WELCOME

May 4-5, 2017

Trump Administration's Acquisition Policy Agenda

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Emerging Acquisition Policy Themes and Objectives

- Fewer regulatory burdens (2-for-1 Executive Order)
- Increased focus on Buy American and Reducing Waste
- Improved Program Management
- More Defense and Infrastructure Spending

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What to Expect: Specific Actions and Initiatives

- Presidential Appointments and New Players
- What the Government is Going to Purchase
- OMB Plan to Reorganize the Executive Branch
- Rescission or Revision of Obama-era Executive Orders
- Streamlined Commercial Item Procurements
- Review of Category Management
- IT Modernization
- Role of GSA

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Suspension & Debarment, Ethics & Compliance, Disclosures

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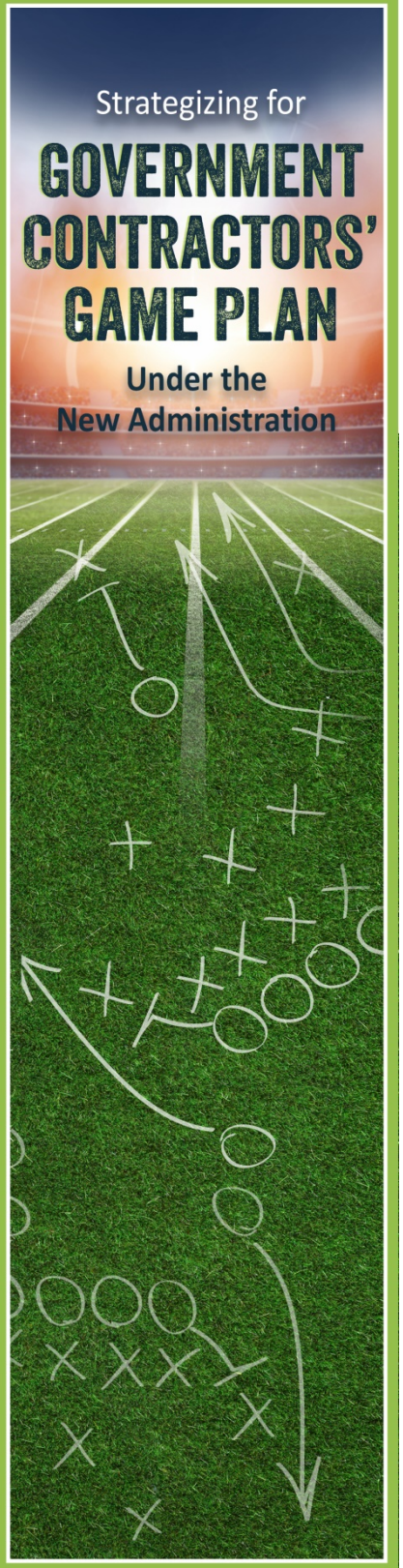

Agenda

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- A view from the Navy SDO
- Expansion of mandatory disclosures
- Labor & employment law convergence with government contracts law
- Other developments relating to ethics and compliance risks

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A View From the Navy SDO

The viewpoints expressed by Ms. Kessmeier are her own, and do not necessarily reflect those of the Department of the Navy or the Department of Defense.

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Mandatory Disclosure Regime Expansion

- Since the 2008 FAR Mandatory Disclosure Rule, new disclosure regimes continue to emerge, including
  - Combatting Trafficking in Persons
  - Avoidance of Counterfeit Parts
  - Cyber incidents and data breach
- New case law (particularly implied certification) necessitates a more granular analysis of whether there is "credible evidence" of a violation of the civil False Claims Act

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L&E, Whistleblower Protections and Government Contracts Law

- Increasingly active DoL debarment efforts
- Whistleblower protections codified and made permanent
- Whistleblower reprisal matters and GAO audit
- Internal-to-government cross-reporting resulting from Fair Pay & Safe Workplaces increases enforcement risk

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Revolving Door Issues

- Highlights of New Executive Order issued by President Trump
  - Bans executive branch appointees from engaging in "lobbying activities" with respect to the former agency for five years post-employment
  - Lifetime ban on "lobbying" for foreign government or political parties
  - Unlike Obama-era Executive Order, this Order does not impose a two-year ban on appointees representing back to their agency; reverts back to 18 USC § 207(c)

