THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

THOMSON REUTERS®

Vol. 61, No. 34 September 18, 2019

In this issue ...

Focus

¶ 264

FEATURE COMMENT: Gotta Have (Good) Faith—FCA Risks Arising From Small Business Subcontracting

On Sept. 5, 2019, the U.S. District Court for the District of Maryland denied a motion to dismiss a qui tam complaint alleging that the defendants falsely represented the status of workers to make it appear that they were employed by small businesses in order to fulfill small business subcontracting requirements on a $4.6 billion interpretation and translation contract. *U.S. ex rel. Fadlalla v. Dyncorp Int'l LLC*, 2019 WL 4221476 (D. Md. Sept. 5, 2019). By allowing the case to proceed into discovery, *Fadlalla* becomes the latest—but far from only—cautionary tale of the potential False Claims Act risks associated with small business subcontracting.

Most Government contractors know that their failure to comply with small business subcontracting plans can potentially result in liquidated damages under Federal Acquisition Regulation 52.219-16 or negative past performance ratings. But as seen in *Fadlalla*, an emerging trend suggests there may be a far greater risk when a prime contractor claims credit for awarding small business subcontracts to companies that fail to meet the necessary size and status requirements—FCA liability and the specter of treble damages.

The Statutory and Regulatory Regime—As one of many methods by which the Government has prioritized creating maximum opportunities for small businesses to participate in federal procurement, many Government contracts include FAR Clause 52.219-9. This clause requires the inclusion of a small business subcontracting plan setting forth goals to subcontract a portion of the work to

Focus continued on page 3 ...

✦ Index ✦

Focus

Developments

Legislation

Regulations

Decisions

A ✦ has been added at the end of headlines in this section to indicate cases having an accompanying analytical note.

— Case Table —

various categories of small businesses, including Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), small businesses in Historically Underutilized Business Zones (HUBZones), and Women-Owned Small Businesses (WOSB) in prime contracts and subcontracts with other than small businesses that offer subcontracting possibilities and are expected to exceed $700,000 (or $1.5 million for construction of any public facility). Moreover, agencies may choose to evaluate the small business subcontracting plan as part of the procurement. Ultimately, contractors must semiannually report on their progress in achieving their subcontracting goals, and a failure to make a good faith effort to meet these goals during contract performance can result in liquidated damages.

Broadly, prime contractors are not required to independently verify the status of their subcontractors for reporting purposes. The legislative history of the Small Business Act Amendments of 1978 indicates that Congress intended for prime contractors to be able to rely on the representations of small businesses because Congress recognized the challenges of assessing the size and status of a company:

> The conferees recognize *the difficulty that prime contractors might have in determining whether a firm is owned and controlled by a socially and economically disadvantaged person*. Contractors may therefore rely on written representations by their small business subcontractors that they are either a small business or a small business owned and controlled by a socially and economically disadvantaged person.

H.R. CONF. REP. 95-1714, 26, 1978 U.S.C.C.A.N. 3879, 3887 (emphasis added). Recognizing that most higher-tier contractors lack the information needed to make fact-specific determinations about size and status, the various small business programs such as the SDVOSB program and the 8(a) business development program permit the higher-tier contractor to rely on the subcontractor's representations so long as the higher-tier contractor is acting in "good faith." 13 CFR § 121.108 (size); 13 CFR § 124.521 (8(a)); 13 CFR § 125.32 (SDVOSB); 13 CFR § 127.700 (WOSB).

But contractors are left to grapple with how to craft policies and procedures that ensure compliance with the amorphous concept of "good faith" reliance. It is clear that contractors do not have an obligation to independently investigate a subcontractor's size or status, but they also cannot look the other way if there are red flags. Indeed, the 2013 National Defense Authorization Act included a reporting requirement, now codified at 13 CFR § 125.3(c)(9), that reads as follows:

> Anyone who has a reasonable basis to believe that a prime contractor or a subcontractor may have made a false statement to an employee or representative of the Federal Government, or to an employee or representative of the prime contractor, with respect to subcontracting plans must report the matter to the [Small Business Administration] Office of Inspector General. All other concerns as to whether a prime contractor or subcontractor has complied with SBA regulations or otherwise acted in bad faith may be reported to the Government Contracting Area Office where the firm is headquartered.

At some point prior to awarding a subcontract, or during contract performance, a prime may learn facts such that the prime can no longer rely on a subcontractor's representations as to size and status. A case out of the Eastern District of Washington helps illustrate this risk. See *U.S. ex rel. Savage v. Wash. Closure Hanford LLC*, 2017 WL 3667709 (E.D. Wash. Aug. 24, 2017).

Failure to Act in Good Faith—In *Savage*, the Department of Justice intervened in a qui tam suit against defendant Washington Closure Hanford (WCH), which held a multibillion-dollar contract for the environmental cleanup and closure of a portion of the Department of Energy's Hanford Site. WCH's contract included a 65-percent small business subcontracting goal.

DOJ alleged that WCH had not implemented its small business subcontracting plan in good faith when the prime claimed small business credit for subcontracts awarded to two WOSBs: Sage Tec and Phoenix Enterprises Northwest (Phoenix). According to the complaint, WCH knew that Sage Tec was acting as a pass-through for a large company called Federal Engineers & Constructors (FE&C). DOJ alleged that WCH knew that all the work awarded to Sage Tec would actually be performed by FE&C because Sage Tec lacked the relevant experience to perform

the specialty waste site remediation work that was called for under the subcontract. Sage Tec allegedly employed only one person, had no equipment and had only $50,000 in assets. According to the Government, these were all potential red flags, but what may have ultimately prompted DOJ to intervene in the case against WCH was an internal e-mail from the prime contractor's subcontracting specialist that discussed how much Sage Tec would be paid. The specialist's e-mail stated that Sage Tec was only entitled to a small mark-up because Sage Tec was not adding any value to the contract other than providing its small business status.

Similarly, DOJ faulted WCH for claiming credit for awards to Phoenix because the SBA had determined that Phoenix was not an eligible small business due to its affiliation with FE&C. Specifically, the SBA had determined that Phoenix and FE&C were affiliated because Phoenix's owner was a full-time FE&C employee; Phoenix was located within FE&C office space and had the same phone number and mailing address; FE&C prepared Phoenix's cost proposal for the subcontract; and Phoenix had no employees and no receipts. WCH did not claim small business credit for the initial award to Phoenix, but the prime did claim small business credit for subsequent modifications to the subcontract.

According to the Government's complaint, WCH was incentivized to misreport compliance with its subcontracting goals because the contract gave DOE the option to assess liquidated damages as well as the ability to reduce WCH's incentive fee payments by $3 million for each contract milestone if small business subcontracting goals were not met. DOJ sought the full value of the subcontracts awarded to Sage Tec and Phoenix as the basis of damages before WCH settled the allegations in 2018 for $3.2 million.

A Perfect Storm—As seen in *Savage*, determining whether a prime contractor relied in good faith on its subcontractors' representations or whether the prime acted with the knowledge sufficient for a finding of FCA liability (as defined by statute at 31 USCA § 3729(b)) is a fact-dependent inquiry. In *Savage*, the alleged facts strongly suggested that the prime contractor knew—or should have known—that Sage Tec and Phoenix were not bona fide WOSBs. Consistent with the old adage that "bad facts make for bad law," *Savage* could prove to be an exception, but the factors below suggest that the WCH settlement could be part of a growing trend of prime contractors getting pulled into cases based on their alleged knowledge of small business subcontracting fraud.

