA) eTool to drive more speed and savings into their acquisition process. The RA platform delivers increased savings on the most commonly purchased office products, equipment, and services, while also making it easier for small business to compete for DoN business.

"GSA and the DoN have a longstanding partnership for reverse auction procurements," said Erv Koehler, Acting Regional Administrator and FAS Regional Commissioner for GSA Region 4, Southeast Sunbelt Region. "Since the introduction of the RA platform in 2013, the Navy has been GSA's most active user - awarding over $22 million in reverse auction procurements with an average savings of 7.82 per cent over standard pricing".

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Federal Marketplace Matters

Lead agencies must turn category management small business strategies into action

The future of the Obama administration's category management initiative remains unknown. Several federal officials involved in category management have told me they have received good feedback from Trump administration transition team and special advisers so far in the first few months of the transition and presidency. But others, particularly in industry, say they are hearing major changes are on the way for this and several procurement initiatives of the prior administration.

Keep in mind it has been four months since comments were due on the proposed category management circular. One source told me recently the circular is basically on hold until more political appointees are in place.

One thing is certain no matter what happens to category management, small businesses have a lot of anxiety about the future of federal procurement.

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The MAS Program: The Imperative of Procurement Innovation

As you know, over the last several years, the Coalition has made the case to stakeholders across government that GSA's MAS program must keep pace with innovation and other changes in the dynamic commercial market. In doing so, the Coalition set forth the intellectual, legal, and policy framework for streamlining the MAS program, putting the "commercial" back in commercial item contracting, and, thereby, increasing the government's rapid access to innovative products, services and solutions in the commercial market.

Over the last four years, the Coalition provided analysis, recommendations, and commentary regarding reform of the GSA MAS and VA MAS pricing policies, streamlining MAS contracting processes, GSA's statutory authority for MAS and governmentwide acquisition, Other Direct Costs, Transactional Data Reporting, FASA and commercial item contracting, and category management. At the same time, across government and within the MAS program, noncommercial, government-unique provisions and reporting requirements expanded, driven, in large part, by the proposed centralization of procurement through OFPP's category management initiative.

Now comes news of a partnership relationship between the Department of Homeland Security/FEMA and Amazon Business creating a centralized business account for FEMA purchase card ordering via the Amazon Business marketplace. As we understand it, under the partnership, FEMA purchase card holders will be able to use a centralized DHS Amazon Business account for certain purchases. If such is the case, this effort by FEMA is quite understandable, as FEMA, like other agencies, likely is seeking to streamline purchasing using commercial practices via an online commercial portal. At the same time, however, the situation raises some fundamental procurement policy questions:

To view the questions and more information *click here*

Federal Marketplace Matters

Senate GOP to vote to roll back blacklisting rule for federal contractors

Sen. Ron Johnson, R-Wis., has introduced a resolution to repeal an Obama administration labor regulation that has come to be known as the "blacklisting rule."

"Had it been up to me, I would have called it the 'blackmailing rule, " said Johnson as he addressed the Senate on Thursday.

The 2014 executive order requires federal contractors to disclose violations committed or alleged violations of 14 different labor laws and similar state labor laws, as well as subcontractor or supplier compliance with these laws.

Johnson introduced the disapproval resolution under the Congressional Review Act, which could allow the GOP-controlled Senate to overturn the rule without bipartisan support. If it passes the Senate, it will just require President Trump's signature to be made official.

For Senator Johnsons remarks *click here*

SBA Finds Violation of Ostensible Subcontractor Rule – Even Though Contractor Performs "Primary and Vital" Requirements

Contractors seeking to avoid affiliation under the Ostensible Subcontractor Rule know the soundbite: Your firm must self-perform the "primary and vital" contract requirements.

A small business prime contractor must zero in on the essential objective of its contract and make sure to perform those requirements with its own employees. If those requirements are subcontracted out to others, the SBA will have all the ammunition it needs to find affiliation.

While the "**primary and vital**" requirements test is the most commonly cited metric for the Ostensible Subcontractor Rule, a recent Small Business Administration Office of Hearings & Appeals decision reminds us that there is another factor to consider. Namely, affiliation can also arise under the Ostensible Subcontractor if the small business prime contractor is **unusually reliant** on its subcontractor.

The SBA considered a General Services Administration custodial, landscaping, and grounds maintenance services contract set aside for small businesses. On the facts presented in the appeal, it appears that the small business prime contractor would meet the requirement to perform the contract's primary and vital requirements by, among other things, providing custodial services and controlling all contract management activities

Digging deeper, however, the SBA determined that the primary and vital issue was irrelevant to the final analysis.

According to the SBA, the Ostensible Subcontractor Rule is "disjunctive" – which is to say that the contractor must perform the primary and vital requirements AND cannot be unduly reliant on its subcontractor. The inquiries are totally independent and a black mark on either is enough to tip the scales towards affiliation.

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Army seeks help to guard against fake social media accounts

With the rise of social media — whether LinkedIn or Twitter or Facebook or Instagram — a new way to find out information about a federal employee or military service member is easier than ever.

This is why the Army released one of the most fascinating requests for information in recent times.

The Army is looking for help from a vendor to find, monitor and get rid of imposter social media accounts. Among the capabilities the Army is looking for a vendor to provide are "an existing commercially available, user-friendly, web-based solution to monitor and mitigate imposter profiles on social media platforms. A solution that is automated and secure (not susceptible to hacking). The ability to query at a minimum, but not limited to the following social media platforms: Facebook, Twitter, LinkedIn, Google+, Skype, Instagram, and YouTube as well as the ability to include new/additional social media networks as they arise."

