BakerHostetler

Government Contracts Quarterly Update

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The Government Contracts Quarterly Update *is published by BakerHostetler's Government Contracts Practice Group to inform our clients and friends of the latest developments in federal government contracting.*

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Employment

Executive Actions Continue to Complicate Contractor Compliance

Following through on a promise made in his State of the Union Address, President Obama has undertaken a series of unilateral measures this year creating new labor requirements for federal contractors. The third quarter was no different, with two new Executive Orders and new rules governing the implementation of existing Orders.

- On July 21, President Obama signed Executive Order 13,672, "Further Amendments to Executive Order 11,478, Equal Employment Opportunity in the Federal Government, and Executive Order 11,246, Equal Employment Opportunity," extending nondiscrimination requirements to also prohibit discrimination on the basis of sexual orientation or gender identity, and charging the Secretary of Labor with responsibility to propose implementing regulations. One month later, the Office of Federal Contracting Compliance Programs ("OFCCP") issued a directive explaining that discrimination on the basis of gender identity or transgender status constitutes sex discrimination under applicable Equal Employment Opportunity Commission precedent, essentially rendering the requirements of Executive Order 11,246 immediately effective for federal contractors.

  Although the new requirements may not impose a significant burden on the many federal contractors who have already adopted nondiscrimination policies for lesbian, gay, bisexual and transgender ("LGBT") individuals, religious organizations receiving federal funding assistance must pay especially close attention to the development of the new rules. Executive Order 11,246 contains a limited exemption for such groups—the so-called ministerial exception that exempts religious organizations from the Order's requirements when hiring employees to serve the organization's religious ends. Although Executive Order 13,672 does not contain a similar exception, the Secretary of Labor potentially has the discretion to tailor exceptions in the implementing regulations. Organizations planning to participate in the rulemaking process should proactively develop a strategy now to address these requirements.
- On August 8, the Department of Labor ("DOL") proposed additional new non-discrimination obligations under a Notice of Proposed Rulemaking requiring certain federal contractors to provide OFCCP categorized compensation data to aid the OFCCP's continuing efforts to ensure contractor compliance with the requirements of Executive Order 11,246. 79 Fed. Reg. 46,562. Under the proposed rule, employers with more than 100 employees who hold a federal contract, subcontract, or purchase order worth $50,000 or more that covers a period of at least 30 days will be required to expand the Employer Information Report (EEO-1 Report) that they currently submit. The expanded EEO-1 Report will contain two additional columns for employers to enter summary data on compensation paid to employees grouped by sex, race, ethnicity, and specified job categories, as well as the number of employees within each group and their hours worked. The DOL states that it plans to use the data to identify noncompliant contractors, while also increasing compliance incentives through voluntary self-assessments and by publishing aggregated data for industry and labor groups.

  The proposed rule, which has been in development over the past few years, has already drawn significant criticism from members of the business community. If implemented in its current form, the proposed rule would likely impose minimal reporting costs, but it could also expose contractors to serious business risk as OFCCP is able to more readily identify pay disparities; additionally, companies operating in industries where pay disparities are publicized may be subject to intense scrutiny as well. Contractors are encouraged to review the prospective impact on their business and submit comments to the DOL. Comments are due by November 6.

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- On July 31, just 10 days after signing Executive Order 13,672, (discussed above), President Obama signed Executive Order 13,673, "Fair Pay and Safe Workplaces," which imposes a variety of new labor compliance requirements on contractors competing for awards valued at $500,000 or more. Most prominently, the Executive Order requires agencies to develop solicitation clauses that require contractors to disclose all violations of certain labor laws that have occurred in the preceding three years. The Executive Order further requires agencies to designate a Labor Compliance Advisor to consult with contracting officers about factoring these disclosures into a determination about the offeror's present responsibility. Awardees must then be required to update their disclosures every six months and will be continually reassessed based on these updated disclosures. The relevant labor laws are:

  - Fair Labor Standards Act;
  - Occupational Safety and Health Act;
  - Migrant and Seasonal Agricultural Worker Protection Act;
  - National Labor Relations Act;
  - Davis-Bacon Act;
  - Service Contract Act;
  - Executive Order 11,246, regarding equal employment opportunity;
  - Section 503 of the Rehabilitation Act;
  - Vietnam Era Veterans' Readjustment Assistance Act;
  - Family and Medical Leave Act;
  - Title VII of the 1964 Civil Rights Act;
  - Americans with Disabilities Act;
  - Age Discrimination in Employment Act;
  - Executive Order 13,658, setting the minimum wage for contractors' employees; and
  - any state law determined by the DOL to be an equivalent to any of the above-listed laws.