1. Deep-Pocketed Defendants: Over the past decade, there has been a steady rise in qui tam activity and Government enforcement in connection with allegations of small business fraud. Just last month, DOJ reached a $20 million settlement with the CEO of Atlantic Diving Supply (ADS). The Government alleged that the CEO, along with others at ADS, falsely represented that the Virginia-based defense contractor qualified as a small business concern when it did not because of its apparent affiliations with other entities, among other reasons. When that recovery is added to the settlement that ADS paid two years earlier, the combined settlement—totaling more than $36 million—is the largest recovery based on allegations of small business contracting fraud.

But small business fraud cases do not always result in recoveries because even when a plaintiff is able to establish FCA liability, a small business might fold or enter bankruptcy when faced with a large damages award. As a result, FCA plaintiffs are now pursuing theories of FCA liability that will pull in new classes of defendants that are not "judgment proof" such as private equity funds or surety companies. See, e.g., *U.S. ex rel. Scollick v. Narula*, 215 F. Supp. 3d 26 (D.D.C. 2016). In the same vein, relators now appear to be focusing not just on the small businesses allegedly committing small business fraud but the large (and well-funded) higher-tier contractors that are awarding the subcontracts.

2. Aggressive SB Subcontracting Goals: Congress sets federal small business procurement goals requiring that the Federal Government direct a percentage of dollars to small business concerns, and this includes goals for small business subcontracting for certain socioeconomic categories of small businesses. For example, in fiscal year 2019, Congress set a goal that at least five percent of all subcontract awards would be to socially and economically disadvantaged small businesses and at least three percent of all subcontract awards would be to small businesses in HUBZones.

In an effort to meet agency-specific goals, federal agencies push prime contractors to subcontract with small businesses to the greatest extent possible. Many solicitations establish minimum goals for small business subcontracting, and others include small business participation as an evaluation factor. In turn, prime contractors are motivated to propose or commit to aggressive small business subcontracting plans when bidding on projects in an effort to win the work. Once awarded the contract, the subcontracting plan is made a material part of the contract. 15 USCA § 637(d)(4)(B). As a result, a prime contractor's knowing failure to meet a material term of the contract, when accompanied by a request for payment, could potentially form the basis of an FCA violation.

A further complication seen in some of the case law is a prime contractor's own inclination to work with larger, known, and/or established entities in order to increase its own comfort that contract requirements are met on time and performance is completed within budget. In one case, the relator's complaint—which survived a motion to dismiss—alleged that the prime contractor represented to the Government that 40 percent of the work would be subcontracted to small businesses, but rather than issuing valid subcontract awards, the defendants allegedly set up a pass-through scheme in which small businesses would act as conduits and work would be performed by a larger information technology staffing agency with which the prime had previously worked.

In short, a small business may be able to bring legitimate value to its subcontract by further subcontracting some aspect of the work, but such a situation has the potential to be seen as a pass-through if too much of the work is being performed by a large business. One way to mitigate such risk is the SBA's 8(a) and All-Small Mentor-Protégé Programs under which small businesses of all statuses can now enter into mentor-protégé relationships and subsequently perform work through a joint venture with their mentor.

3. Beware the Bitter Bidder: While cases alleging small business subcontracting fraud can certainly be filed by such traditional whistleblowers as employees of a company, this theory of liability appears to be particularly fertile ground for suits filed by competitor companies. A company that loses out on a subcontract award may believe that a qui tam suit is the best chance of dislodging a competitor. For example, the *Savage* case was filed by the owner of a small business that had lost out on subcontract awards to Sage Tec and Phoenix.

4. Statutory Presumption of Loss: Cases involving allegations of small business fraud are being filed with increased regularity, in part, because of the extra leverage provided by the Small Business Act's presumption-of-loss rule. 15 USCA § 632(w)(1). This rule provides that if a concern willfully seeks and receives an award by misrepresenting its small business size or status, there is a presumption of loss to the U.S. equal to the entire value of the contract, subcontract, cooperative agreement or grant. For example, in *Savage*, DOJ sought the full value of the subcontracts that had been awarded to Sage Tec and Phoenix, and the court ruled against WCH when the prime contractor moved for partial summary judgment on the permissible scope of the Government's damages.

More to Come?—Almost four years after she filed her initial case against WCH, the relator in *Savage* filed a separate lawsuit arising from the clean-up work at Hanford. This qui tam alleges that another prime contractor, CH2M Plateau Remediation Co. (CH2M), also falsely claimed credit for subcontracting to Phoenix. See *U.S. ex rel. Savage v. CH2M Hill Plateau Remediation Co.*, 2016 WL 3647648 (E.D. Wash. Feb. 3, 2016). The complaint further alleges that CH2M claimed credit for awarding subcontracts to a HUBZone small business despite knowing that the HUBZone company had been decertified. As of the time of this writing, although the Government declined to intervene, the case had survived a motion to dismiss and had entered the discovery stage.

Earlier this year, a case was unsealed alleging that student loan private collection agencies (PCAs) failed to execute small business subcontracting plans in good faith when performing work under a Department of Education contract. See *PCA Integrity Assocs. LLP v. NCO Fin. Sys.*, 1:15-cv-00750 (D.D.C.). The non-intervened suit alleges that the prime PCAs claimed credit for awarding tens of millions of dollars in small business subcontracts to companies that the primes knew were ineligible because of issues of affiliation. In total, ten companies were named as defendants, nine of which filed motions to dismiss which are now fully briefed and awaiting a decision.

Given the steady rise in cases alleging small business fraud, contractors would be well-served to consider the steps below to mitigate FCA risks when implementing their small business subcontracting plans.

Steps to Mitigate Risks—First, when developing a small business subcontracting plan for a specific project, prime contractors should propose competitive but realistic goals—both for total subcontracting as well as the individual statuses—so as not to set themselves up for a situation where compliance with the plan is unattainable. If the Government includes minimum goals as part of the solicitation that are unrealistic, contractors may want to raise the issue through Q&A and clarify that such goals reflect percentages of work subcontracted versus the total contract spend. Second, contractors should develop a system for vetting new companies before awarding them small business subcontracts. Although the FAR and the SBA regulations allow higher-tier contractors to rely on a subcontractor's representations as to size and status, if a prime contractor finds itself defending an FCA action, the use of an internal vetting program can provide important evidence that the contractor was acting in good faith. Third, contractors should train their staff on how to spot red flags during the negotiation of the subcontract as well as contract performance to be sure that their subcontractors are properly performing work and not just functioning as a pass-through. Lastly, contractors should implement internal controls to make sure that if the company discovers eligibility concerns about a subcontractor, the prime does not claim credit towards its goals when submitting its semiannual small business subcontract reports.

Although there is no guaranteed way to eliminate all potential FCA exposure in connection with small business subcontracting, these steps should go a long way in helping mitigate risk. Because in the end—to paraphrase the famous hit of British pop star George Michael—contractors "gotta have (good) faith" when relying on a subcontractor's representations.

✦

This Feature Comment was written for The Government Contractor by **Jason M. Crawford** ***and*** **Olivia L. Lynch,** ***counsel in Crowell & Moring's Government Contracts group; and*** **Gabrielle Trujillo,** ***an associate in the Government Contracts and White Collar and Regulatory Enforcement groups.***

Developments

¶ 265

DOD Should Identify, Train Non-Acquisition Personnel Supporting Services Acquisitions

The Department of Defense has implemented initiatives to identify non-acquisition personnel who develop requirements, oversee contracts and perform other acquisition-related functions, but it has not implemented an initiative to identify such personnel who support services acquisitions more generally, the Government Accountability Office has reported. DOD also does not know the training needs of non-acquisition personnel and, thus, "cannot determine the extent to which it is meeting their needs."

