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The BDO GovCon Week Ahead - July 2022

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How to Mend the Gap for Small / Disadvantaged Businesses

In the fiscal year (FY) 2022 budget, a goal of awarding 11% of total contract dollars to small disadvantaged businesses (SDBs) was included. However, concerns arose that not enough was being done to address the sharp decline in small businesses performing on government contracts, and that goal was proving to be far from achievable. A Government Accountability Office (GAO) report continued to show a large drop-off in small businesses supplying goods to the government, with one report indicating a 17% drop between 2016 and 2019, which forced the White House to act.

Last month, the White House released a memo calling agency acquisition officers to “use existing and open market contracts to achieve a mix of new entrant and seasoned 8(a) businesses and SDBs, evaluate acquisitions under the simplified acquisition threshold, and maximize the use of the

8(a) business development program.” In this memo, the White House suggested that agencies use the General Services Administration (GSA) Federal Supply Schedule program and the category management Quick Decision Dashboard / Small Business Dashboard to identify the existing contracts that offer access to SDBs, as these tools create low-hanging fruit by allowing acquisition offers to available SDBs.

Experts promote collaboration between the Office of Management and Budget and the GSA program management office to develop resources, such as the Dashboards, and training for small businesses aiming to secure contract opportunities. The training and resource development, paired with an increase in hiring of procurement professionals, has the potential to expand the acquisition workforce and get the government closer to the 11% SDB goal.

In one example of an effort to help small / disadvantaged businesses, the GSA recently issued a memo announcing a collaboration with the National LGBT Chamber of Commerce (NGLCC). GSA and NGLCC want to initiate a memorandum of understanding in which the GSA can share the NLCC database of LGBT-certified small businesses with the primary objectives of enhancing access to GSA contracting for lesbian, gay, bisexual and transgender-inclusive business owners and diversifying the government contracting world. This collaboration was introduced at the end of June, during Pride Month, but the effects will likely not be seen until FY23.

For more information, please visit this [link](#), this [link](#) and this [link](#).

Cybersecurity is Great and All, But What If Patients Cannot Access Their Own Data?

Medical-device manufacturers aim to create products that will help their customers better manage diseases like diabetes to allow them to live a less-restricted lifestyle and to streamline the efforts required to do so. Unfortunately, medical information is often subject to fraud and bad actors and, as a result, the Food and Drug Administration (FDA) has drafted cybersecurity guidance for staff to use when processing submissions from manufacturers seeking approval to market their products.

This comes about as the FDA has been under pressure from Congress to improve the cybersecurity of medical devices through the pre-market approval process. Earlier this month, a 90-day public comment period on proposed cybersecurity language ended, where the FDA received over 1,000 comments. These comments were mainly from patients and families of patients who rely heavily on their medical devices, expressing concern about the unintended effects that the proposed cybersecurity requirements will have on their ability to access the data.

They have asked the FDA to remember that following safe cybersecurity guidance is intended to ensure that unauthorized parties do not gain access, and their hope is that the patients, who are authorized users, do not inadvertently get lumped into that category.

Part of the reason for such a public outcry is because it has happened in other industries, which sparked political campaigns surrounding the Right to Repair Act, which essentially states that if a person owns a device, they should also have access to the knowledge necessary to repair the devices themselves. This also includes ensuring that the information is available, making parts and tools accessible, allowing device unlocking and accommodating the repair process.

Contractors in the medical device space should continue to monitor the progress of the proposed FDA guidance, as their end users could be severely impacted by the final policy.

For more information, please visit this [link](#).

Insights from BDO's Center of Excellence for Government Contracting

OFCCP's New Contractor Portal

The U.S. Department of Labor's Office of Federal Contract Compliance Programs has developed a new online portal requiring contractors to certify on an annual basis whether they are meeting their requirement to develop and maintain affirmative action programs (AAPs). The Contractor Portal went live on Feb. 1, 2022 and giving contractors a June 30, 2022 certification deadline. Contractors that become covered at a later date are required to create AAPs within 120 days of being awarded a covered federal award and must register and certify compliance within 90 days from the creation of their AAPs. For more guidance, visit this [link](#).

July 18, 2022

Federal Agencies Take a Back Seat in a Major Shift of the Separation of Powers Principle

The federal government has always operated under a separation of powers principle. This prevents one branch of government from encroaching on the powers of another, while also preventing one entity within the government from inappropriately delegating its own authority to another entity. This balance has been consistently monitored by the Supreme Court and in a recent case, *West Virginia et al. v. Environmental Protection Agency (EPA) et al.*, the court issued a

ruling that severely restricts independent federal agencies' ability to create new regulations.

In a 6-3 decision, the majority opinion officially recognized the "major questions" doctrine, which had previously been an informal term used only by individual Supreme Court justices, and they defined it as a "body of law... [where] the agency must point to 'clear congressional authorization' for the authority it claims." The court referenced precedent to further define that the doctrine shall take into consideration both the "history and breadth of the authority that [the agency] has asserted," and the "economic and political significance" of their action to determine if Congress had the intent to confer that authority.

In this specific case, EPA had proposed a new regulation using the authority of the Clean Air Act (CAA), in which Congress lays out the EPA's responsibilities for protecting and improving the nation's air quality, to regulate the net pollution from each state's overall carbon dioxide emissions by requiring them to shift activities from "dirtier to cleaner sources." The majority argued that EPA had historically used this section to set emission limits by requiring a specific "regulated source to operate more cleanly," not asking them to make a shift away from using that polluting source entirely. Thus, this new regulation could be "exorbitantly costly" and "threaten the reliability of the grid" and, therefore, "there is little reason to think Congress assigned such decisions to the Agency."

