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This edition includes Recent Developments, Recent Decisions, and a Feature Article titled "Service Contract Act Price Adjustments: Federal Circuit Holds that Department of Labor Wage Determination Could Not Be Retroactively Withdrawn, Finds Contractor Entitled to Service Contract Act Price Adjustment for Contract Extension Executed Before Wage Determination Was Rescinded."

Recent Developments

DOD Grant and Agreement Regulations: The Department of Defense (DOD) issued a final rule revising its Grant and Agreement Regulations. 70 Federal Register (Fed. Reg.) 49460 (Aug. 23, 2005). Among other things, the regulations were revised to require the electronic posting of synopses of funding opportunity announcements, to increase the threshold (from $300,000 to $500,000 per year in expenditures of Federal funds) at which recipients are required to have single audits, and to update rules on nonprocurement debarment and suspension as well as drug-free workplace requirements.

Small Business Regulations: The U.S. Small Business Administration (SBA) issued an interim rule amending the SBA's Historically Underutilized Business Zone (HUBZone), 8(a) Business Development, Government Contracting, and Size Standard regulations to implement recent statutory requirements. 70 Fed. Reg. 51243 (Aug. 30, 2005). The interim rule: (1) amends the definitions of the terms "business concern," "affiliation," "HUBZone small business concern," and "qualified HUBZone small business concern"; (2) amends the HUBZone eligibility requirements for tribally-owned HUBZone concerns; (3) extends qualified HUBZone areas to include military base closure areas for a period of five years; (4) revises the definition of a "qualified non-metropolitan county"; (5) extends the redesignation period for HUBZone areas through the release of the 2010 census data; and (6) provides for a five percent HUBZone evaluation price preference for agricultural commodities in international food aid procurements. These interim changes took effect on August 30, 2005. Comments must be submitted by October 31, 2005 to be considered for the final rule.

Notification of Potential Safety Issues Under DOD Contracts: The DOD issued a proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require contractors to notify the Government of certain potential safety

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issues under contracts for the acquisition of (1) replenishment parts identified as critical safety items, (2) systems and subsystems, assemblies, and subassemblies integral to a system, or (3) repair, maintenance, logistics support, or overhaul services for systems and subsystems, assemblies, and subassemblies integral to a system. 70 Fed. Reg. 44077 (Aug. 1, 2005). The rule would require contractors to notify the administrative contracting officer and the procuring contracting officer within 72 hours after discovering or acquiring credible information concerning any (1) technical nonconformances for replenishment parts identified as critical safety items acquired under covered DOD contracts or (2) nonconformances or deficiencies that may result in a safety impact for systems (or subsystems, assemblies, subassemblies, or parts integral to a system) acquired by or serviced for the Government under covered DOD contracts. This notification requirement would be implemented through a new DFARS clause to be included in covered solicitations and contracts as well as subcontracts under covered contracts. Notably, the proposed clause contains a provision stating that "[n]otification of safety issues under this clause shall be considered neither an admission of responsibility nor a release of liability for the defect or its consequences." Comments to the proposed rule must be submitted by September 30, 2005.

Suspension and Debarment: The U.S. Government Accountability Office (GAO) issued a report summarizing its in-depth review of the suspension and debarment process at six federal agencies. Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process (GAO-05-479 July 29, 2005). The six agencies were the Air Force, the Army, the Navy, the Defense Logistics Agency, the General Services Administration, and the Environmental Protection Agency. The GAO's report states that, in Fiscal Year 2004 alone, these six agencies in total suspended 262 parties, debarred 590 parties (out of 651 proposed debarments), and entered into administrative agreements (which permit contractors that meet certain requirements to remain eligible for new contracts) with 38 parties. The GAO's report contains two recommendations on how the suspension and debarment process could be improved. First, the GAO noted that information in the Excluded Parties List System (EPLS), a governmentwide database on exclusions, may be insufficient to enable contracting officers to determine with confidence that a prospective contractor is not currently suspended, debarred, or proposed for debarment. In particular, while the EPLS database includes a field for entering contractors' unique, nine-digit Data Universal Numbering System (DUNS) numbers, it is not a required field in the database and is routinely omitted. Contracting officers therefore instead typically search the EPLS database using a prospective contractor's name; however, this search method may be unreliable because a contractor's name as it appears in a bid or proposal may not be the same as the name included in the EPLS database. The GAO's report therefore recommends that the EPLS database be modified to require contractor identification numbers for all actions entered into the system. Second, the GAO stated that information regarding administrative agreements is not routinely shared among agencies, even though it would be helpful for agency officials contemplating action against a contractor to know whether another agency has ever used an administrative agreement with that contractor, what the terms of the agreement were, and whether the contractor complied with the agreement. The GAO's report therefore recommends that the Office of Management and Budget require agencies to collect data on administrative agreements, report the data to the Interagency Suspension and Debarment Committee, and ensure that such data is available to all suspension and debarment officials. The GAO's report also recommends that similar actions be taken to share information

regarding compelling reason determinations, which allow agencies to continue doing business with excluded parties in certain circumstances.