As of March, DOD reported that about 175,000 out of its 3 million personnel were formally a part of its acquisition workforce, although other personnel can also "perform acquisition-related functions" and have "a significant impact" on acquisition outcomes, GAO explained. Functions performed by non-acquisition personnel include defining requirements, conducting market research, participating in source selection and overseeing contract performance. For example, non-acquisition personnel could verify and document that a contractor "fulfill[s] delivery and quality parameters in accordance with the contract," and could serve as contracting officer's representatives.

Non-Acquisition Personnel—"As of October 2018, DOD had identified approximately 4,000 requirements development positions for defense acquisition programs, and approximately 90,000 individuals serving as CORs for various types of product and service acquisitions," GAO found. However, "DOD's efforts to identify [other] non-acquisition personnel supporting services acquisitions have been unsuccessful."

The role played by non-acquisition personnel in services contracts is particularly significant, GAO has previously determined. See 53 GC ¶ 318. "The significance of services acquisitions for DOD is underscored by the fact that DOD is the federal government's largest purchaser of contractor-provided services, obligating $175 billion for services contracts in fiscal year 2018," GAO pointed out. In FYs 2014–2018, "about half of DOD's contract obligations were for services," and services acquisition is "an element underlying [GAO's] designation of DOD contract management as a high-risk area."

According to GAO, in 2016 the department's acquisition executive directed a team to help identify non-acquisition personnel supporting services acquisitions, but the team did not complete the task and the current acquisition executive has directed the team to focus on other issues. Thus, "DOD has not established how and when it will identify non-acquisition personnel contributing to services acquisitions, or what policy updates and resources may be necessary to identify them," GAO determined.

Department officials told GAO that DOD "does not have efforts in place to systematically identify non-acquisition personnel performing market research or supporting source selections because they do not believe such efforts would provide a good return on investment." Further, officials told GAO that "non-acquisition personnel often perform market research for a relatively short amount of time—sometimes just a few hours—before returning to their primary non-acquisition functions." Similarly, non-acquisition personnel support source selections for a limited amount of time or on a part-time basis, officials told GAO.

Training Requirements—DOD policy sets minimum training requirements for CORs. Further, DOD policy requires providing the Defense Acquisition University with information about the training needs of non-acquisition personnel as part of the budgeting process, but GAO determined that components only provide DAU with information on the training needs of acquisition personnel and requirements developers. "DOD's acquisition leaders generally manage the acquisition-related training resources that may be accessed by non-acquisition personnel," GAO pointed out. "As of June 2019, the responsibility resides with the Under Secretary of Defense for Acquisition and Sustainment."

Although DOD does not comprehensively identify the training needs of non-acquisition personnel, it does give them access to online training courses. Officials told GAO that DAU and the military departments generally provide training workshops, including for non-acquisition personnel, and the Defense Pricing and Contracting office's website has links to resources and training opportunities. GAO found that in FYs 2016–2018, "non-acquisition personnel constituted over half of DAU's online course enrollments and about 10 percent of DAU's classroom enrollments."

"DAU also offers more advanced courses—not available online—that provide training on how acquisition and non-acquisition personnel contribute to services acquisitions and support source selections, among other things," GAO determined. However, to address capacity constraints for these classes, DAU's enrollment policy gives acquisition personnel higher-priority access to them.

Although DAU officials said the prioritization system is appropriate given that DAU's primary mission is to train DOD acquisition personnel, "DAU lacks a complete understanding of non-acquisition personnel's need for acquisition training," GAO concluded. "Ensuring that designated officials carry out their responsibilities to provide DAU data on the training needs of non-acquisition personnel can help inform decisions on resource requirements and the most appropriate ways to meet these needs."

Recommendations—GAO recommended that DOD designate an official to identify non-acquisition personnel supporting services acquisitions and ensure that components provide DAU with information about the training needs of those personnel.

Defense Workforce: Steps Needed to Identify Acquisition Training Needs for Non-Acquisition Personnel (GAO-19-556) is available at *www.gao.gov/assets/710/701178.pdf*.

¶ 266

DOE Not Documenting Interagency Acquisition Planning, Incurred Costs

For interagency agreements, Department of Energy procurement officials did not properly maintain acquisition planning documents or review documents

supporting incurred costs, the DOE inspector general has reported. DOE officials "did not believe that they were required to document acquisition planning in the file or obtain support for costs incurred."

In fiscal years 2012–2017, DOE paid $9.7 billion on 1,585 interagency agreements for goods, services and fees. The IG found problems with documentation of acquisition planning or support of costs in 58 of 60 sampled interagency agreements. The 60 agreements included 40 interagency transactions and 20 interagency acquisitions from three DOE procurement offices. The IG explained that an interagency acquisition involves a servicing agency providing acquisition assistance to DOE, such as awarding and administering a contract, and an interagency transaction involves DOE using a servicing agency's internal resources to fulfill a requirement.

DOE officials failed to document all acquisition planning as required. For example, 18 of the 40 interagency transactions did not document the consideration of alternative sources. Three transactions lacked a determination and findings (D&F) to justify use of an interagency transaction, and 15 had D&Fs that "did not contain sufficient details to support the determination to use an interagency transaction."

Sixteen of the 20 interagency acquisition files did not contain documents showing that market research was conducted, as required—"even though many of the acquisitions were for services similar to those previously procured directly by the Department or services that appeared to be readily available in the market," the IG said.

DOE could not show that supporting documentation for $37 million in interagency transaction costs and $24 million in interagency acquisition costs was reviewed before payment. And DOE contracting officers and CO's representatives "could only demonstrate that they had, or had access to, supporting documentation of costs incurred, such as itemized statements of costs or invoices, for 16 of the 60 interagency agreements." For the other 44 agreements, COs and CORs received only transaction reports from the Treasury Department, but the reports "did not provide sufficient detail of the work performed to correlate the cost charged to the work performed under the interagency agreement."

DOE officials told the IG that they considered interagency agreements to have very little risk because other agencies have no profit motive. Nonetheless, the IG admonished that considering alternate sources "confirms the cost effectiveness of using the other agencies' contracts or procurement functions," and reviewing supporting cost documents confirms that interagency agreement costs are allowable.

The IG acknowledged that the sampled interagency agreement files generally properly contained requisitions and statements of work as required, referred to the statutory authority, and contained cost and schedule estimates.

The IG recommended that DOE (1) clarify guidance on documenting acquisition planning and supporting incurred costs, (2) ensure files contain required acquisition planning documents, (3) ensure COs review acquisition documents before signing D&Fs, and (4) train procurement staff on interagency agreements.

The Department of Energy's Interagency Agreements (DOE-OIG-19-46) is available at *www.energy.gov/sites/prod/files/2019/09/f66/DOE-OIG-19-46_1.pdf*.

¶ 267

GAO Weighs DOD Offshoring Risks And Benefits

Offshoring, the practice of moving domestic business activities abroad, can lower costs and provide better access to foreign workers and markets, but it also can make it harder for the Department of Defense to get what it needs, a recent Government Accountability Office report concluded. Offshoring companies can help DOD save money and access more technology, but it also allows other countries to cut off U.S. access to critical supplies such as rare earth minerals procured from China.