For awards valued at $1 million or more, the Executive Order prohibits contractors from requiring employees to arbitrate claims of employment discrimination or sexual harassment—a requirement that must be flowed down to subcontractors. The Executive Order does not prohibit contractors from enforcing arbitration agreements signed prior to the award, however, and it does not prohibit submitting claims to arbitration by mutual consent.

The President has directed the Federal Acquisition Regulation ("FAR") Council and the DOL to issue guidelines and implementing regulations for the requirements outlined in the Executive Order. In 1999, the Clinton Administration proposed similar rules, requiring contracting officers to consider a prospective (continued on page 3)

BakerHostetler Spotlight

Employment Law Group[1]

Government Contracts and Employment Law Update

The Obama Administration continues to impose new obligations on government contractors. An unprecedented proliferation of Executive Orders and regulations issued by the DOL has the potential to make employment and labor law compliance unduly burdensome and prompt small and mid-sized businesses to forego federal government contracts altogether.

The latest shot recently fired by the OFCCP of the DOL changes the information that government contractors must provide initially in a compliance investigation. Among other things, specific individual compensation information must now be made available as a matter of course, preferably in electronic form for easier comparison. This action follows on the heels of OFCCP's issuance of regulations designed to set hiring benchmarks for protected veterans and individuals with disabilities. As indicated above, the President has also signed Executive Orders that do the following:

- Raise the minimum wage to $10.10 for individuals working on new federal service contracts
- Increase penalties for contractors who discriminate against or penalize employees for discussing compensation data
- Implement self-reporting obligations and monitoring responsibilities to federal contractors who have been found in violation of certain federal laws
- Extend discrimination prohibitions to include protections based on "sexual orientation" and "gender identity"

As might be expected, these Executive pronouncements present myriad questions. More than ever, government contractors may feel compelled to compromise and resolve disputed employment law issues. An adverse court judgment or administrative adjudication on the merits of an issue unrelated to government contract compliance may nonetheless trigger a reporting obligation once the relevant Executive Order becomes effective. And with increased enforcement authority, the DOL likely will become even more assertive. Contractors generally will be loath to litigate their disagreements with the DOL with debarment as an agency sword.

1 Included in this edition of the Quarterly Update is a short commentary provided by attorneys in Baker Hostetler's Employment Law Group, which specializes in all facets and stages of employment and labor relations. The Employment Law Group has substantial experience in government contracts matters and works regularly with BakerHostetler's Government Contracts Group.

contractor's unsatisfactory compliance with federal labor law, as well as other federal laws including tax and antitrust laws, when making responsibility determinations. Noting this similarity, industry groups have already labeled the Order with the same epithet used in the campaign that ultimately defeated the 1999 proposal—a "blacklist"—and announced their intention to vigorously participate in the rulemaking process. Because there is no deadline by which the government must issue these clauses and guidance, contractors have ample opportunity to participate in the rulemaking process; in the interim, contractors should also assess their labor practices to determine how the new requirements may affect them. On top of the new $10.10 minimum wage rules proposed by the DOL pursuant to Executive Order 13,658, 79 Fed. Reg. 34,568, these executive actions, combined with other regulatory changes, such as the new hiring rules for veterans and individuals with disabilities discussed in our May 2014 Quarterly Update, impose upon federal contractors a vastly more complicated compliance landscape than existed just one year ago. Requirements can vary dramatically based on whether an employee works on public or private contracts, the value of the contract, or when the employee was assigned to the contract, and contractors must quickly adapt to manage these new challenges.