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Marketing to the Federal Government

- 2017 Changes to Gift Rules
  - Imposes duty on federal government employees to decline otherwise permissible gifts if it would give rise to the appearance of impropriety
  - Changes to definitions of "gift" and "market value"
  - Changes to exceptions to the prohibitions for the acceptance of gifts

Anti-Kickback Act

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- 41 USC § 8702: Cannot provide, attempt to provide, offer, solicit, accept, or attempt a kickback.
- Kickback is defined as any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract.
- 41 USC § 8702 provides for corporate liability against entity "whose employee, subcontractor, or subcontractor employee violates section 8702 of this title by providing, accepting, or charging a kickback."

Anti-Kickback Act

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- Fifth Circuit decision in *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.* (Feb. 3, 2017)
- Holds that corporations are liable "for the knowing violations of those employees whose authority, responsibility, or managerial role within the corporation is such that their knowledge is imputable to the corporation."
- Decision permits recovery of twice the amount of each kickback plus $11,000 for each occurrence of a prohibited conduct.

Anti-Kickback Act

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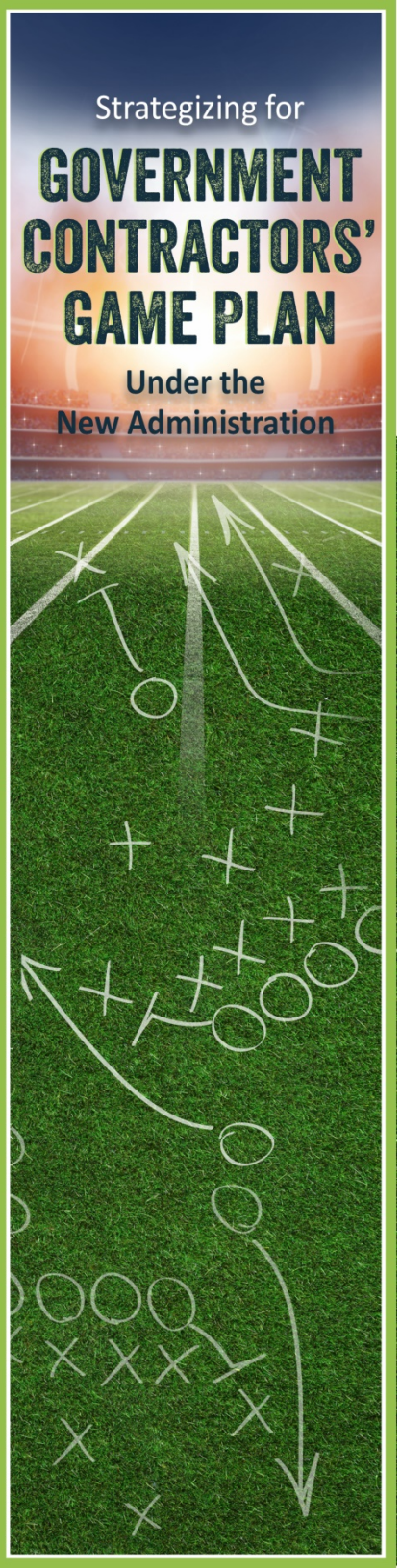
- Statute and regulation require:
  - Contractors must have in place reasonable procedures designed to prevent and detect violations of the Anti-Kickback Act.
  - Mandatory reporting obligation if "a prime contractor or subcontractor has reasonable grounds to believe that a violation of the Anti-Kickback Act" may have occurred.