DOD and other federal agencies have identified offshoring and foreign investment in U.S. companies as "risks to maintaining a sufficient domestic defense supplier base and U.S. leadership in emerging technologies." The 2018 National Defense Strategy highlighted the challenges posed by strategic competitors, such as China and Russia. The strategy also notes the risk of eroding U.S. military readiness and superiority when the defense supplier base offshores certain business activities or receives foreign

investment from adversaries seeking access to the same technologies as DOD.

Congressional committee reports related to the Fiscal Year 2019 National Defense Authorization Act required GAO to examine how offshoring and foreign investment affect DOD's supplier base. GAO noted several factors limiting this required analysis ,including the scarcity of publicly available data that provides "granularity to analyze foreign direct investments in industry subsectors that comprise the defense supplier base." GAO concluded that because of the lack of data, "the extent of offshoring and its effects are largely unknown."

The Bureau of Economic Analysis' (BEA) publicly available data allowed GAO to perform a high-level analysis of new foreign investments in the U.S. BEA's data on new foreign direct investment show that foreign entities invested from $277 billion to more than $460 billion annually for calendar years 2014–2018. However, DOD industrial policy officials told GAO that BEA's publicly available data are "not complete enough to assess foreign investments in U.S. defense industrial subsectors." GAO also found that BEA does not disclose certain data for industry subsectors if the data would disclose the identity of individual companies. For example, BEA data on new foreign direct investment from China in some sectors is available for only two out of the past five years, and data for other sectors is available for all five years.

GAO convened a panel to review the benefits and risks of offshoring. The panel concluded that offshoring business operations can be a rational decision for U.S. businesses, and those benefits can be passed on to DOD. These benefits include (1) lower business expenses resulting from cheaper labor and less regulatory compliance, (2) access to a new customer base in foreign markets, and (3) access to a skilled workforce in other countries.

The panelists did note that reduced visibility of foreign sourcing and offshoring can "inhibit the ability to identify high-risk suppliers that could introduce counterfeit or compromised parts, which could ultimately affect DOD's ability to deliver secure weapons systems."

The panelists' other principal offshoring concerns included (a) foreign investors from strategic competitors accessing sensitive technologies, (2) the erosion of skills in the U.S. workforce if too much production is sent abroad and (3) geopolitical conflicts compromising access to foreign supplies to meet current and future needs.

Defense Supplier Base: Challenges and Policy Considerations Regarding Offshoring and Foreign Investment Risks (GAO-19-516) is available at *www.gao.gov/assets/710/701170.pdf*.

¶ 268

Developments In Brief ...

(a) Interior IG Suggests Improving Safety, Cost Controls on Flight Services Contract—A helicopter services contract covering the Gulf of Mexico region provides the best mechanism for the Bureau of Safety and Environmental Enforcement (BSEE) of the Department of the Interior to perform offshore inspections, but "there are issues that impact contract costs and safety that BSEE must address," the Interior inspector general has reported. For example, a helicopter company in the region has denied BSEE's contractor access to its refueling stations, although restricting access "violates the Code of Federal Regulations," and "creates additional flight hour costs and safety risks from the extra flights to available refueling stations." BSEE has not taken any enforcement actions to address the restriction, the IG explained. "Safe and cost-effective transportation of inspection personnel to offshore oil and gas facilities is critical to BSEE's ability to conduct oversight and enforcement activities in [the region]." The IG also found weaknesses in verification of helicopter flight hours that "create an opportunity for the overstatement of flight hours," because the contractor documents individual and multiple flight hours using a paper-based flight log which is solely retained by the contractor. "Moreover, BSEE does not always approve and sign all flight logs as required by the contract," the IG said. The approximately $316 million, five-year flight services contract was awarded in 2016. It provides for around 4,000 flights per year, including the use of 35 helicopters—24 designated exclusively for BSEE use. BSEE is charged for each day that a helicopter is

available solely for BSEE use, the IG noted. And BSEE pays for flight times, "which is calculated by multiplying the contracted usage rate by the amount of flight hours for each helicopter." The IG made five recommendations for BSEE to enforce its authority to access refueling stations and strengthen its flight hour verification controls. *The Bureau of Safety and Environmental Enforcement's Flight Services Contract* (2018-EAU-034) is available at *www.doioig.gov/sites/doioig.gov/files/FinalEvaluation_BSEEFlightServicesContract_090419.pdf*.

(b) OFCCP Excludes Students from Affirmative Action Compliance Evaluations—The Office of Federal Contract Compliance Programs will limit compliance evaluations of educational institution contractors to non-student workers, according to OFCCP Directive 2019-05, issued September 5. Educational institutions thus will not be cited for excluding student workers from their affirmative action plans (AAPs), but OFCCP will still consider students' discrimination complaints. For purposes of determining "employee" status for contractors' AAPs and OFCCP enforcement, OFCCP generally applies the common-law agency test, and contractors should be guided by the "*Darden* factors." See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). But "[f]or student workers, there is no single answer to the question of employee status under OFCCP's laws given the many different fact-specific inquiries required under the applicable legal tests." For example, OFCCP noted that courts typically refuse to treat graduate student assistants as "employees" only where their academic requirements are central to the relationship with the institution, but "courts have reached various outcomes." OFCCP noted that the fact-intensive inquiry can be difficult and time-consuming for both educational institutions and OFCCP officials. "OFCCP has an interest in focusing its time, attention, and resources on individuals whose primary relationship with the educational institution is work-related." Thus, "OFCCP will not cite violations for excluding student workers from AAPs or personnel activity data submissions in compliance evaluations," although OFCCP will continue to consider employment-discrimination complaints filed by student workers at educational institutions. OFCCP Director Craig Leen said, "recognizing that student workers of educational institutions have a unique relationship with their employer compared to non-students provides needed focus to OFCCP compliance evaluations." OFCCP also announced the launch of a resources webpage for historically black colleges and universities, *www.dol.gov/ofccp/HBCUInitiative*, to help contractors "increase the representation of minorities and females in career-level jobs." OFCCP Directive 2019-05 is available at *www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm*.

(c) DOD Falls Short of Open Source Software Requirements—The Department of Defense has not implemented an open source software pilot program required by the Fiscal Year 2018 National Defense Authorization Act, the Government Accountability Office recently reported. Open source software is code that is released under a license which allows users to modify, share and reuse the software. Office of Management and Budget memorandum M-16-21 requires agencies to implement a pilot program, which it defines as (1) releasing at least 20 percent of new custom developed code as open source and (2) establishing a metric for calculating program performance. See 58 GC ¶ 293. GAO found that DOD has not fully implemented the program or established the metric. Until DOD fully implements the pilot program and develops milestones for the OMB requirements, "it will not be positioned to satisfy the mandate established in the law," GAO found. DOD officials told GAO that an open source pilot program could result in financial benefits and increased efficiency. Officials, however, are concerned about increased cybersecurity risks with using open source software. GAO recommended ensuring DOD implements the program and develops milestones for completing requirements in the OMB memo. *Information Technology: DOD Needs to Fully*

Implement Program for Piloting Open Source Software (GAO-19-457) is available at *www.gao.gov/assets/710/701285.pdf*.