Suspension and Debarment

Appropriations Bill Could *de facto* Debar Contractors from DOE and Army Corps Contracts

On July 10, the House of Representatives joined the President in seeking to combat unfair labor practices when it passed the 2015 Energy and Water (continued on page 4)

Practitioner's Spotlight

The Equal Access to Justice Act

Welcome to a new feature of the Government Contracts Quarterly Update, "Contract Spotlight." We intend to use this space to highlight fundamental but often-overlooked aspects of government contracting law that can give contractors a leg up in this fiercely competitive space. This quarter, we are highlighting the Equal Access to Justice Act ("EAJA"), 29 U.S.C. § 2412.

Under the EAJA, a small business, nonprofit organization, or low-net-worth individual who prevails in a suit against the United States government is generally eligible to obtain reimbursement for attorneys' fees of up to $125 per hour, as well as related expenses, if the government's position was not "substantially justified"; the award may be increased above this limit when warranted by "special circumstances" such as a cost-of-living increase or if there is a limited number of qualified attorneys to handle the case due to the need for special skills. Although certain practice areas, including patent law, have been held to require such specialized skills as to justify an increase, government contracts are not generally treated as sufficiently special to support an increase. *See, e.g.*, *Cal. Marine Cleaning, Inc. v. U.S.*, 43 Fed. Cl. 724, 733 (1999). Because of these limitations on eligibility and award under the EAJA, many contractors do not account for it when contemplating litigation against the government. Two decisions by the Court of Federal Claims ("COFC") this past quarter, however, demonstrate how the EAJA can be a powerful tool for enabling litigation when the government engages in arbitrary or spurious behavior.

On July 23, the COFC awarded attorneys' fees to a contractor who successfully protested the U.S. Army Corps of Engineers' decision to exclude the contractor's proposal as nonresponsive. *BCPeabody Const. Svcs., Inc. v. U.S.*, — F.3d —, 2014 WL 3640776 (2014). Due to a clerical error, BCPeabody's proposal omitted a project information sheet demonstrating the prior experience of a subcontractor, and the contracting officer deemed the proposal technically unacceptable. However, the omission constituted a "minor or clerical error" under FAR § 15.306(a), providing the contracting officer with discretion to allow BCPeabody to clarify the error; because the contracting officer learned from a different proposal that the subcontractor had significant prior experience, the court determined that it was an arbitrary abuse of discretion not to allow BCPeabody to clarify the error. BCPeabody was awarded compensation for 130.65 attorney hours, which came to a total of $16,331.25 at the statutory rate.

On August 7, the COFC awarded attorneys' fees to another contractor in litigation stemming from a claim for payment. *Ulysses, Inc., v. United States*, — Fed. Cl. —, 2014 WL 3883329 (2014). The contractor, believing that it was an approved source, planned to manufacture a part internally on task orders issued by the government; one of these orders stipulated that the part be manufactured by a certain third party. The government canceled both orders and then responded to the contractor's claim for payment with a series of counterclaims alleging violations of the False Claims Act ("FCA"), Contract Disputes Act ("CDA"), and Forfeiture of Fraudulent Claims Act ("FFCA")—a common government tactic that can dramatically increase the risks and costs associated with litigation for contractors. The COFC found that while the government had properly canceled the purchase order with explicit performance requirements, ambiguities in the task orders and solicitations provided a plausible basis for the contractor's belief that it was permitted to produce components for other task orders internally. Stressing the importance of sound prosecutorial discretion in FCA cases, the court characterized the government's decision to counterclaim as an "overreaction" to a reasonable error and held that the government's position was not substantially justified. Ulysses was awarded $24,493.79 for 132.5 attorney hours.

Because increases in the cost of living are among the "special circumstances" for which a court may grant an increased award, the plaintiff in *Ulysses* was able to recover at a rate of $184.83 per hour, though contractors are reminded that this increase is not automatic—BCPeabody, as discussed above, was awarded only $125 per hour because it failed to request a cost-of-living adjustment. Although this may not be enough to cover the full costs of litigation, government contractors assessing the value of litigating with the government should consider the EAJA's potential to defray costs when deciding whether to pursue litigation.