Recent Decisions

Bundling: The GAO sustained a bid protest challenging the Army's bundling of system engineering and technical assistance (SETA) support services with numerous other requirements under a single, $130 million blanket purchase agreement. Sigmatech, Inc., Comp. Gen. Dec. B-296401, Aug. 10, 2005. The GAO concluded that, although small businesses had provided the SETA support services for the previous 15 years, the Army failed to perform a bundling analysis as required by FAR 7.107, failed to provide notice of bundling to the SBA as required by FAR 19.202-1, and failed to provide notice of its intent to bundle to the protester (the incumbent small business concern) as required by FAR 10.001.

Price Evaluations: The GAO sustained a bid protest challenging the terms of an Army solicitation for commercial travel office services because the solicitation's price evaluation scheme was flawed. CW Government Travel, Inc. et al., Comp. Gen. Dec. B-295530.2 et al., July 25, 2005. The solicitation contemplated multiple awards of indefinite-delivery, indefinite-quantity contracts for worldwide DOD travel agent services. The Army's price evaluation scheme was flawed because it did not require offerors to propose binding transaction and management fees that they must honor in subsequent task order competitions conducted under the multiple award contracts. Under such a scheme, an offeror could game the competition by proposing low fees for purposes of the evaluation that they did not intend to propose at the task order level. As a result, the Army's price evaluation could not meaningfully assess the likely cost to the Government.

Alteration of Solicitation Terms and Conditions: Where an offeror in a Bureau of Indian Affairs procurement for firefighter meals submitted a quotation that altered the required location of meal deliveries, limited the type of modified meals available, and added terms regarding advance notice of the number of meals to be provided, the GAO concluded that the agency properly rejected the quotation for failing to conform to material terms and conditions of the solicitation. Muddy Creek Oil and Gas, Inc., Comp. Gen. Dec. B-296836, Aug. 9, 2005. Although the offeror explained that it was led to believe that the procurement did not involve a competitive solicitation and that it would be awarded a sole-source contract, the GAO stated that this expectation became unreasonable once the solicitation, a request for quotations that described the basis for award and identified evaluation factors, was issued.

Proposal Revisions: The GAO sustained a bid protest regarding a Navy procurement for the construction of facilities in Italy because the agency lacked a reasonable basis for refusing to permit offerors to revise their proposed schedules when submitting their final proposals. Cooperativa Muratori Riuniti, Comp. Gen. Dec. B-294980.5, July 27, 2005. Following an earlier sustained protest, the Navy revised the solicitation and permitted offerors to revise their technical and cost proposals, except that changes to their proposed schedules were not allowed. The GAO, however, stated that where an agency decides to amend a solicitation after closing and permit offerors to revise their proposals, it should permit offerors to revise any aspect of their proposals, including those that were not the subject of the amendment, unless the agency offers evidence that (1) the

amendment could not reasonably have any effect on other aspects of the proposals or (2) allowing such revisions would have a detrimental impact on the competitive process. The GAO sustained the protest because it disagreed with the Navy's argument that the solicitation amendment had no impact on proposed schedules and because the Navy did not claim that allowing schedule revisions would have a detrimental impact on the competitive process.

Solicitation Cancellations: The GAO sustained a bid protest challenging the cancellation of a Department of Veterans Affairs Request for Proposals for construction services. Rand & Jones Enterprises Co., Comp. Gen. Dec. B-296483, Aug. 4, 2005. The GAO sustained the protest because the agency publicly disclosed offerors' proposed prices, the solicitation provided only for a price competition and did not contain any technical evaluation factors, the agency intended to instead issue an Invitation for Bids for the same requirement, and there was no basis for finding that the Government or the integrity of the procurement would be prejudiced if the solicitation was not cancelled. The GAO recommended that the Department of Veterans Affairs award a contract to the protester, which proposed the lowest price, if it was found to be responsible and there was sufficient funding.

Small Business Size Challenges: The SBA Office of Hearing and Appeals (OHA) held that an Air Force contracting officer could not file a protest with the SBA challenging the size status of an offeror in a procurement for training systems that was set aside for small business concerns until the contracting officer had notified offerors of the selection of the apparent successful offeror. Dept. of the Air Force, SBA No. SIZ-4720, Aug. 2, 2005. Because the contracting officer filed the size protest before notifying offerors of the selection of the apparent successful offeror, the SBA OHA dismissed the protest as premature. The SBA OHA noted that, until a contracting officer identifies the apparent successful offeror, the SBA could not know whether a protest challenging a particular offeror's size was relevant or anything other than academic.

