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Domain Expertise

Fair Pay and Safe Workplaces Regulations Nullified and Underlying Executive Order 13673 Revoked

On Monday, March 27, 2017, President Trump signed House Joint Resolution 37, repealing and nullifying the Fair Pay and Safe Workplaces final rule issued last August, implementing President Obama's Executive Order 13673 (Fair Pay and Safe Workplaces). As previously discussed here, this Resolution was passed by both Houses of Congress under the Congressional Review Act, 5 U.S.C. § 801 et seq. (CRA), which means that no new similar future rule may be issued "in substantially the same form," unless explicitly authorized by Congress.

In addition, President Trump signed a new Executive Order, explicitly revoking E.O. 13673, as well as Section 3 of Executive Order 13683, issued December 11, 2014, and Executive Order 13738, issued August 23, 2016, which amended Executive Order 13673. Section 2 of President Trump's new Executive Order explicitly directs all executive departments and agencies to consider promptly rescinding "any orders, rules, regulations, guidance, guidelines, or policies implementing or enforcing the revoked Executive Orders." This direction presumably encompasses the Department of Labor's published Guidelines interpreting various terms in the Executive Order.

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Federal Marketplace Matters

GAO: DoD boosted its 'buying power' by $10.7 billion in 2016

In its annual assessment of the Defense Department's major weapons systems, the Government Accountability Office calculated last week that over the past year, DoD has seen a $10.7 billion increase in its "buying power" — GAO's term for the amount of goods or services the department is able to buy with a given amount of money, even after adjusting for increases or decreases in the number of items within a certain procurement line.

In fact, there are several data points in GAO's analysis of DoD's 2016 weapons portfolio that seem to undercut the narrative that weapons costs are out of control, a picture painted as recently as last week by Sen. John McCain (R-Ariz.), the chairman of the Senate Armed Services Committee, who claimed that the Pentagon has "done nothing but resist" Congress' efforts to control cost growth

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The Office of American Innovation: A Jump Start for Procurement Innovation!

From CGP's March 31 "Far & Beyond" Blog

On March 27, President Trump established the White House Office of American Innovation (OAI). The OAI "will make recommendations to the President on policies and plans that improve Government operations and services, improve the quality of life for Americans now and in the future, and spur job creation." OAI will be responsible for launching initiatives with a focus on innovation, coordinating implementation of any resulting plans and creating reports of the President setting forth policy recommendations." In furtherance of its mission, OAI "will gather information, ideas, and experiences from other parts of Government, from the private sector, and from thought leaders and experts outside of the Federal Government."

The OAI is a timely, strategic, and necessary effort. Although there are many processes of government, the federal procurement process underpins all that the Government does to serve the American people. Unfortunately, too often that procurement process increases costs, reduces competition, and serves as a barrier to access best value commercial products, services and solutions. The risk is that day-to-day Government operations become suboptimal, *i.e.*, not efficient or effective in meeting mission requirements.

OAI can drive procurement streamlining that will create a dynamic, innovative, and responsive federal procurement marketplace. To jump-start this innovation in procurement, the OAI can embark quickly on a Procurement Innovation Initiative (PII) encompassing the following:

- Identify best practices in procurement, share lessons-learned, and leverage centers of excellence and innovation, like GSA's FEDSIM and the Department of Homeland Security's Procurement Innovation Lab.

Read Article in Full

Federal Marketplace Matters

Deal to Avoid Shutdown Isn't Likely to Include Trump's Proposed 2017 Cuts

Republicans in Congress are indicating they will deal with President Trump's request to cut a total of $18 billion from most non-defense agencies separately from the looming shutdown fight, saying they will handle the White House's funding proposal another time.

Federal agencies are funded on a continuing resolution through April 28, at which point lawmakers must pass another spending bill or the government would shut down. Trump has asked for an extra $30 billion for the Defense Department to spend by Sept. 30 -- the end of fiscal 2017 -- and $3 billion for the Homeland Security Department. The White House proposed partially paying for the surge by slashing $18 billion from the discretionary coffers of domestic agencies.