Development and Related Agencies Appropriations Act, providing funding for the U.S. Department of Energy ("DOE") and the U.S. Army Corps of Engineers ("USACE") for Fiscal Year 2015. The bill, which is now under consideration in the Senate, would cut the aggregate budget of the two agencies by about $50 million.

While the pie may be shrinking somewhat, the number of competitors for it might shrink even more dramatically. The House version of the bill contains provisions restricting the DOE and USACE from using the appropriated funds to contract with businesses that have violated the Fair Labor Standards Act, whistleblower protection laws, or certain other requirements, effectively debarring offenders. These restrictions would add to the nine government-wide statutory disqualification provisions found in laws ranging from the Clean Water Act to the Drug-Free Workplace Act, as well as numerous other agency-specific restrictions.

The bill also contains restrictions on contracting with businesses convicted of, or under indictment for, fraud, antitrust violations, or similar crimes, and would continue Congress' recent trend of restricting contracting with domestic inverted corporations by prohibiting the use of any appropriated funds to contract with inverted corporations incorporated in Bermuda or the Cayman Islands.

While the bill is pending in the Senate, contractors with significant business with either the DOE or the USACE should take the opportunity to at least preliminarily assess the prospective impact in the event that the legislation is passed into law.

Competition

DOD Competition Guidelines Set to Create Further IP Focus

On August 22, the U.S. Department of Defense ("DOD") published new competition guidelines outlining strategies for contracting officers to increase competition with various types of acquisition programs. The guidelines were developed as a result of the DOD's Better Buying Power 2.0—Achieving Greater Efficiency and Productivity in Defense Spending initiative, Memorandum from The Under Secretary of Defense to the Defense Acquisition Workforce (Nov. 13, 2012), and place a heavy emphasis on avoiding "vendor lock" by employing Open Systems Architecture ("OSA") and intellectual property strategies, as well as taking specific additional steps to ensure competition in developmental programs, weapons systems production, services, and commodities procurements. The DOD's intellectual property guidance has sparked a particular interest within the defense community and includes policies that defense contractors have been seeing come into play in recent years, including added attention to intellectual property license rights and restrictive markings. To remedy the DOD's concerns that it has failed to secure necessary technical data deliverables and associated license rights, the guidelines state that program management must better manage intellectual property issues by: (1) addressing both data deliverables and data rights in the solicitation and resulting contract; (2) pricing contract options for data deliverables and data rights; (3) segregating DOD-funded development from privately-funded technology; (4) requiring form, fit, and function data for proprietary technology or software; (5) evaluating intellectual property deliverables and rights in source selections; and (6) monitoring data deliverables and restrictive markings. As DOD and contractors continue to work through these issues on a case-by-case basis, contractors should anticipate the DOD's concerns while keeping in mind that the guidelines specifically state that "[c]are must be taken to avoid requiring an offeror ... to grant [DOD] additional data rights beyond the standard or default rights that are specified in the DFARS clauses."

Commercial Contracting

Court of Federal Claims Limits Applicability of Commercial Requirements to Federal Supply Schedules

On August 22, the Court of Federal Claims ("COFC") denied a bid protest challenging a solicitation's payment terms for deviating from commercial practice, holding that the commercial contract requirements prescribed by the Federal Acquisitions Streamlining Act ("FASA") and FAR Part 12 (governing commercial acquisitions) do not apply to the terms of solicitations issued under Federal Supply Schedules ("FSSs"). *CGI Federal, Inc. v. United States*, — Fed.Cl. —, 2014 WL 4179360 (2014). The protest stemmed from a solicitation for recovery audit services by the Center for Medicare and Medicaid Services, which included delayed payment terms requiring contractors to wait up to 420 days after recovering overpayments to invoice the government in order to allow for the possibility of appeals; the protest alleged that this deviated from customary commercial practice—recovery audit contractors are customarily paid within 60 days of identifying an overpayment—and that the agency was required under FASA to obtain a waiver from this departure from customary commercial practice under FAR Part 12. Although the court agreed that the payment provision deviated from customary commercial practice, it nevertheless upheld the solicitation term because, in the court's view, the solicitation was not required to comply with FASA or FAR Part 12. In a detailed statutory construction-based analysis, in which the court compared cross-references to FAR Part 12 and FAR Subpart 8.4, the court held that neither FASA nor FAR Part 12's requirements applied to a procurement under FAR Subpart 8.4.