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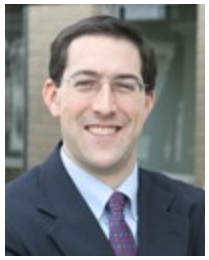

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Identifying and Pursuing Affirmative Recovery Opportunities and Navigating the Trump Era

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Affirmative Recovery

- Contracting with the U.S. Government
  - Opportunities
    - World's largest purchaser of goods and services
    - Every imaginable industry sector
    - Pays its bills
    - Defined processes for recovery and funds appropriated to pay resolved disputes
  - Risks
    - Difficult customer
    - Unique terms and conditions
    - Unique oversight / enforcement mechanisms
    - Funding uncertainties (e.g., sequestration, shut-down)

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Affirmative Recovery

- Identifying Affirmative Recovery Opportunities
- Pursuing Claims Recovery

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Affirmative Recovery

- Companies doing business with the U.S. Government may be entitled to affirmative recovery based upon a variety of legal theories.
  - Increased performance costs attributable to Government
  - Costs resulting from Government-initiated contract termination
  - Costs arising from Government-caused delay
  - Costs arising from differing site conditions
  - Unpaid costs under money-mandating statutes
  - Costs of remediating certain environmental pollution and toxic tort litigation costs
  - Indemnification for certain hazardous activities
- What they all share in common: the Government does not pay claims unless they are asserted, pursued, and appropriately documented.

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Changes

- Express or constructive
- Impact of limited funding
  - "Scope creep"
  - Increased use of termination for convenience (and importance of addressing contract changes promptly during performance)
- Impact of failure to provide timely notice
  - *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000 (Fed. Cir. 2015).
- Hypo: Under a firm fixed price contract for a particular inventory tracking system that is based on outdated Government equipment, the Government attempts to require the contractor to upgrade the Government equipment as part of its contract.

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Deductive Changes

- Deductive change ("de-scope" by deleting work)
- Permissible if "in the general scope of the contract"
- Produce a downward equitable adjustment to the extent of the savings to the contractor due to the deletion
- Government burden

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Deductive Changes

- Generally priced based on how much the deleted work "would have cost"
- Can be partial termination for convenience
- Considerations
  - Profitability of deletion
  - potential downstream performance impacts of the work deleted (e.g., subcontract pricing and supplier chain complications)

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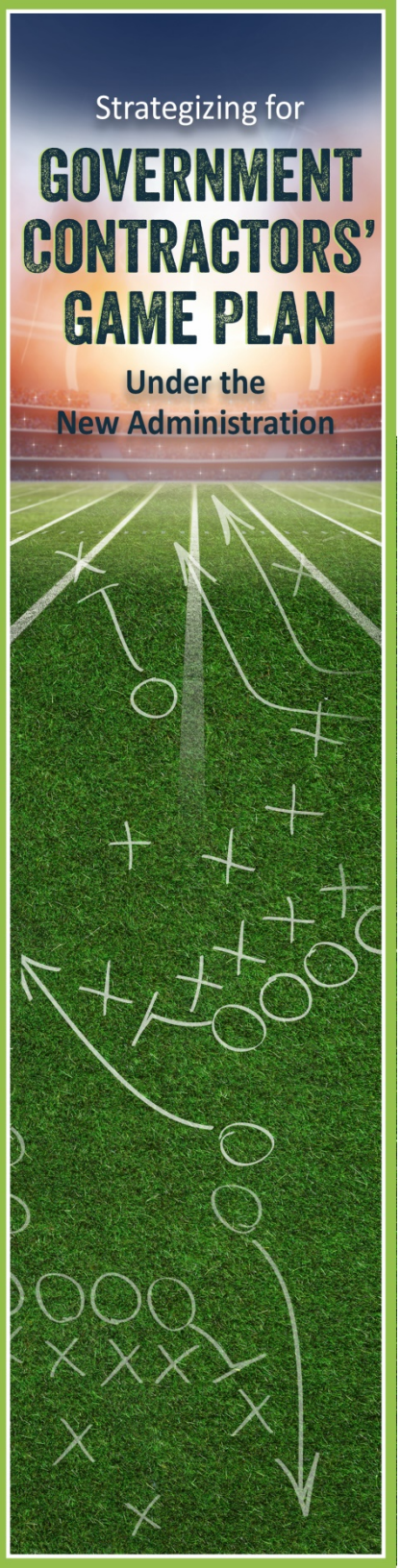
Deductive Changes

- Hypo: Under a contract that requires excavation, demolishing, and replacement of a pipeline as necessary, the contractor was prepared to demolish and replace a portion of the pipe to address a leak, but the COR directed it to pursue an alternative.

