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The BDO GovCon Week Ahead - February 2023

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Vendor Pushback Cannot Stop this Acquisition Regulation

The General Services Administration (GSA) is looking to expand the Transactional Data Reporting (TDR) program to multiple new contract vehicles. In a recent memo, Jeff Koses, GSA's senior procurement executive, described a class deviation which lets more vendors submit pricing data at the task order level, which TDR facilitates, on multi-agency and governmentwide acquisition contracts (GWACs). The deviation continues a trend away from negotiating contract level pricing based on commercial or other prices.

TDR was adopted in 2016 with the goal of eliminating the dual requirements of disclosure of commercial sales practices (CSP) and the Price Reduction Clause (PRC). CSP describe the nature

of contractors' non-government sales. The PRC requires contractors to provide price reductions offered in corresponding commercial sales to government customers under their schedule contracts. Contractors typically dislike the PRC due to its burdensome requirements and penalties for noncompliance including prospective False Claims Act violations.

TDR requires that contractors report transactional data to GSA from orders placed against their Federal Supply Schedule (FSS), GWACs, and government-wide indefinite delivery, indefinite quantity (IDIQ) contracts. Transactional data are reported monthly and include eleven items of transactional data such as a description of the deliverable, identifying manufacturing information, quantity sold, and unit and total price. The deviation expands the number of items that must be reported from eleven to thirty-three for multi-agency and GWAC cost type contracts and task orders.

The implementation of TDR, however, has not been well received among vendors or the GSA inspector general since its inception. In a recent report the IG stated "When performing price analyses on TDR pilot contracts, FAS [Federal Acquisition Service] contracting personnel do not have access to TDR data that can be used for pricing decisions and as a result, they mainly compared proposed pricing to other MAS [multiple award schedules] and government contracts. However, this approach does not provide customer agencies with assurance that FAS achieved pricing that reflects the offerors' best pricing and will result in the lowest overall cost alternative to meet the government's needs."

Some experts believe GSA may not have correctly gauged the industry response before implementing the deviation. One source noted that the deviation requires that industry supply transactional data at no cost to the government but that there is always a cost to send data. In addition, use of TDR may not work well for comparison of services pricing because services are very requirements specific.

Despite the pushback, GSA has expanded TDR with the belief that it makes obtaining a GSA GWAC or multiple award contract (MAC) contract easier for companies.

For more information: [One more step away from the acquisition regulation that most vendors hate](#)

February 20, 2023

Is COVID-19 Over?

Due to the ongoing Coronavirus (COVID-19) pandemic, the Department of Health and Human

Services (DHHS) declared a federal public health emergency on Jan. 31, 2020, and President Trump declared a national emergency on March 13, 2020. Those two declarations allowed the federal government to more easily access funds and resources to aid state and local governments in their fight against COVID-19. The emergency declarations also suspended various health care requirements, which granted the public greater access to general health care and made it possible for people to receive free COVID-19 testing, treatment, and vaccines. On Jan. 30, 2023, almost three years later, President Biden announced intentions to “end both the national emergency and the public health emergency declarations related to COVID-19.” So, what happens next?

An end to the emergency declarations could lead to more difficulty accessing COVID-19 treatment and vaccination – particularly boosters. The removal of federal emergency funding means that state and local health agencies and insurance companies will need to charge the public to cover the increased costs of free treatment and vaccination. An end could also lead to a significant reduction in the number of people with health care insurance under Medicaid. In March 2020, Congress enacted a continuous enrollment provision in Medicaid that prevented states from removing anyone from their rolls during the pandemic. In December 2022, Congress passed a provision that will end continuous enrollment on March 31, 2023. The Biden administration has defended this time frame as sufficient but many people with Medicaid may be unaware of these changes until they actually lose their benefits. A Federal transition from emergency status will impact the funding methods used by state and local governments, not the authority those governments have over their own emergency declarations. States can choose to keep or lose various “COVID-era emergency standards, such as looser restrictions on telemedicine or out-of-state health providers.” COVID-19 is nowhere near ‘over’ or through impacting the public, and many people still require treatment and care.

For government contractors the rollback of the COVID-19 emergency declaration follows news about the ending of the federal COVID-19 vaccine mandate. On Jan. 12, the 6th U.S. Circuit Court of Appeals unanimously ruled against the Biden administration, concluding it overstepped its authority when it required federal contractors to get COVID-19 vaccinations. In Aug. 2022, the President updated the Safer Federal Workforce Task Force guidance and announced it would no longer enforce vaccine mandates on federal contractors.

In other areas however the Government continues to maintain careful surveillance. For example, with incidents of fraud related to the Paycheck Protection Plan (PPP) (see link below), contractors may expect DCAA to audit circumstances surrounding forgiveness of PPP loan proceeds.