(d) DOD Seeks Comments on Draft Cybersecurity Certification Model—The undersecretary of defense for acquisition and sustainment (A&S) is seeking comments on the Cybersecurity Maturity Model Certification (CMMC) draft version 0.4, against which independent auditors will certify compliance with Department of Defense cybersecurity requirements. Comments are due September 25. A&S said the CMMC is intended to be "a unified cybersecurity standard for DOD acquisitions to reduce exfiltration of [controlled unclassified information] from the [defense industrial base]." The CMMC model "will continue to be improved over the next several months with the collaboration of all the stakeholders with the finalization of v1.0 in January 2020," following another round of public comments on CMMC version 0.6 in November. The draft CMMC model consists of 18 domains, such as access control, asset management, audit and accountability, cybersecurity governance, incident response, personnel security, and situational awareness. A&S said domains are key sets of capabilities, based on cybersecurity best practices. Each domain comprises dozens of controls, practices and processes, across five certification levels, from level 1, "Basic Cyber Hygiene," to level 5, "Advanced/Progressive." A&S noted, for example, that level 1 practices include Federal Acquisition Regulation requirements and antivirus protection, and level 5 practices include deployment of organizational custom protections and cyber maneuver operations. The CMMC builds on the cybersecurity requirements of Defense FAR Supplement 252.204-7012 and National Institute of Standards and Technology special publication 800-171. See Major and Turner, Feature Comment, "Guerrillas Of The NIST: DOD Re-attacks Supply Chain And Contractor Cybersecurity (Parts I & II)," 61 GC ¶ 224, 61 GC ¶ 231. CMMC version 0.4 and a comment template are available at *www.acq.osd.mil/cmmc/draft.html*.

(e) Delays Putting IRS Data Loss Solution at Risk, Tax IG Finds—Continued delays with the Internal Revenue Service's implementation of a software solution to protect against data loss, the Safeguarding Personally Identifiable Information Data Extracts Project, "are preventing realization of the full benefits of the Data Loss Prevention solution," the Department of the Treasury inspector general for tax administration has reported. The Data-In-Motion component, which reviews unencrypted e-mails and attachments and file transfers, has been implemented and is generally working as intended, but the implementation of other components has been delayed due to technical, project management and administrative issues. "Because of the delays, two key components involving data in repositories and data in use are still not operational more than eight years after the project started," the IG said. "Without these components, Personally Identifiable Information continues to be at risk of loss. The delays have also resulted in the inefficient use of resources of approximately $1.2 million in software costs for the components that are not operational." The delays have been "significant and ongoing," and have led to multiple changes to target release dates, the IG found. Until all three components are fully deployed, the IRS will not be able to meet the original Treasury and Office of Management and Budget requirements for the project. The IG also noted that the IRS is required to reach a formal agreement with an employee union before certain actions can be taken, which the IG previously identified as contributing to the delays. "IRS management has again cited the negotiations as the cause of delays with project implementation," the IG said. The IG recommended that the IRS deploy the software components, prepare and maintain required project documentation, and identify issues requiring negotiation with the IRS employees' union and begin negotiations immediately. *The First Phase of the Data Loss Prevention Solution Is Working As Intended, but the Remaining Phases Continue to Experience Delays* is available at *www.treasury.gov/tigta/auditreports/2019reports/201920049fr.pdf*.

(f) Oracle to Appeal COFC JEDI Dismissal—Oracle America Inc. will appeal the Court of Federal Claims' dismissal of Oracle's protest of the Department of Defense's Joint Enterprise Defense Infrastructure (JEDI) cloud solicitation. See *Oracle Am., Inc. v. U.S.*, 2019 WL 3385953 (Fed. Cl. July 19, 2019); 61 GC ¶ 230. Oracle general counsel Dorian Daley said the COFC "describes the JEDI procurement as unlawful, notwithstanding dismissal of the protest solely on the legal technicality of Oracle's purported lack of standing," which Oracle believes "is wrong as a matter of law, and the very analysis in the opinion compels a determination that the procurement was unlawful on several grounds." In August, Defense Secretary Mark Esper said he will review the JEDI procurement process, and two senators questioned whether political pressure played a role in DOD's decision to pause the process. See 61 GC ¶ 232.

Legislation

¶ 269

OMB, Industry Group Chime In With FY 2020 NDAA Wish Lists

As the Senate and House Armed Services committees begin bicameral conference discussions on reconciling the respective House and Senate versions of the National Defense Authorization Act (NDAA) for Fiscal Year 2020, H.R. 2500, S. 1790, Russell Vought, acting director of the Office of Management and Budget, and David Berteau, president and chief executive of the Professional Services Council (PSC), an industry advocate organization, urged the committees to heed their wish lists. The House and Senate passed competing bills in June and July. See 61 GC ¶ 207.

OMB sought consideration of a wide range of topics from the handling of detainees at Guantanamo Bay to redirecting Department of Defense construction funding. The White House objects to sections on the direction of the "Space Force," missile defense, funding for unmanned naval surface vessels, and reforms to the security clearance process included as part of the Intelligence Authorization Act for FYs 2018–2020.

PSC recommended changes to areas of interest to Government contractors, such as provisions on sustainment and readiness planning; improved data collection on the Government's use of lowest-price, technically acceptable (LPTA) solicitations; and reforms to the security clearance process. "PSC encourages the conferees to include provisions that: increase transparency and stability through better planning; promote an effective, streamlined, and competitive federal contracting system; and eliminate onerous compliance requirements that increase costs without improving performance or essential accountability, and to reject those that do not," Berteau wrote.

OMB—Although the FY 2020 NDAA "provides some elements to elevating the space domain, it does not provide the necessary legislative authority to establish the United States Space Force as the sixth branch of the Armed Forces," Vought wrote. He urged Congress to "explicitly designate the Space Force as a separate sixth branch … and include all related technical and conforming amendments."

The administration objected to Senate § 1673's limit on DOD's "ability to establish the most cost-effective missile defense architecture," and is concerned with the transfer of about $526 million in funding for the Ballistic Missile Defense Terminal High Altitude Area Defense (THAAD) segment from the Missile Defense Agency to the Army. Vought explained that DOD, MDA and the Army are currently assessing THAAD transfer options.

The White House complained that the Senate bill would "only authorize $134.5 million" for large unmanned naval surface vessels, which is $372.5 million less than the administration's budget request. "These are critical experimentation vessels with modular payloads to reduce risk, conduct integration and testing of payloads, and develop Navy tactics and concepts of operations," Vought warned. "The Administration urges the Congress to fully support this critical capability at the levels in the FY 2020 Budget request."

The administration also expressed concern about "the cumulative amount of burdensome reporting and short deadlines" that would slow down current security clearance reform initiatives. "The

number and nature of the requirements are such that they will likely distract from interagency efforts to execute the needed reforms and transfer activities that are desired," Vought said. For example, the White House opposes "establishment of timelines for conducting security clearances," in part because the proposed deadlines "do not take into account the transformation activities already underway to significantly streamline the clearance process."

The administration also objected to Senate § 9313, "because requiring an electronic portal for security clearance applicants is premature without first assessing its viability, and because the requirement for each agency to create an electronic portal discounts efforts currently underway to reduce duplication and move to enterprise shared services."

PSC—PSC expressed support for efforts to strengthen DOD's material readiness and planning for sustainment costs, to improve reporting and transparency on DOD's use of other transactions authority, to delay the implementation of a pilot program that would require unsuccessful protesters to pay DOD's costs, to accelerate payments to small business subcontractors, and to seek a Government Accountability Office review on the impact of continuing resolutions.

PSC supports House § 872(d), providing additional guidance on implementing the Runway Extension Act, P.L. 115-324. "PSC supports requiring the Small Business Administration to implement a transition plan to assist businesses and federal agencies with compliance and urges the conferees to clarify that SBA should provide for a reasonable transition period for implementation between publication of the final rule and the 'effective date' of the rule," Berteau wrote. "This will allow for the government systems to be updated and give the contractor community time to take action to properly implement the size calculation change." PSC has also made this recommendation in comments to SBA. See 61 GC ¶ 261.