- Result: Award of full contract price of $41,257.000 due in part to government failure to meet its burden to prove cost savings to the contractor due to its deletion of work. *HCS*, ASBCA No. 60533, Sept. 2016



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Termination for Convenience

- Unilateral termination without stated reason
- Generally entitles contractors to **costs** and **losses** incurred
- FAR cost principles and case law can inform extent of negotiated settlement (including commercial item contracts, *SWR, Inc.*, ASBCA No. 56708, Dec. 2014)
  - Loss of useful value
  - Initial Costs
  - Subcontractor claims

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Termination for Convenience

- Efforts to restrict agency funding/shutdown
- Limitation of Cost/Funding provisions
  - require contractor notice where funds are running out and put the risk of continued performance on the contractor
  - Relieves the Government of liability for "costs incurred in excess of" allotted funding "[e]xcept as required by other provisions of this contract, specifically citing and stated to be an exception to this clause"
- Protest activity due to limited government pot
- Scarce funding for negotiated equitable adjustments
- Greater emphasis on the need to address contract changes promptly during performance

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Termination for Convenience

- Hypo: Under a contract to manage soldiers' vehicles in Hawaii , the Government issued a stop-work order and then T4C'd, but CO refused to reimburse costs that post-date termination.

- Result: $123,489.37 plus CDA interest awarded because contractors are entitled to "fair compensation" with reference to FAR 31 cost principles. *SWR, Inc.*, ASBCA No. 56708, Dec. 2014.

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Breach Recovery

- Improper T4C allows recovery of breach damages
  - *Securiforce v. United States* (on appeal to Federal Circuit)
- Government's inadequate preparation of estimates in solicitation
  - *Agility v. United States* (Feb. 2017, Federal Circuit)
- Government duty of good faith and fair dealing
  - Affirmative duty to cooperate
  - Negative duty not to hinder
- Make Me Whole: The reach of breach damages (e.g., *SUFI Network Servs., Inc. v. U.S.*)

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Government Delays

- Stop Work Order can be issued for 90 days (or more by agreement)
- Contractor entitled to equitable adjustment remedy (FAR 52.242-15)
- When the period ends, the contractor must resume or the CO must terminate the work.
- Contractor also has a remedy for Government delay of work, but without profit (FAR 52.242-17)

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Government Delays

- Hypo: Under a contract to conduct on-site services, a government shutdown causes the federal facility to close, preventing access by the contractor.
- Preserve claims through notice
- Preserve claims by ensuring they are not released through contract modification or acceptance of payment
- Seek payment in contract units (*Amaratek*, ASBCA No. 59149, Nov. 2014)

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Government Delays

- The Government will continue to address budget challenges in part by slowing contract work.
- Projecting the impacts and calculating the costs of delay will be complicated and more likely disputed by a customer seeking to conserve funds.
- Those most likely to see substantial impacts are lower-priority, higher-cost, and underperforming projects.

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Commercial Items

- Under Commercial Item clause (FAR 52.212-4), all changes must be "agreed bilaterally."
  - But if the CO issues a ***unilateral*** direction / change order, must the Contractor perform the change?
  - Is it a Government ***breach***?

- How should the equitable adjustment to perform the change be measured?
  - As **actual costs + profit** (standard) ….. ***or*** something else?

- *ULS*, ASBCA No. 56850, June 2016.
  - Commercial item contract for satellite launch services.
  - FFP prices per launch vehicle (CLINs by size/weight)
  - Government ordered a "small" (cheaper) rocket.
  - But CO's constructive changes made payload weight grow to need a "medium" rocket. So ULS launched with medium (for safety). What amount is ULS entitled to?

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Differing Site Conditions

- When the conditions at a particular site are different from what was expected. Two types.
- Construction and Non-construction
- Non-construction Hypo: At a VA hospital, the ceilings at a particular facility turn out to be different than expected. Contractor cannot use standard (proposed) cabling approach. A different, more expensive cabling method is needed. Differing site?

