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Weekly Wright Report (1/08/18)

NEW PROTEST RULES

By Don Walsh

Pursuant to the FY 2018 NDAA, debriefings will be required for all contract and task order awards for contracts valued at $10 million or greater. Disappointed offerors will also be able to submit additional, follow-up questions within two business days of a post-award debriefing. The agency must answer these questions, in writing, within five business days of receipt. Debriefings will not be considered concluded to start the 5 day period for obtaining a stay of contract performance until the agency delivers its written response to the follow-up questions.

Additionally, for procurements which exceed $100 million, all required post-award debriefings must include the agency's written source selection award decision appropriately redacted of confidential and proprietary information. For contracts valued between $10 million and $100 million, small businesses or nontraditional contractors may request the agency's written source selection decision; however, it is unclear on the timing of a response to such requests.

Section 827 of the FY 2018 NDAA also creates a pilot program to determine the effectiveness of requiring contractors to reimburse DOD for costs incurred in certain protests. This program will not begin until December 2020 and is limited to protests denied by GAO and filed by a party with revenues exceeding $250 million.

CONTRACT CHANGES

By Don Walsh

In addition to changes in protest practices, the FY 2018 NDAA establishes a pilot program for DOD to enter into up to five service contracts for up to 10 years. The FY 2018 NDAA also requires more specificity in DOD service contracts which will now be submitted through the DOD budget process.

The NDAA reflects a continued shift away from lowest-price technically acceptable (LPTA) acquisition methodologies unless they are for commodity or nontechnical items. Specifically, the additional provisions limit the use of LPTA to acquisitions where: (i) the DoD will not realize any (or only minimal) additional innovation or future technological advantage by using other acquisition methodologies; and (ii) the goods acquired are predominantly expendable in nature, nontechnical or have a short life expectancy. Section 832 prohibits the use of LPTA acquisitions for an “engineering and manufacturing development contract of a major defense acquisition program.”

THE GIFT OF EMPLOYEE LEAVE

By Laura Rubenstein

This is the perfect time of the year for people to appreciate that there is no such thing as one size fits all. Like poorly chosen sweaters from Aunt

Elsa, this principle also applies to employers who should ensure flexibility exists in their leave policies and approaches. Difficult leave problems require customized solutions to adequately fit the situation presented. Employers should:

- Review their policies and train managers/supervisors.
- Ensure there are not policies stating or suggesting that an employee who exhausts his or her FMLA leave will immediately be terminated.
- Ensure managers/supervisors understand that the company may always consider a reasonable accommodation for an employee's ADA-qualifying disability.
- Check return to work letters to eliminate language that informs employees they must "return to work without restrictions" or unrealistic notice procedures.
- Ensure any notice procedures given to employees are followed.
- Seek information about the requested additional leave and, if necessary, request documentation to substantiate the existence of an ADA-qualifying disability and need for reasonable accommodation.

PAID IF PAID VS. PAID WHEN PAID

By Max Stadfeld

Who holds the risk of non-payment from an owner was recently addressed in a case under Connecticut law in *Baker Concrete Const. v. A. Poppajohn Co.*, 2017 WL 4106383. In that case, the parties had signed an agreement which provided that:

> The Subcontractor expressly acknowledges and agrees that payments to it are contingent upon the Contractor receiving payments from the Owner. The Subcontractor expressly accepts the risk that it will not be paid for the Work performed by it if the Contractor, for whatever reason, is not paid by the owner for such Work. The Subcontractor states that it relies primarily for payment for Work performed on the credit and ability to pay off [sic] the Owner and not of the Contractor, and thus the Subcontractor agrees that payment by the owner to the Contractor for work performed by the Subcontractor shall be a condition precedent to any payment obligation of the Contractor to the Subcontractor.

Distinguishing the situation for public jobs, the court specifically relied on the contract language that provided "The Subcontractor expressly accepts the risk that it will not be paid for the Work performed by it if the Contractor, for whatever reason, is not paid by the owner for such Work" and "the Subcontractor agrees that payment by the owner to the Contractor for work performed by the Subcontractor shall be a condition precedent to any payment obligation of the Contractor to the Subcontractor" in determining that there was no ambiguity as to what these parties intended.