The minority, in its dissenting opinion, points out that "Congress charged EPA to... regulate... any substance that 'causes, or contributes significantly to, air pollution'" and that, "Carbon dioxide and other greenhouse gases fit that description." The dissent recognized that the new EPA rule would cause a big shift but that it was a necessary one for the EPA to achieve the goals, which Congress charged them with in the first place, in the CAA. This opinion goes on to state:

"A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases."

Going forward, this leaves agencies in a precarious situation where they will still be responsible to move forward with creating regulation, as directed by Congress, while being considerate of this

new rule whereby new regulations shall not have too large an economic or political significance.

For more information, please visit this [link](#).

CISA to Build Out Its Own Procurement Function

As cybersecurity threats increase, so do the needs for more efficient procurements and more specialized contracting officers. As a result, the Cybersecurity and Infrastructure Security Agency (CISA) continues to grow as a stand-alone department and is set to receive its own procurement authority sometime this month, per CISA Chief Information Officer (CIO) Robert Costello.

CISA was established in 2018 as the country's operational entity for managing and mitigating risk from cyber and physical security threats. At that time, CISA was a stand-alone operational component of the Department of Homeland Security (DHS), previously known as the National Protection and Programs Directorate at DHS headquarters. Currently, CISA relies on outside entities, including the Office of Procurement Operations at DHS, to carry out its procurement needs.

However, due to rising demand and procurement needs, CISA is requesting \$6.2 million in its FY 2023 budget to build out its own procurement workforce, consisting of at least 50 personnel, with at least 25 full-time equivalents. The need for this functional procurement team comes from CISA's fast growth as a stand-alone department and the rapidly changing cybersecurity landscape, which will require better internal procurement operations to effectively support end users' needs.

Costello stated that the CIO's office currently has a staff of about 90 people and that a priority for the coming fiscal year is to expand support to CISA's growing field operations, including statewide cybersecurity directors, chemical security advisors and regional directors. Additional efforts, per CISA's FY 2023 budget, include conducting additional training and security assessments to enhance threat resilience, providing additional technical and programmatic support to emergency responders, and assisting state and local jurisdictions in efforts to enhance election security.

For more information, please visit this [link](#) or this [link](#).

Insights from BDO's Center of Excellence for Government Contracting

Since its introduction, the new standard has raised concerns among government contractors. One major concern is the allowability of rental expense under FAR Part 31. Contractors have expressed

concern that the new standard could impact rental expense calculation and the allowability of costs. Fortunately for government contractors, under ASU 2016- 02, rent expense recorded under operating leases, and amortization expense associated with the ROU asset under finance leases, will be allowable for purposes of calculating indirect rates. The interest expense portion under finance leases will be unallowable, in accordance with FAR, consistent with prior accounting for capital leases. [View BDO's lease accounting guide](#) or [visit this link](#) to read the full insight.

July 11, 2022

Inflation, Rising, Fuel Costs and Procurement Provisions. Oh My!

The government fiscal year (FY) 2023 National Defense Authorization Act (NDAA) intends to address many of the issues that government contractors have been facing over the past few years. While FY23 begins Oct. 1, 2022, the act will likely not go into effect until well after Oct. 1, as we'll still be operating under a continuing resolution. As a result, we're able to see some of the government's thought processes from the House Armed Services Committee markup of the NDAA.

Some of the key takeaways from the draft markup session are:

- ▶ A 4% inflation rate, which is less than half of the current actual 8.6% rate, but is likely to be more accurate than the 2.2% rate built into the FY22 NDAA
- ▶ \$3.5 billion for fuel inflation
- ▶ Procurement provision additions and deletions, including striking down a proposal that would have altered/ended the e-commerce pilot project
- ▶ An additional \$37 billion in excess of the Department of Defense request

We will continue to monitor the language of the draft FY23 NDAA and the potential impacts to defense contractors as it takes shapes. Stay tuned for updates from the Senate's proposed edits and what to expect in the final FY23 NDAA in subsequent issues of BDO's *GovCon Week Ahead*.

For more information, please visit this [link](#).

Fast and the Fixed Price: Upcoming Military Space Acquisitions

New Assistant Secretary of the Air Force for Space Acquisition and Integration Frank Calvelli recently expressed a strong preference for fixed-price contracting for military space acquisitions over cost-reimbursable approaches.

Calvelli cited faster acquisitions as one benefit of using fixed-price contract vehicles; noting that long development cycles make it difficult to refresh rapidly changing technologies. Calvelli's preference for fixed-price space acquisition contracts is in line with that of NASA Administrator Bill Nelson who told senators on the Senate Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies that, "we have been moving to the fixed-price where we can under procurement law."

Generally, under fixed-price contracts, any unexpected costs not accounted for in the contractor's proposal are borne entirely by the contractor and cannot be passed on to the government, as they might be under a cost-plus contract. This pendulum shift towards fixed-price contracts comes at a time when increased supply-chain disruptions and high inflation have created a heightened risk of unexpected costs causing overruns, including increased supply chain, fuel and labor costs. While, some unexpected costs are unavoidable, companies proposing on these fixed-price contracts should do everything they can to mitigate these risks by making sure to account for them in their proposals, rather than offering the lowest possible rate.

For more information, please visit this [link](#).

Insights from BDO's Center of Excellence for Government Contracting

BDO's CMMC consulting provides a holistic approach to the compliance development lifecycle. There are several tasks that should be performed prior to any gap assessment that allows an organization to approach an understanding of not only contract regulations, but of controlled unclassified information data flows, and assist in building a proper architecture to support these requirements within the context of a CMMC-compliant framework. To learn more about BDO's CMMC services, [visit this link](#).