Additionally, PSC expressed support for House § 829, which would revise the Federal Procurement Data System to improve the collection of data on source selection processes used by federal agencies, including on the use of LPTA and best-value contracting methods. "PSC has long advocated for government-wide restrictions to prevent improper use of [LPTA] evaluation criteria for certain services contracts," Berteau said. "Reforming federal procurement systems to collect complete, timely, and reliable data on LPTA will help with both consistent implementation and Congressional oversight." PSC has also urged OMB to synchronize LPTA regulations. See 61 GC ¶ 51.

PSC also supports permanently authorizing DOD's mentor-protégé program and measures to improve communications between the Government and the contractor community, including expanding a DOD-only debriefing measure to provide all federal contractors with detailed information about unsuccessful bids.

Finally, PSC expressed support for several security clearance reform provisions, including House § 1076 to provide additional information on the backlog of clearance investigations, and Senate §§ 1059, 1624, 6014, 6606, 9313 and 9314, which would "inform the transfer of background investigations" from the Office of Personnel Management to DOD, and "help facilitate federal government access to local criminal records, improve the quality of information in background investigation packages, create electronic portals for individuals and companies to view the status of their application, and improve information-sharing programs between government and industry."

PSC's comments are available at *www.pscouncil.org/a/Resources/2019/Letter_to_HASC_and_SASC_on_FY20_NDAA.aspx*; OMB's comments are available at *www.whitehouse.gov/wp-content/uploads/2019/09/Letter-to-the-Chairs-and-Ranking-Members-of-the-House-and-Senate-Armed-Services-Committees.pdf*.

Regulations

¶ 270

State Issues Draft Guidance On Exporting Surveillance Technologies

The Department of State has published draft guidance for exporters of items with intended and unintended surveillance capabilities, "to provide insight … on considerations to weigh prior to exporting these items," including a greater understanding of the U.S.

Government's human rights concerns. The department is seeking public feedback to strengthen the document. The draft guidance will be available online only until October 4, at which time the department will withdraw the draft and work on finalizing it.

Items with surveillance capabilities "have the vast potential to provide positive contributions to a country's economic, defense, and societal wellbeing," but they "can be misused to violate or abuse human rights when exported to government end-users or private end-users that have close relationships with the government," the guidance cautions. The U.S. Government is committed to protecting human rights, and "the exporter of an item should carefully review this guidance, and consider whether to participate in, or continue to participate in, an export transaction if the exporter identifies a risk that the end-user will likely misuse the item to carry out human rights violations or abuses."

The draft guidance recommends that exporters (a) generally tailor the item to minimize the risk of misuse to commit human rights violations by integrating safety and privacy protections; (b) review the item's capabilities for potential for misuse, including noting red flags such as information that indicates misuse of similar items or the ability of the exported item to help build or use a system known to be misused to commit human rights violations; and (c) review the human rights record of the government agency end-user, including noting credible reports on the recipient end-user government agency's human rights record and seeking first-hand information from non-governmental organizations with knowledge of the end-user's human rights record.

Other recommendations include (1) reviewing whether the end-user's laws, regulations and practices that implicate surveillance-capable items are consistent with the International Covenant on Civil and Political Rights; (2) reviewing how other stakeholders involved in the transaction, including intermediaries such as resellers and distributors, plan to use the item; (3) working to mitigate risks through contractual and procedural safeguards, including export compliance clauses requiring end-users to comply with applicable U.S. export control laws; and (4) publicly reporting on the export transactions.

State encouraged commenters "to be as specific as possible in your suggested input (e.g. line edits, and accompanying rationale, are welcome)."

Comments can be sent to *IFBHR@state.gov*. The draft guidance is available at *www.state.gov/wp-content/uploads/2019/09/DRAFT-GUIDANCE-FOR-THE-EXPORT-OF-HARDWARE-SOFTWARE-AND-TECHNOLOGY-WITH-SURVEILLANCE-CAPABILITIES.pdf*.

¶ 271

Regulations In Brief …

FAR

(a) FAR Final Rule Merges PPIRS into CPARS—The Federal Acquisition Regulatory Council has issued a final rule establishing the Contractor Performance Assessment Reporting System (CPARS) as the official FAR system for contractor past performance information, following the retirement of the Past Performance Information Retrieval System (PPIRS). "All data from PPIRS has been merged into CPARS.gov," the FAR Council said, noting that PPIRS was retired on January 15. The transition creates a single site for "functions such as creating and editing performance and integrity records, changes to administering users, running reports, generating performance records, and viewing/managing performance records." The final rule (1) amends FAR 42.1501(b) to remove a reference to PPIRS and to state that "CPARS is the official source for past performance information," (2) removes from FAR 42.1503(f) a reference to automatic transmission from CPARS to PPIRS, and (3) makes conforming changes throughout the FAR. The transition is part of a consolidation of federal websites, initially, at *beta.SAM.gov* and, eventually, at *SAM.gov*. GSA has already migrated wage rate data from *WDOL.gov* and announced the transition of data from FedBizOpps beginning on November 8. See 61 GC ¶ 195(e); 61 GC ¶ 260(g). The Department of Defense also issued a related final rule, implementing the changes in the Defense FAR Supplement. See 84 Fed. Reg. 48507 (Sept. 13, 2019). In 2017, DOD's Defense Pricing and Contracting of-

fice emphasized the importance of accurate, timely performance assessment reports after the DOD inspector general flagged problems with CPARS compliance. See 59 GC ¶ 156. The FAR rule is effective October 10, and the DFARS rule is effective immediately. See 84 Fed. Reg. 47865 (Sept. 10, 2019).

(b) FAR Final Rule Bans Kaspersky Software—The FAR Council issued a final rule banning contractor use of antivirus software, hardware and services from Russian cybersecurity firm Kaspersky Lab. The rule finalizes an interim rule, issued in 2018, which created subpt. 4.20, "Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab"; added corresponding clause 52.204-23; and prohibited Kaspersky purchases below the micro-purchase threshold at 13.201. In 2017, a House subcommittee probed bans, issued by the Department of Homeland Security and General Services Administration, on Kaspersky software on agency or contractor information systems. See 59 GC ¶ 327. The rule implements § 1634 of the National Defense Authorization Act for Fiscal Year 2018. It is effective immediately. See 84 Fed. Reg. 47861 (Sept. 10, 2019).

(c) FAR Final Rule Adds Australia as WTO GPA Member—The FAR Council issued a final rule to add Australia as a World Trade Organization Government Procurement Agreement (GPA) country. Australia acceded to the GPA on May 5. The WTO noted that "[p]reliminary calculations suggest that Australia's overall government procurement markets are worth [$78 billion] annually, meaning that Australia's accession will add significantly to the current government procurement market covered by the Agreement." The Council noted that the Trade Agreements Act "provides the authority for the President to waive the Buy American Act and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States (such as the WTO GPA)." The Council added that Australia was already a "designated country" because it is a free trade agreement country. In May, the Government Accountability Office reported that the U.S. awarded more contract dollars to GPA members' contractors than GPA members did to U.S. firms, although data limitations made comparisons difficult. See 61 GC ¶ 204. The rule is effective October 10. See 84 Fed. Reg. 47866 (Sept. 10, 2019).

