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The BDO GovCon Week Ahead - November 2022

November 14, 2022

Navy Small Business Initiatives: Navy to break up five large contracts to increase small business participation and accountability in workshare agreements

The U.S. Navy is pursuing a pilot program for small and disadvantaged businesses that includes an initiative to break up five large contracts to increase small business awards, competition and accountability from prime contractors to subcontracting plans.

On Oct. 25, “Naval IT Day,” Jimmy Smith, Director of the Office of Small Business Programs at the Department of the Navy, stated: “We know that the primes are going to the subs anyway, contracting with them directly. We can save the pass-through money and get more capability and more service out of that dollar, than just giving a bonus to the industry partner to just pass the money through and take that percentage off the top. So again, we’re serious about making sure that small businesses have an opportunity to do business with us.”

Smith provided additional detail regarding the five large contracts in an interview with Federal News Network: “I can’t pull the trigger on a new contract and tell you which ones those are that we’re going to break down and break into many parts until we get past the continuing resolution.”

These initiatives fall in line with Biden’s Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, which directs agencies to focus on opportunities in government contracting within those communities. Additionally, a February 2022 Department of Defense report, “State of Competition within the Defense Industrial Base,” highlights growing the small vendor base with outreach to expand the ability to compete, leveraging small businesses to grow the industrial base, and reducing barriers to entry to support competition.

Navy Secretary Carlos Del Toro, who spoke at Naval IT Day regarding small business initiatives, explained:

“Over the course of the last 10 years or so, there have been a lot of contracts that have been bundled together. It made it hard for medium-sized companies and small companies to compete on. And I’m very sensitive to that fact because I don’t think it’s good for the taxpayer. Competition is what’s important as well. And so we have to have healthy competition across all sectors in order to build efficiencies for the American taxpayer.”

Del Toro is also championing accountability from prime contractors in workshare agreements. The Navy is looking at new terms to incentivize large primes, along with withholding payment terms for noncompliance with commitments.

Navy small business prime contractor spending in Fiscal Year (FY) 2021 was more than \$17 billion and, in FY 2022, has reached \$18.4 billion.

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

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KING & SPALDING

November 7, 2022

Impact of Inflation on Government Contractors (GSA ECONOMIC PRICE ADJUSTMENT (EPA) CONTRACT CLAUSES AND TEMPORARY MORATORIUM)

On March 17, the General Services Administration (GSA) issued a memorandum for the heads of GSA's Federal Acquisition Service (FAS) Contracting Activity that suspends restrictions on GSA Contract economic price increases. Specifically, the issue placed a "temporary moratorium on the enforcement of various limitations contained in certain GSA EPA Contract clauses." The moratorium applies to GSA contracts that contain the following clauses:

- ▶ 552.216-70, Economic Price Adjustment—FSS Multiple Award Schedule Contracts; Alternate I; and Deviation II
- ▶ I-FSS-969, Economic Price Adjustment—FSS Multiple Award Schedule; and Alternate II
- ▶ 552.216-71, Economic Price Adjustment—Special Order Program Contracts; Alternate I; and Alternate II

GSA intended to allow contractors to adapt to fluctuating market conditions and to continue to support federal customer and contractor demands. Contractors still confronted obstacles, however, such as looming deadlines and challenges to secure pricing increase approvals.

On Sept. 12, GSA released a supplement to the original moratorium, Acquisition Letter MV-22-02, which expanded modifications on the enforcement of restrictions on GSA Economic Price Adjustment (EPA) set by the original moratorium. Supplement 1 was intended to address the challenges contractors faced to secure pricing increase approvals by further eliminating the need for additional approvals over the ceiling percentage. Additional benefits provided by Supplement 1 include:

- ▶ Reduced approval requirements for price increases.
- ▶ Eased time limitations regarding the number of days between requests.
- ▶ Modified limitations on number of EPA increases that contractors may request.
 - GSA contractors can now submit EPA modifications at any time, including those that exceed the ceiling amount*.
- ▶ Reduced regulatory enforcement when a contractor removes an item from its schedule contract.

** EPA modification approval is still at the discretion of the contracting officer, who may request supportive documentation for the increase.*

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

Executive Order 14042, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

On Sept. 9, 2021, President Biden signed Executive Order (EO) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors. This EO aims to ensure agencies include a clause in covered federal contracts which requires contractors and subcontractors to follow task force guidance in locations that have been approved by the OMB. Specifically, the guidance aims to:

- ▶ Ensure all federal covered contractor employees become fully vaccinated.
- ▶ Impose masking and physical distance requirements.
- ▶ Require contractors to designate an individual(s) to coordinate COVID-19 workplace safety efforts.

Since then, several federal district courts have issued nationwide injunctions attempting to prohibit enforcement of the vaccination requirement against all federal contractors. On Aug. 26, 2022, the U.S. Court of Appeals for the Eleventh Circuit narrowed the injunction to limit prohibition

enforcement only to the plaintiffs in the case—a group of states and members of a single industry trade organization. The Office of Management and Budget (OMB) and the Safer Federal Workforce Task Force communicated that agencies would take no action in requiring contractors to enforce COVID-19 related contract clauses, in line with the nationwide injunction, until further notice.

OMB and the Safer Federal Workforce Task Force anticipate certain guidance will be issued following final decision on any narrowing of the injunction. They anticipate that guidance being:

- ▶ Narrative on whether contract clauses implementing EO 14042 will be included in any new solicitations and contracts.
- ▶ Addition of a timeline for contractors to implement COVID-19 safety protocols to ensure compliance with any new COVID-19 safety policy.
- ▶ Narrative on timing of provision of written notice from agencies to contractors regarding the enforcement of EO 14042-related contract clauses

Essentially, the courts, the OMB, and the Safer Federal Workforce Task Force are slowing the enforcement of this EO, resulting in agencies being directed not to take action on requiring covered contractors and subcontractors to enforce any contract clauses related to EO 14042.

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

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