For more information, please visit:

- ▶ [Biden's plan for ending the emergency declaration for COVID-19 signals a pivotal point in the pandemic – 4 questions answered](#)
- ▶ [Court Curbs Federal Contractor Vaccine Mandate](#)
- ▶ [Man Convicted for Multimillion-Dollar COVID-19 Relief Fraud](#)

February 13, 2023

New and Improved SBA Veteran Small Business Certification Program

Beginning January 9, 2023, the U.S. Small Business Administration started accepting applications through the Veteran Small Business Certification program. SBA's new Veteran Small Business Certification program implements changes from the National Defense Authorization Act for Fiscal Year 2021 (NDAA 2021) which transferred the certification function from the Department of Veterans Affairs (VA) to SBA as of January 1, 2023. The program will be the Agency's primary certification vehicle for all Veteran-owned small businesses (VOSBs) and SDVOSBs, important classifications that enable those businesses to qualify for sole-source and set-aside federal contracting awards. Certified VOSBs are eligible to compete for sole-source and set-aside contracts at the Department of Veterans Affairs, while certified SDVOSBs can compete for sole-source and set-aside contracts government-wide.

The VOSB and SDVOSB Programs, set forth in 38 U.S.C. 8127, authorize Federal contracting officers to restrict competition to eligible VOSBs and SDVOSBs for Department of Veterans Affairs (VA) contracts. Previously, to be eligible for VA contracts, VOSBs and SDVOSBs had to be verified by VA's Center for Verification and Evaluation (CVE) in accordance with 38 U.S.C. 8127. There was no Government-wide SDVOSB certification program, and firms seeking to be awarded SDVOSB sole source or set-aside contracts with Federal agencies other than the VA only needed to self-certify their status as set forth in section 36 of the Small Business Act, 15 U.S.C. 657f.

Section 862 of the NDAA 2021 amended the VOSB/SDVOSB requirements to transfer the responsibility for certification of VOSBs and SDVOSBs to SBA as of January 1, 2023 and created a certification requirement at SBA for SDVOSBs seeking sole source and set-aside contracts across the Federal Government. Section 862 also created a one-year grace period after the Transfer Date for businesses to file an application for SDVOSB certification with SBA and to continue to self-

certify.

The SBA certification program offers extensive economic opportunity to Veterans. It focuses on accessibility to integral resources and exceptional support to skilled entrepreneurs within the military community.

An applicant's eligibility is dependent upon three main prerequisites:

1. Small business status as defined by the size standard corresponding to any NAICS code listed in the business's SAM profile.
2. 51% or more of the business must be Veteran-owned.
3. SDVOSB certifications mandate that a minimum of 51% of the business must be owned by a Veteran, rated as service-disabled by the VA.

The Small Business Administration has put a strong emphasis on improving the certification experience for Veteran entrepreneurs. The SBA provides a central support platform for Veteran small business certification needs, reciprocal certification for businesses with remaining eligibility in the women-owned small business (WOSB) and 8(a) programs, and has streamlined the application process and aligned ownership and control requirements across the VetCert, 8(a), and WOSB programs.

Please visit www.sba.gov/vetcert for the latest Veteran Small Business Certification program information.

February 6, 2023

Challenge to White House's Minimum Wage Increase for Federal Contractors Fails

On January 1, 2023, the minimum wage for federal contract workers increased to \$16.20 an hour. According to the Department of Labor the minimum wage increase will impact approximately 327,000 workers and account for roughly \$1.7 billion in additional wages for those employees over the next decade. This increase to the minimum wage is on top of the \$15.00 per hour increase which went into effect in April 2022. The initial increase faced opposition.

In April 2021, the Biden Administration issued the Executive Order on Increasing the Minimum wage for Federal Contractors, which mandates a \$15.00 an hour minimum wage for workers on federal contracts. The executive order faced a lawsuit led by the Attorneys General of Arizona, Idaho, Indiana, Nebraska and South Carolina which failed after US District Judge John Tuchi ruled on January 6, 2023 that the President had authority to issue it under the Federal Property and Administrative Services Act. The Act grants the President the authority to set policies necessary to promote the economy and efficiency of federal contracting. Tuchi's ruling noted that the President rationally determined that increasing the minimum wage would increase the productivity of employees and the quality of their work and thereby benefit the federal government's contracting operations.

The executive order also applies to subcontracts on federal prime contracts. The Biden administration successfully argued that applying the same minimum wage standard to subcontractors would prevent prime contractors from subcontracting out labor associated with the increased minimum wage.

The executive order still faces challenges for specific subsets of federal contract workers. Another injunction filed in February 2022 by the 10th Circuit Appeals Court in Colorado prevents it from being enforced on federal contracts related to seasonal recreational service or equipment rental on federal lands for the time being.