DFARS

(d) DFARS ANPR to Expand Technical Data Presumption of Commercial Item Development at Private Expense—DOD issued an advance notice of proposed rulemaking that would remove an exception for major weapon systems to the presumption, for purposes of validating restrictions on technical data, that commercial items were developed exclusively at private expense. Currently, the general presumption of private expense at DFARS 227.7103-13(c)(2)(i) is subject to an exception in subparagraph (c)(2)(ii) for certain major weapon systems and certain subsystems and components thereof. The rulemaking would delete the exception, making the presumption apply to all commercial items. Contracting officers would presume development at private expense "whether or not a contractor or subcontractor submits a justification in response to a challenge notice," and "failure to respond to the challenge notice cannot be the sole basis for" denying the validity of a contractor's asserted restriction on rights in technical data. The rulemaking would implement § 865 of the FY 2019 NDAA. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The Impact Of The FY 2019 NDAA On Federal Procurement Law—Part II," 60 GC ¶ 340. Comments are due November 12. See 84 Fed. Reg. 48513 (Sept. 13, 2019).

(e) DFARS Final Rule Updates ASBCA Member Appointment Procedures—DOD issued a final rule updating the Armed Services Board of Contract Appeals charter at DFARS appendix A to the latest version of May 23. The final rule updates paragraph 2 of the charter "to reflect that appointment of ASBCA members

and designation of the Chairman and Vice Chairmen of the ASBCA shall now be made by the Secretary of Defense," instead of by the undersecretary of defense for acquisition and sustainment and other designated senior officials. See 84 Fed. Reg. 48508 (Sept. 13, 2019).

Decisions

¶ 272

Course Of Dealing And Other Factors Demonstrated Unreasonableness Of Agency's Interpretation Of The Contract, ASBCA Holds

Fluor Fed. Solutions, LLC, ASBCA 61093, 2019 WL 4235862 (Aug. 19, 2019)

The Armed Services Board of Contract Appeals considered several factors in determining that the agency unreasonably interpreted a contract as requiring 24/7 staffing of a water treatment plant (WTP). Agency responses to pre-bid requests for information (RFIs) on whether the contract required 24/7 staffing referred bidders to state permits for the construction and operation of the WTP. Those regulations did not require 24/7 staffing. Moreover, the agency knew that the contractor was not supplying 24/7 staffing yet did not object for two and a half years. Finally, the contract terms were performance specifications that gave the contractor discretion on staffing, so long as the contractor met performance requirements, the ASBCA said in granting summary judgment for the contractor.

The Navy awarded a contract to Fluor Federal Solutions LLC for operations support at Navy installations, including Naval Station Mayport (NS Mayport). The work included maintaining and supporting the WTP.

More than two years into performance, the Navy told Fluor that it was not complying with contract requirements to provide personnel 24 hours a day, seven days a week to operate the WTP. Flour objected that the contract did not require 24/7 staffing. The Navy then withheld contract payments, deducted amounts from the contract price and gave Fluor negative Contractor Performance Assessment Reports (CPARs). To avoid further withholdings and negative CPARs, Fluor provided 24/7 staffing.

Fluor later submitted a certified claim demanding return of the deducted amounts, compensation for additional costs for 24/7 staffing and revision of the CPARs. The contracting officer denied the claim, and Fluor appealed to the ASBCA.

Contract Terms—Contract Section C, Spec. Item 3.1 Operation, included a table with the headings "Title," "Performance Objective," "Related Information" and "Performance Standard." The performance objective required operation of the WTP to provide potable water "24 hours per day, seven days per week."

"Related Information" read in part:

> Operation consists of "watch-standing" or attendance type work by a sufficient staff of qualified persons during a specified time period to ensure safe, reliable, efficient production and distribution of potable water.
>
> …
>
> Safe operation shall ensure that all Water Treatment Plant equipment requiring operator attendance is staffed by qualified personnel at all times of operation.

Spec. Item 3.1.5, addressed "Minimum Operator Attendance" for the WTP. "Performance Objective" required Fluor to provide "water treatment plant operators and support personnel in sufficient quantities of staffing per shift to efficiently and safely operate equipment at all times of operation, 24 hours per day, seven days per week, throughout the contract period."

Spec. Item 3.1.5 "Performance Standard" further stated: "Minimum numbers and types of water treatment plant operators, support personnel, and supervisory operators in direct responsible charge comply, by each applicable shift, with operating permit, approved SOP, and Maintenance Manual."

In interpreting these provisions, the ASBCA relied on Navy responses to pre-award RFIs, the parties' course of dealing and the contract language.

RFIs—Bidders are entitled to rely on Government responses to RFIs. Thus, pre-bid questions and answers used by bidders are highly relevant to the post-award interpretation of contract provisions. *Metcalf Constr. Co. v. U.S.,* 742 F.3d 984 (Fed. Cir. 2014); 56 GC ¶ 52, 82.

The recent ASBCA decision in *Parsons Evergreene, LLC,* ASBCA 58634, 18-1 BCA ¶ 37,137, shows the significance of RFI answers. That case addressed a contract interpretation dispute involving a design-build contract. The ASBCA held that although contract language precluded unilateral design changes by the design-build contractor, the Government responses to pre-award questions changed that contract language and gave the contractor the unilateral right to change a "double wall design to structural brick."

RFI 243: Two RFIs are relevant to Fluor's claim. RFI 243 cited Spec. Items 3.1 and 3.1.5 and asked for a definition of watchstanding and whether WTPs "require 24 hr/7 day a week staffing." The Navy responded that "[p]ermits determine staffing. Permits and requirements for compliance are given by the Florida Department of Environmental Protection (FDEP). Water Permits are available from FDEP."

FDEP issued a Nov. 6, 2006 permit to the Navy for the conversion of its disinfection system to liquid sodium hypochlorite. In addition to authorizing the construction for the conversion, the permit set conditions on operating the WTP. Permit "Specific Condition" no. 9 required the Navy to "follow the guidelines of Chapters 62-550, 62-555, and 62-560, [Fla. Admin. Code], regarding public drinking water system standards, monitoring, reporting, permitting, construction, and operation."

Fla. Admin. Code § 62-555.350(8) required the Navy to "employ licensed operation personnel in accordance with Chapters 62-602 and 62-699." Fla. Admin. Code § 62-699.3 10(e) specifies that a facility with NS Mayport WTP's permitted maximum capacity must have "[s]taffing by Class C or higher operator: 6 hours/day for 5 days/week and one visit on each weekend day."

RFI 550: RFI 550 cited Spec. Items 3.1 and 3.1.5 and again asked for a definition of watchstanding and whether WTPs require 24/7 staffing. The Navy responded that WTPs "are to be addended [sic] per the [consumer use permit (CUP)] Permit #589 and #829. 'Watch Standing' is the required attendance per the CUP permit."

CUP 829 authorized the Navy to use water from the St. Johns River for fire protection and "had nothing to do with the Mayport WTP," the ASBCA said. CUP 589 authorized NS Mayport to use water for a variety of purposes arguably including the WTP. Neither of these CUP permits have anything to do with, or relate to, WTP staffing or watchstanding. "It is hard to understand why the Navy answered RFI Nos. 243 and 550 the way it did," the ASBCA said. The RFIs gave the Navy the opportunity to state that 24/7 WTP staffing was required, but the Navy did not do so, the ASBCA said, noting that this was consistent with its following discussion of course of dealing.

Course of Dealing—For the first two and a half years of performance, the Navy did not enforce 24/7 staffing, although Fluor provided a monthly log showing the hours worked by its employees. The Navy's knowledge that Fluor was not providing 24/7 staffing and failure to object established a "clear course of dealing" that conflicted with the Navy's current interpretation of the contract, the ASBCA said.