……While Congress has a month to come up with a spending bill, it will go on recess from April 8 through April 23. Blunt said he hoped to make significant progress next week before the recess begins.

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Contractors Resist Push to Post Contracts Online

In a move intended to make it easier for the public to see what exactly federal contractors do for the taxpayer money they receive, two Senate Democrats have introduced legislation that would require agencies to post the text of major contracts online. But contractors and contracting specialists are pushing back.

On March 15, Sens. Claire McCaskill, D-Mo., and Jon Tester, D-Mont., introduced the Contractor Accountability and Transparency Act of 2017 (S. 651), which would require agencies to post a "machine-readable, searchable copy of each covered contract" within 30 days of its signing. The bill would cover awards worth $150,000 or more and would require that contracts be posted not later than 30 days after the agency enters into the agreement.

Contractors would be permitted to request redactions of sensitive national security information, trade secrets and other proprietary information—subject to approval by the contracting officer in consultation with the director of the Office of Management and Budget. No information required to be made public under the Freedom of Information Act would be redacted, the bill says.

"Taxpayers deserve to know where their money is being spent," said McCaskill, the top-ranking Democrat on the Homeland Security and Governmental Affairs Committee. "The more transparency we have, the more all of us can do to identify and cut down on wasteful spending and unethical practices."

Tester added, "Making these documents publicly available will hold government contractors accountable to the American public . . . ensure taxpayer dollars are spent responsibly, increase government transparency, and shine more light on big corporations."

The senators cited the Pentagon's rejection of a FOIA request last year that the Defense Department justified by saying it would have to scour every contract—at a cost of $660 million.

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White House Asks Congress to Cut $140M from NASA, NOAA Programs

The Trump administration has asked Congress to cut $90 million from the National Oceanic and Atmospheric Administration's weather satellite programs and another $50 million from NASA's science programs in fiscal year 2017 spending bills, Space News reported Tuesday.

Jeff Foust writes the White House sent a 13-page document to congressional appropriators requesting $17.9 billion in budget reductions from FY 2016 spending levels.

The cuts would be distributed among NASA's science programs, including missions that are cancelled in the FY 2018 budget blueprint, Foust reported.

Trump's FY 2018 budget blueprint proposed to scrap four Earth science missions including the *Plankton, Aerosol, Cloud, Ocean Ecosystem* satellite; *Climate Absolute Radiance and Refractivity Observatory* pathfinder; *Orbiting Carbon Observatory 3* instruments; and the Earth imaging instruments on the *Deep Space Climate* Observatory.

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SDVOSB Task Order Eligibility: SBA OHA Provides Some Clarity

If an SDVOSB was eligible at the time of its initial offer for a multiple-award contract, the SDVOSB ordinarily retains its eligibility for task and delivery orders issued under that contract, unless a contracting officer requests a new SDVOSB certification in connection with a particular order.

In a recent SDVOSB appeal decision, the SBA Office of Hearings and Appeals confirmed that regulatory changes adopted by the SBA in 2013 allow an SDVOSB to retain its eligibility for task and delivery orders issued under a multiple-award contract, absent a request for recertification.

OHA's decision in Redhorse Corporation, SBA No. VET-261 (2017) involved a GSA RFQ for transition ordering assistance in support of the Network Services Program. The RFQ contemplated the award of a task order against the GSA Professional Services Schedule multiple-award contract. The RFQ was issued as an SDVOSB set-aside under NAICS code 541611 (Administrative Management and General Management Consulting Services). The GSA contracting officer did not request that offerors recertify their SDVOSB eligibility in connection with the order.

After evaluating quotations, the GSA announced that Redhorse Corporation was the apparent awardee. An unsuccessful competitor subsequently filed a protest challenging Redhorse's SDVOSB status. The SBA Director of Government Contracting sustained the protest and found Redhorse to be ineligible for the task order.

Redhorse filed an SDVOSB appeal with OHA. Redhorse argued that regulations adopted by the SBA in 2013, and codified at 13 C.F.R. 125.18(e), specify that a company qualifies as an SDVOSB for each order issued against a multiple-award contract unless the contracting officer requests recertification in connection with the order.