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Evaluation of Subcontractor Past Performance Not Required For FSS Procurements

For Federal Supply Schedule procurements, agencies are not required to evaluate past performance references of subcontractors, unless the solicitation provides otherwise.

As one offeror recently discovered in Atlantic Systems Group, Inc., B-413901 (Jan. 9, 2017), unlike negotiated procurements, where agencies "should" evaluate the past performance of subcontractors that will perform major or critical aspects of the contract, offerors bidding under FSS solicitations should not assume that a subcontractor's past performance will be considered.

Atlantic Systems involved a solicitation for technical, engineering, management, operation, logistical, and administrative support for the Department of Education's cybersecurity risk management program. The solicitation was set aside for SDVOSB concerns that held Schedule 70 contracts.

Pursuant to the solicitation, offerors were to be evaluated for both corporate experience and past performance. In order to enable the agency to conduct the past performance/experience evaluation, each "offeror" was to provide evidence of the experience "of the organization" with similar projects or contracts.

For corporate experience, offerors were to provide between 3 and 5 performance examples that demonstrated the offeror's capabilities "with similar projects or contracts, in terms of the nature and objectives of the project or contract; types of activities performed; studies conducted; and major reports produced." Similarly, under the past performance factor, offerors were to provide between 3 and 5 performance examples "performed in the past [3] years that were similar in size, scope, and complexity" to the solicitation. The solicitation did not specify how the agency would treat a subcontractor's past performance.

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Report looks at how Trump's policies, expiring contracts will impact competitiveness

The departments of Education, State and the Army are among those with the most documented bids for contracts expiring in 2017, providing industry with actionable insight on just how competitive the procurement process will be.

This and other facets of vendor competition are examined in a new report by government market analysts Govini, looking at the contracting environment as the Trump administration reveals its new defense agency-centric budget request.

Assigning agencies a "Competitiveness Score," Govini aims to offer its report to assist vendors in anticipating recompetes, allowing them to craft strategies that align to their competitive strengths.

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Educational

McCaskill: Whistleblower Protections Mean Nothing If Agencies Don't Follow the Law

Senator calls on agencies to properly implement protections as required by law

Friday, March 3, 2017 - U.S. Senator Claire McCaskill, the top Democrat on the Homeland Security and Governmental Affairs Committee, is calling on agency heads and inspectors general at the Departments of Homeland Security, Commerce, Interior, and State to address how they'll fully implement whistleblower protections for government contractors, subcontractors, and grantees.

A recent report from the Government Accountability Office—mandated following McCaskill's bipartisan efforts to extend whistleblower protections to government contractors and grantee employees—highlighted key issues with implementation of these protections. The report outlined the failures of the Departments of Homeland Security, Commerce, Interior, and State to include or update the appropriate clauses in contracts and to ensure that contractors inform workers of their responsibilities and rights as it pertains to whistleblowing.

McCaskill's letters to the agency heads and inspectors general at the four agencies ask for updates by March 30, 2017 on the actions they'll take to implement the report's recommendations. "We need to make sure that everyone who is involved in taxpayer dollars being spent can call out waste, fraud, and abuse when they see it, without worrying about losing their job," said McCaskill, former Missouri State Auditor. "Having these protections in place is meaningless if agencies don't make sure they are in the contract or grant. I have seen cases fall through the cracks because agencies fell down on the job, and that's unacceptable."

Both the heads of agencies and inspectors general have a role in ensuring that the protections, which began as a pilot program and are now permanent, are properly implemented.

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Upcoming Events

March 7-8, 2017 IFMIPS 51V, Industry Day Event
Register

March 28 -29, 2017 IFMIPS 03FAC Industry Day Event
Register

April 25-26, 2017 the GSA Federal Acquisition Training Symposium Huntsville, Alabama,
Registration Details

June 6, 2017 the Professional Services Industry Day in Tacoma, Washington.
See more information

April 13 2017 B2G Conference & Expo Joint Base Langley / Eustice
More Info

TGG will be represented at all GSA Industry events above so if you are not able to attend contact your TGG consultant with any questions you may have.

Compliance

Union Fund Uses NY False Claims Act to Blow Whistle on Prevailing Wage Violator and Recover $33,750

In the first reported case of its kind in New York, in February a union fund received a five-figure settlement payment from a Harlem-based general contractor that worked on a New York City affordable housing project after the fund blew the whistle on the contractor's failure to pay prevailing wages. The fund filed a whistleblower complaint under the N.Y. False Claims Act, which allows a whistleblower to file a *qui tam* lawsuit if it knows of and reports violations of the Act. The Act makes liable entities that knowingly present to the state or local government false or fraudulent claims for payment or avoid their obligations to pay the state or a local government. State of New York v. A. Aleem Construction, Inc.

A whistleblower that files a successful claim under the Act can recover 15 to 25 percent of any recovery if the State intervenes in the matter and converts the *qui tam* action into an attorney general enforcement action. If no State intervention, the whistleblower can recover between 25 and 30 percent of the total recovery. New York is among 29 states, including New Jersey, plus D.C. that offer an incentive payment or "bounty" to persons who blow the whistle on prevailing wage violators. A whistleblower who plans or initiates the violation that is the basis of the action can recover but in a reduced amount.

The union fund's whistleblower complaint caused the State to investigate and determine that the general contractor violated prevailing wage laws by failing to pay laborers working on the project the required prevailing wages and benefits and failing to maintain proper payroll records. Under the settlement, the general contractor agreed to pay $225,000 to resolve the Action, $33,750 of which, or 15%, was paid to the fund.

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