The decision has been stayed pending appeal; if sustained, its logic could extend to virtually all commercial requirements for FSS buys. Notwithstanding the pendency of the appeal, contractors considering or holding FSSs are advised to note that individual agencies, under this decision, retain discretion to impose noncustomary terms and conditions even when ordering through the FSS.

Cost Reporting

Proposed FAR Rule Would Require More Detailed Cost Reporting

On August 5, the FAR Council published a proposed rule that would impose uniform cost-reporting requirements for line items and sub-line items in government contracts, beginning in Fiscal Year 2016, to improve the accuracy, traceability, and usability of procurement data. 79 Fed. Reg. 45,408. The proposed rule would create a new section of the FAR, FAR 4.10, describing the circumstances when line item reporting is required and the necessary level of detail in line items.

The proposed rule is based on reporting requirements already included in DOD contracts (*see* Defense Federal Acquisition Regulation Supplement ("DFARS") Subpart 204.71) so contractors doing substantial business with the DOD should be able to comply with the rule simply by applying the procedures used on DOD contracts to all government business. Contractors doing little to no business with DOD, however, should review their cost-accounting procedures to ensure that they can cost-effectively produce the necessary data when the rule becomes finalized. Comments closed on October 6.

False Claims

D.C. Circuit Finds Reliance on Supplier Certifications Can Preclude False Claims Liability

On August 29, the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") affirmed the dismissal of a *qui tam* relator's False Claims Act ("FCA") suit against an IT contractor in which the relator alleged that the contractor violated the FCA by supplying computers allegedly manufactured in China. *U.S. ex rel. Folliard v. Gov't Acquisitions, Inc.*, — F.3d —, 2014 WL 4251150 (D.C. Cir. 2014). The relator alleged that the contractor, Govplace, Inc., improperly certified that computers and other IT equipment sold on certain General Services Administration ("GSA") contracts complied with the Trade Agreements Act ("TAA") restrictions, because a subcontractor supplied computer products manufactured in China. The subcontractor certified that these products were TAA-compliant; the defendant in turn relied on these certifications to certify to GSA that the products were compliant. The district court found that no evidence suggested the contractor had "knowingly" submitted false claims, as required by statute, because the contractor had not acted in "reckless disregard" of the possible falsity of the supplier's certifications that the products in question were manufactured in compliance with the TAA, and had explicitly told the GSA that it was relying on the supplier's certifications during compliance reviews. The D.C. Circuit agreed, favorably noting that the contractor informed the government on multiple occasions of its reliance on the certifications, and stating that a contractor in similar circumstances "ordinarily is entitled to rely on a supplier's certification that the product meets TAA requirements."

Practice Updates

- Our Government Contracts team recently scored an arbitration win for client Altos Federal Group. When Altos Federal Group was abruptly terminated from its $25 million subcontract to provide health care professional staffing at Tripler Army Medical Center, it engaged a team led by Hilary Cairnie, which helped the company resolve the dispute and recover approximately $2 million in lost profits.
- Kelley Doran and Barron Avery co-authored an article entitled "Guidance on the Proposed DOE Business System Rule" with Eric Sobota of BDO USA, LLP in September.
- Hilary Cairnie and Barron Avery presented at the American Bankruptcy Institute's workshop on October 6, 2014. The talk was titled "Government Contracts and Bankruptcy: What Happens When Things Go South?"