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Agencies backsliding on FITARA

On Tuesday, March 28, *Federal Computer Week* (FCW) reported that progress related to the implementation of the Federal Information Technology Acquisition Reform (FITARA) Act has stagnated recently. According to testimony submitted by Dave Powner, the Director of IT Issues at the Government Accountability Office, agencies are not progressing as anticipated regarding the implementation of IT management, empowering Chief Information Officers (CIOs), and modernizing aging technology.

In particular, Powner highlighted the still-limited management authorities, limited partnering between Federal agencies and industry, and deficiencies in the IT workforce as recurring themes that have doomed past IT projects. In addition, he detailed how more than half of the current agency CIOs are reporting they do not have many of the authorities prescribed by FITARA.

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Educational

Waiver at Time of Request for Final Payment Dooms Contractor's Claim

Government contractors need to be conscious of the paperwork they sign on Federal contracts. Signing a waiver or release of claims at any point during a project can result in a lost opportunity to recover damages – even if the event giving rise to those damages was already discussed in detail with the Contracting Officer.

In a recent post, we discussed the hazard associated with bilateral project modifications. Even when a modification includes requested relief (like a time extension), it also likely includes broad waiver/release language that will apply to all pending claims. A contractor should not sign a bilateral modification without a full and complete understanding of what claims (if any) are being surrendered with the stroke of a pen.
The same logic and advice applies to requests for final payment – and really any other document executed during the course of a Federal project.

In a case before the Postal Service Board of Contract Appeals, the contractor notified the Agency that it underestimated the paving area for the project – resulting in a significant labor and materials overrun. The contractor informally requested that the Agency share in the associated costs, arguing that the government was aware of the estimating mistake prior to award. The Contracting Officer disagreed with the contractor's position and referred it to the contract's disputes clause.

As the project approached the finish line, the contractor – who still intended to pursue a cost overrun damages claim – requested final payment on the contract. In connection with that submission, the contractor executed a "Contractor's Release." The Release expressly stated that the contractor released the Agency from any further claims, without exception.

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Upcoming Events

April 7, 2017 – Schedule 36 IWA Center Industry Day event in Philadelphia
Register

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

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

May 9-10, 2017 Schedule 84 Industry Day event in Dallas/Ft Worth
Registration Details

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

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

FCA Case Arising from GSA Schedule Contractors' Alleged TAA Non-Compliance

A U.S. District Court recently dismissed a False Claims Act (FCA) *qui tam* action alleging that numerous GSA Schedule contractors violated their obligations under the Trade Agreements Act (TAA), resulting in the submission of false claims under the "implied certification" theory of FCA liability. As discussed further below, the court's decision — United States ex rel. Berkowitz v. Automation Aids, No. 13-C-08185, 2017 WL 1036575 (N.D. Ill. Mar. 12, 2016) — is important for at least two reasons:

1. The court found that "often" it is "tougher" to satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) when FCA allegations are based on an implied certification theory.
2. The court held that, when dealing with conduct arising from a "sprawling federal procurement statutory and regulatory framework" (like the TAA), general allegations of non-compliance may support a breach-of-contract claim, but are insufficient in an FCA case. Rather, "specific allegations" about the fraudulent scheme are needed.

This decision comes at a particularly opportune time for contractors, given the likelihood of increased TAA and Buy American Act (BAA) enforcement during the Trump Administration and the corresponding potential uptick in whistleblower FCA activity involving these country-of-origin issues.

The *Berkowitz* case involves the complex area of TAA compliance. The TAA, as implemented in the FAR, generally waives the domestic sourcing requirements prescribed by the BAA when a procurement is valued in excess of certain specified dollar thresholds. When it applies, the TAA requires that government contractors deliver "U.S.-made end products" (*i.e.*, end products "manufactured" or "substantially transformed" in the U.S.) or "designated country end products" (*e.g.*, end products "wholly manufacture[d]" or "substantially transformed" in certain foreign countries with which the United States has negotiated a trade agreement).

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