Feature Article

Service Contract Act Price Adjustments: Federal Circuit Holds that Department of Labor Wage Determination Could Not Be Retroactively Withdrawn, Finds Contractor Entitled to Service Contract Act Price Adjustment for Contract Extension Executed Before Wage Determination Was Rescinded

When a Government contract is subject to the requirements of the Service Contract Act (SCA), the contractor is entitled to a contract price adjustment under certain circumstances. For example, a contractor is entitled to a price adjustment to reflect its actual increase in applicable wages and fringe benefits to the extent that the increase is made to comply with the Department of Labor (DOL) Wage Determination applicable on the anniversary date of the contract, if it is a multiple year contract, or at the beginning of any renewal option periods. See FAR clause 52.222-43. On August 9, 2005, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) issued a decision addressing whether the DOL may retroactively withdraw a revised Wage Determination that it issued shortly before, and rescinded shortly after, the beginning of a contract extension. Guardian Moving and Storage Co. v. Hayden, No. 05-1086 (Fed. Cir. Aug. 9, 2005). As discussed below, the

Federal Circuit held that the new Wage Determination could not be retroactively withdrawn to deny the contractor an SCA price adjustment for the contract extension.

The case involved a National Security Agency (NSA) contract with Guardian Moving and Storage Company, Inc. (Guardian) for cartage and drayage services. Following a ten-month base performance period followed by a one-year option period ending on September 30, 2002, the NSA and Guardian executed several short contract extensions, or "renewals." These extensions included contract renewals from October 1, 2002 to November 30, 2002 ("October Extension"), December 1, 2002 to January 31, 2003 ("December Extension"), and February 1, 2003 to February 14, 2003 ("February Extension"), as well as additional extensions from February 15, 2003 to, finally, March 29, 2003 ("March Extensions"). The base performance period and one-year option period were governed by an October 13, 2000 Wage Determination, which was based upon a 1995 Collective Bargaining Agreement (CBA) between Guardian and its employees. On September 24, 2002, Guardian and its employees entered into a new CBA, which caused the DOL to issue a revised Wage Determination on November 12, 2002. On December 18, 2002, however, the DOL withdrew the revised Wage Determination because of a concern with a conditional term in the new CBA that did not appear to be the result of "arms-length negotiation." On January 10, 2003, Guardian and its employees agreed to an amended CBA in which the offending term was deleted and, based upon this revision, the DOL reissued the revised Wage Determination without any substantive changes.

In May 2003, Guardian filed a claim with the NSA contracting officer seeking an SCA price adjustment of more than $370,000 for the costs of increased wages incurred under the contract during the October 1, 2002 to March 29, 2003 contract renewal periods, based upon the new CBA and the revised Wage Determination. After the contracting officer denied the claim in its entirety, Guardian filed an appeal with the Armed Services Board of Contract Appeals (Board). The Board concluded that, due to the improper term originally included in the new CBA, the Government was not obligated under the SCA to reimburse Guardian for any wage increases until the new CBA was amended to delete the term on January 10, 2003. The Board therefore held that Guardian was entitled to an SCA price adjustment for the February Extension and the March Extensions, but not for the October Extension or the December Extension. Guardian appealed the Board's decision to the Federal Circuit.

The Federal Circuit agreed with the Board that Guardian was not entitled to an SCA price adjustment for the October Extension. In that regard, the Federal Circuit rejected Guardian's claim that the revised Wage Determination was "applicable" as of October 1, 2002 by virtue of the October 1, 2002 effective date of the new CBA. The court stated that this argument overlooked the fact that DOL Wage Determinations only apply prospectively, regardless of the effective date of an underlying CBA. However, the Federal Circuit agreed with Guardian that it was entitled to an SCA price adjustment for the December Extension. The court relied upon a DOL regulation, 29 C.F.R. 4.3(b), which states that a DOL Wage Determination will apply to a contract "entered into thereafter and before such determination has been rendered obsolete by a withdrawal, modification, or supersedure." The Federal Circuit concluded that, even though the revised Wage Determination was issued in error on November 12, 2002 and was subsequently withdrawn, it nonetheless applied to the December Extension because it was in effect at the beginning of the December Extension. In so concluding, the court rejected the Government's argument that the DOL's December 18, 2002 withdrawal of the revised Wage

Determination was retroactive to December 1, 2002. The Government was unable to cite any authority for such retroactive withdrawal; moreover, the court noted that the regulatory passage cited above suggests that such a withdrawal can only operate prospectively. The Federal Circuit therefore reversed the Board's decision that Guardian was not entitled to an SCA price adjustment for the December Extension.

Given that contractors may not seek SCA price adjustments based upon the retroactive application of revised Wage Determinations, the Federal Circuit's decision provides a measure of consistency and certainty by similarly rejecting the retroactive application of rescinded Wage Determinations. In both cases, the Wage Determination in effect at the start of a contract, the anniversary date of a multiple year contract, or the beginning of each contract renewal should govern the wages and fringe benefits paid during the covered performance period, regardless of any subsequent changes to the Wage Determination.

If you have any questions concerning this Feature Article or any other Government contracting issues, please contact any of the partners, counsel, or associates in the Fried Frank Government Contracts Practice Group listed below.

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