Legislative Updates

Bill Number	Sponsor	Description	Last Action	Status
H.R. 4809	Campbell	Reauthorizes the Defense Production Act and modifies the Defense Production Act Committee.	9/26/2014	Signed by President
H.J. Res. 124	Rogers	Continuing Resolution to provide federal funding through December 11, 2014.	9/18/2014	Signed by President
S. 1611	Bennet	Requires designated federal agencies to develop long-term plans for data center consolidation.	9/18/2014	Passed Senate
S. 2061	Tester	Prohibits the Office of Personnel Management from awarding a contract for quality review of background investigative services if the services being reviewed are conducted by the same contractor.	9/18/2014	Passed Senate
H.R. 5278/S. 2704	DeLauro/ Levin	Prohibits the award of federal contracts to inverted domestic corporations.	7/30/2014	Referred to Committee
H.R. 5035	Delaney	Reauthorizes the National Institute for Standards and Technology.	7/22/2014	Passed House
S. 1681	Feinstein	Provides funding for intelligence and intelligence-related activities for Fiscal Year 2014.	7/7/2014	Signed by President
H.R. 5096/ S. 2598	Price/ Leahy	Expands jurisdiction over crimes committed by federal contractors while abroad.	7/14/2014	Referred to Committee

Regulatory Updates

Code Section	Agency	Description	Latest Action	Effective Date
48 CFR Chapter 2	DOD	Amends the DFARS to update and re-order the Rules of the Armed Services Board of Contract Appeals.	Final Rule	7/21/2014
48 CFR Part 31	DOD, GSA, NASA	Amends the cost principles to allow for reasonable costs incurred in connection with whistleblower reprisal proceedings resolved by settlement where the contracting officer determines that there was “very little likelihood that the claimant would have been successful on the merits.”	Final Rule	7/25/2014
48 CFR Part 204	DOD	Implements a section of the National Defense Authorization Act for FY 2014 to prohibit acquisition of commercial satellite services from certain foreign entities.	Interim Rule	8/5/2014
48 CFR Parts 515, 538, and 552	GSA	Incorporates existing Federal Supply Schedule Contract policies into the General Services Acquisition Regulation and updates the “contracting by negotiation” section.	Proposed Rule	9/10/2014

Executive Orders

Executive Order No.	Description	Latest Action	Effective Date
Exec. Order 13,672	Amends Executive Orders 11,478 and 11,246 by extending protection against discrimination on the basis of gender identity in the civilian federal workforce, and in hiring by federal contractors on the basis of both gender identity and sexual orientation.	Signed	7/21/2014
Exec. Order 13,673	Titled “Fair Pay and Safe Workplaces,” this order requires agencies to include clauses in solicitations for awards greater than $500,000 that require greater disclosure of past violations of labor laws by bidding contractors.	Signed	7/31/2014

About BakerHostetler

BakerHostetler, one of the nation's largest law firms, represents clients around the globe. With offices from coast to coast, our more than 900 lawyers litigate cases and resolve disputes that potentially threaten clients' competitiveness, navigate the laws and regulations that shape the global economy, and help clients develop and close deals that fuel their strategic growth. At BakerHostetler we distinguish ourselves through our commitment to the highest standard of client care. By emphasizing an approach to service delivery as exacting as our legal work, we are determined to surpass our clients' expectations.

BakerHostetler's Government Contracts Practice Group consists of more than a dozen attorneys with extensive experience in government contracts, including former government attorneys from the Justice Department, SEC, and USPTO. Working closely with the firm's other practice groups, including the Intellectual Property, Labor, International Trade, FDA, and White Collar groups, among others, the Government Contracts Practice Group represents clients on a wide variety of government contract matters and cases.

Why BakerHostetler's Government Contracts Practice Group?

- Seasoned, experienced team with a deep bench.
- Several attorneys with technical and engineering backgrounds.
- Former government attorneys.
- Outstanding client service and responsiveness.
- Competitive value-driven rates and fee arrangements.

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Hilary Cairnie is the head of the firm's Government Contracts Practice. He focuses on public contract law, encompassing virtually all aspects including contract formation, performance, administration, and enforcement controversies at the federal and state levels. With two engineering degrees and several years of experience working as an engineer for various companies, Mr. Cairnie uses his unique technical background to represent clients involved in aerospace, automotive, shipbuilding, transportation, construction, software, medical and healthcare, engineering, and research and development endeavors, among others.

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Kelley Doran has focused on government contracts counseling, contract negotiation, and litigation for over fifteen years. Mr. Doran's practice includes representing a broad array of commercial item, defense, and homeland security contractors that sell products and services to the federal, state, and local governments. He has worked with product and service companies in numerous industries, including biodefense and life sciences, environmental remediation, homeland security, information technology, and nanotechnology.

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