Contract Terms—The contract terms were performance specifications, which set out the performance objectives but do not specify how the contractor will achieve those objectives. *P.R. Burke Corp. v. U.S.,* 277 F.3d 1346 (Fed. Cir. 2002).

Spec. Item 3.1 Performance Objective required operation of the WTP to provide potable water "24 hours per day, seven days per week throughout the contract period." Spec. Item 3.1 Related Information stated that WTP operation "consists of 'watchstanding' or attendance type work by a sufficient staff of qualified persons during a specified time period" to provide potable water.

The ASBCA interpreted "sufficient staff" as a performance standard giving Fluor discretion to set staffing. It cannot reasonably be read to mandate 24/7 staffing to achieve the required "sufficient staff." Spec. Item 3.1 Related Information also required that equipment "requiring operator attendance is staffed by qualified personnel at all times of operation."

Spec. Item 3.1 Performance Standard required Fluor to meet demand requirements 99.5 percent of the time. The contract did not define how much "watchstanding," "attendance type work" or "equipment requiring operator attendance" was required. But it did require that "when WATCHSTANDING SERVICES apply" the Navy can provide the service at Fluor's expense if Fluor leaves the post "unmanned for a total of 10 minutes in any shift."

The Navy argued that the watchstanding requirement supports its position that Fluor was

required to staff the WTP 24/7. The Navy cited as an example a disinfection system that it contended required operator attendance.

The ASBCA said that the Navy's argument was unsupported by evidence. Even if the disinfection system required operator attendance, there was no evidence it required attendance 24/7, the ASBCA said in rejecting the Navy's argument for lack of proof.

The basic rules of contract interpretation are well known. *TEG-Paradigm Envtl., Inc. v. US.,* 465 F.3d 1329 (Fed. Cir. 2006) ("When interpreting a contract, the language of [the] contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances."); 48 GC ¶ 385. In determining reasonableness, it is only necessary that the interpretation be in the zone of reasonableness. *States Roofing Corp. v. Winter,* 587 F.3d 1364 (Fed. Cir. 2009) ("A contractor's reasonable interpretation need not be the best interpretation. It need only be within the zone of reasonableness."); 52 GC ¶ 35.

The ASBCA found that Spec. Item 3.1 cannot reasonably be interpreted to require 24/7 WTP staffing to meet the performance standard.

Spec. Item 3.1.5 Minimum Operation Attendance, requiring "sufficient quantities of staffing per shift" to safely operate the WTP 24/7, is a performance specification that gives Fluor discretion to determine staffing. It cannot reasonably be read to mandate 24/7 staffing to achieve the required "sufficient quantities of staffing." As for Spec. Item 3.1.5 Performance Standard, the Navy did not identify anything requiring 24/7 staffing, the ASBCA said.

The ASBCA considered several factors to interpret the contract. First, both RFIs asked if 24/7 staffing was required, but the Navy did not respond directly and missed the chance to tell bidders that it wanted 24/7 staffing. The RFIs referred bidders to FDEP permits that required compliance with Fla. Admin. Code sections that do not require 24/7 staffing.

Second, the two-and-half-year course of dealing conflicted with the Navy's interpretation. Finally, the contract specifications were performance specifications that gave Fluor discretion to set staffing so long as performance objectives and standards were achieved, the ASBCA said in granting Fluor's motion for summary judgment.

✦ **Note**—The ASBCA did not expressly find that the contract was ambiguous. A contract is ambiguous if it is susceptible to more than one reasonable interpretation. *TEG-Paradigm*. The ASBCA did, however, hold that the Navy's interpretation was not reasonable. In interpreting the contract, the ASBCA cited extrinsic evidence—the two-and-a-half-year delay in objecting to Fluor's staffing. It is sometimes said that extrinsic evidence is irrelevant to interpreting an unambiguous contract. See *Barron Bancshares, Inc. v. U.S.*, 366 F.3d 1360 (Fed. Cir. 2004) (course of dealing). But the Federal Circuit in *TEG-Paradigm* recognized that extrinsic evidence may be considered, even if the contract is not ambiguous, to confirm that the court's interpretation of the plain and ordinary meaning was, in fact, the parties' understanding. In that case, the extrinsic evidence concerned pre-contract course of dealing.

In *Fluor*, the ASBCA's consideration of post-contracting course of dealing looks a lot like the rationale in cases—including cases that post-date *TEG-Paradigm*—holding that the parties' pre-dispute conduct is entitled to great weight in interpreting a contract. See *Reliable Contracting Grp., LLC v. Dept. of Veterans Affairs*, 779 F.3d 1329 (Fed. Cir. 2015); 57 GC ¶ 95.

For a discussion of the distinction between pre-contract or contemporaneous extrinsic evidence and post-contracting extrinsic evidence, see 22 N&CR ¶ 62. And for a detailed discussion of the labyrinth of the plain meaning rule, ambiguity and extrinsic evidence, see Allen, Contract Interpretation Handbook chapt. 6.

The Government Contractor Advisory Board

THOMSON REUTERS®

The Government Contractor® (ISSN 0017-2596) is issued weekly, except that no issue is published in the weeks containing January 1, Memorial Day, July 4, Labor Day and December 25, or the week after Thanksgiving ✦ 2019 calendar-year subscription includes annual, accredited "Government Contracts Year In Review Conference" ✦ Attorney Editors: William Schieken, Rick Southern, Ken Berke and Joseph Windsor; Manuscript Editor: Lyrica Johnson ✦ Published and copyrighted © 2019 by Thomson Reuters, 610 Opperman Drive, PO Box 64526 St. Paul, MN 55164-0526 ✦ *www.west.thomson.com/dceditorial* ✦ Postage paid at St. Paul, MN. POSTMASTER: Send address changes to The Government Contractor, 610 Opperman Drive, PO Box 64526, St. Paul, MN 55164-0526. For subscription information: call 800.221.9428 or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753 ✦ All correspondence concerning the content of this publication should be addressed to Thomson Reuters, Attention: The Government Contractor—Editorial Staff, 1333 H. St., NW, Suite 700, Washington, DC 20005.

THE GOVERNMENT CONTRACTOR®

published by Thomson Reuters
610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526

FIRST CLASS

First Class Mail
U.S. POSTAGE
PAID
Twin Cities, MN
Thomson Reuters

DATED MATERIAL PLEASE DELIVER PROMPTLY

September 2019						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

October 2019						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

November 2019						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

Accounting Compliance for Government Contractors
October 21-22
Sterling, Va.
$1275

Advanced Contractor Business Systems Assessment Workshop
October 21-22
Sterling, Va.
$1275

Advanced Cost Impact Analysis Workshop
October 23-24
Sterling, Va.
$1275

Basics of Multiple Award Schedule Contracting
October 22-23
Sterling, Va.
$1275

FAR Workshop
October 24-25
Sterling, Va.
$1275

Federal Grants Compliance
October 21-22
Sterling, Va.
$1275

Government Contract Accounting
October 21-22
Sterling, Va.
$1275

Government Contract Compliance
October 23-24
Sterling, Va.
$1275

Preparing and Defending Government Contract Claims
October 22-23
Sterling, Va.
$1275

Rights in Technical Data & Computer Software
October 24-25
Sterling, Va.
$1275

The Service Contract Act
October 17-18
McLean, Va.
$1275

Wage and Hour Compliance
October 24-25
Sterling, Va.
$1275

For full brochures of the above seminars, contact Federal Publications Seminars at 1365 Corporate Center Curve, Suite 101, Eagan, MN 55123 ✦ Phone 888.494.3696 ✦ *www.fedpubseminars.com*