

# Commercial Contracting in a Global Procurement Market

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**Compliance with Export Controls in a Changing World**

**Managing Global Compliance Risk in GSA Scheduling Contracts**

**Managing Global Supply Chain Risk**

# Export Control Reform Continues

- Goal of “Higher Fences on Fewer Items”
- Final rules effective:
  - Cat. IV, V, IX, X, and XVI (July 1, 2014)
  - Cat. XV (Nov. 10, 2014)
  - Cat. XI (Dec. 30, 2014)
- Remaining Categories
  - Cat. XII – Proposed Rule (May 5, 2015)
  - Cat. XIV & XVIII (this Spring)
  - Cat. I, II, III (no news)

## ECR Update

- Department of State reports 36% drop in licensing volume.
  - Resulted in internal reorganization of licensing personnel
- Goal of a single IT system, USXPORTS:
  - State Department transitioned July 2014, Commerce (BIS), Treasury (OFAC), and Department of Energy still underway
- Agencies' periodic review of revised USML and CCL:
  - Public comments on Cat. VIII and XIX and related 600 series ECCNs

# Regulatory Changes to Come

- Cloud computing issues:
  - New definition of “export”: controlled information encrypted to the specified government standard will not constitute an export
- Harmonized definitions in the ITAR and EAR:
  - “reexport,” “technology,” “fundamental research,” and “public domain”
- Yet another PR for “defense services”
- Discrete changes to EAR encryption regulations

## Industry Questions to Consider

- Is your product still ITAR controlled?
  - High rate of licenses Returned Without Action
  - Contractual requirements to notify customers
- Did the technology/technical data associated with your product also transition to CCL?
- Does company need to remain ITAR registered?
- End User/End Use screening requirements for CCL items?

# U.S. Economic & Trade Sanctions

- Crimea Region of Ukraine/Russia
  - Comprehensive prohibitions on transactions with Crimea (EO 13685)
  - OFAC and BIS restrictions on transactions in support of deepwater, Arctic offshore, or shale exploration or production projects
  - DDTTC will deny applications for “high technology” items
- Cuba
  - New General Licenses authorizing travel to Cuba
  - Expanded BIS License Exceptions and new licensing policies
- Iran
  - P5+1 Framework Agreement

# Major Risks in GSA Schedule Contracting

- Recent False Claims Act cases underscore:
  - MAS contractor is responsible for certifying that products and services offered comply with Trade Agreements Act;
  - But, MAS contractor may rely on supplier's certification; and
  - Compliance with Price Reductions clause remains a challenge:
    - Monitoring
    - Commercial Price Lists

# Substantial Transformation Defines COO

- “Complex or Meaningful” vs. “Minimal or Simple”
- Customs considers:
  - Origin of components;
  - Extent of processing;
  - Different character & use than components;
  - Product design & development;
  - Post-assembly inspection & test;
  - Worker skill & number of operations
- Case-by-Case decisions



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## Recent TAA Rulings – Role of SW

- HQ H215555 (2012)
  - Pwn Plug, full security testing suite
- HQ H206977 (2013)
  - NEC iPASOLINK, hybrid digital microwave radio
- HQ H248027 (2014)
  - Voyager Legend™ cordless headset
- HQ H240199 (2015)
  - EliteBook 840-G1 notebook



## Recent TAA Rulings – Software

- HQ H192146 (2012) – Non-binding Advisory Opinion
  - Database management / application integration SW
  - Place of SW Build: process converting source code files, routines etc. into machine executable object code.
- HQ H243606 (2013) – Final Determination
  - DocAve SW suite for MS SharePoint®
  - Source code converted to Object code by US team

# TAA Rulings – Accessories?

- Pwn Plug Ruling
- HQ H248696 (2014)
  - Elliptical Exercise machine
- HQ H259326 (2015)
  - Powered exoskeleton



## Price Reductions Clause – A New World?

- Historical approach
  - Price Reduction Clause (PRC) and Basis of Award (BOA) customer price monitoring
- GSA Proposal:
  - Monthly transactional data reporting
  - Largely eliminate the Price Reductions clause
- Some initial reactions:
  - GSA IG objects to losing its hammer
  - Industry concerned about burden

# Global Supply Chain Security

- Increasing scrutiny of security risks related to commercial global supply chains
  - See, e.g., White House National Strategy for Global Supply Chain Security (2012)
- Laws and regulations focused on information technology and information systems, but expect to see broader application going forward



# Global Supply Chain Security



- DOD Procurements: Section 806
  - Statutory authorization for DOD to address IT supply chain risk first provided in the FY2011 NDAA, as amended by Section 806 of the FY2013 NDAA)
  - Pilot program sunsets in 2018
  - Interim rule issued 2013 (final rule expected in 2015); DFARS 252.239-7017, 7018
    - Applies to procurements related to “National Security Systems” (NSS)
    - Applies to contracts for commercial items and COTS items
    - Provides for exclusion of source (prime or subcontractor) that fails to meet qualification standards or achieve an acceptable rating for supply chain risk evaluation factor
    - Not subject to bid protest review
    - No specific compliance requirements; leaves measures up to individual contractors to protect supply chain

# Global Supply Chain Security



- Intelligence Community Directive (ICD) 731
  - Issued in December 2013
  - Applies to procurement of “mission-critical” products, materials, and services (as deemed by heads of IC elements)
  - Directs member agencies of intelligence community to consider supply risks in IT procurements
  - When acquiring IT products, contractors, subcontractors or vendors may be excluded from competing based on supply chain risk factors identified in risk assessment, and disclosure of exclusion may be limited when necessary to protect national security

# Global Supply Chain Security



- Section 515 of Consolidated Appropriations Act of 2014 (“Wolf Provision”)
  - Restricts spending by DOJ, DOC, NASA, NSF on “high impact” and “moderate impact” information systems until supply chains risks have been assessed
  - Agencies to assess “risk associated with such system[s] being produced, manufactured, or assembled by one or more entities identified by the United States Government as posing a cyber threat, including but not limited to, those that may be owned, directed, or subsidized by the People’s Republic of China.”
  - Agencies to coordinate with FBI and other agencies to obtain threat information for assessments

# Global Supply Chain Security



- December 2014 GSA request for information (RFI) on industry capabilities to perform due diligence research on federal contractors' supply chain security
- GSA collaborating with customer agencies to establish risk indicators; e.g.,
  - Foreign ownership, control and influence of contractors, suppliers, and manufacturing hubs
  - Product and component countries of origin
  - Manufacturing practices
- Information to be used by federal acquisition, grant, and oversight communities
- GSA anticipates 100-500 due diligence reports per month

# Questions?

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