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Statutory Claims

- Recovery under money-mandating statutes
- Company or group(s) of companies to recover money from the U.S. Government in the event of non-payment
- Recent examples:
  - The Affordable Care Act
    - ACA "risk corridors" law suits
  - The American Recovery and Reinvestment Act
    - Section 1603 claims

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Environmental / Indemnification

- Costs of remediating certain environmental pollution and toxic tort litigation costs
  - Recovery under P.L. 85-804 and 10 U.S.C. § 2354 indemnification clauses
  - Recovery under "Taxes" clauses
  - Recovery under World War II era indemnification clauses
  - In addition to traditional CERCLA actions

- Hypo: Oil companies contract with Government to increase production of aviation gasoline for war efforts, but the resulting increased waste and byproducts must be dumped in violation of environmental laws.

- Result: Government indemnification of all remediation costs under CERCLA (*Shell Oil Co. v. United States*, 751 F.3d 1282, 1303 (Fed. Cir. 2014))

- Contractor had not waived by settling

- Government had failed to prove any release of claims

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Takeaways

- Impact of limited funding/potential shutdown
  - Pressure to provide concessions after performance begins
  - Terminations for convenience
  - Delays due to Government constraints
  - Incremental funding and funding gaps
  - Scarce funding for negotiated equitable adjustments
- Proactive protection of rights under the law **during performance**
- Continuous identification of potential claims
  - Training
  - Timely and adequate documentation
  - Prevention of waiver
  - Prevention of release

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Two Steps to Take Right Now

- **Identify contracts and programs that are either losing money or less financially viable than anticipated**
  - Determine whether underperformance is fully or partially the Government's fault

- **Seek recovery where the Government has not lived up to its end of the bargain**

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Hurry-Up Offense: Keeping Pace with Information Security and Privacy

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Game Plan: Information Security & Privacy Risk

- Managing "Ordinary" Information Security & Privacy Risk
  - Legal Principles, Information Sharing, and Incident Preparation/Response
- Managing Government Contracts Information Security & Privacy Risk
  - Risk Environment, DFARS/FAR/NIST, Insider Threats, and Investigations
- Managing Business Life Cycle Information Security & Privacy Risk
  - Governance, Business Transitions, and Vendor Management

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Managing 'Ordinary' Information Security and Privacy Risk

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Privacy & Data Security Guidance

- Federal and State Law Patchwork
  - Privacy, data security, incident response
  - Multiple regulators (sectors, industries, conduct)
  - Private rights of action
- International Law
  - GDPR, APEC, regional and local laws, including data transfers, data localization,
- Contract-Specific Obligations
- Fair Information Practice Principles (FIPPs)
  - Privacy by Design
  - Security by Design
- Industry Best Practices
- Certification Programs
- Self-Regulation Programs

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Selected Data Types and Risk Considerations

DATA TYPE	COMPLIANCE & RISK CONSIDERATIONS
Personal information (Personally Identifiable Information (PII))	• Federal Law (e.g., Privacy Act, E-Government Act of 2002, FISMA; FTC Act), and sector-specific laws, below • State privacy, security, and data breach notification laws • International laws on collection, use, and transfer
Protected Health Information (PHI)	• Health Insurance Portability and Accountability Act (HIPAA)/Health Information Technology for Economic and Clinical Health (HITECH) Act • Federal and State laws regarding medical and health information • International laws on collection, use, and transfer

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Selected Data Types and Risk Considerations (cont.)

DATA TYPE	COMPLIANCE AND RISK CONSIDERATIONS
Intellectual Property/Proprietary Information	• Copyright, trademark, patent, and trade secrets law and regulations • Contractual obligations
Government Information	• Federal contract requirements (FAR and DFARS) • National Industrial Security Program Operating Manual (NISPOM) • NIST Cybersecurity Framework and Data Security Guidance • State laws

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Managing Risk with Effective Incident Response: Prepare, Practice, and Execute

- Incident response plan
- Incident response team (IRT), including third parties (counsel and forensics)
- Regular tabletop exercises
- Investigation triggered by incident report -- Focus on security, mitigation and evidence gathering
- Manage external risks
  - Government (Federal and state)
  - Insurance
  - Communication
  - Individuals
  - Business partners and vendors
- Incident-related legal and contractual compliance
- Anticipate litigation

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Teamwork: Managing Risk with Information Sharing

- E.O. 13691: Promoting Private Sector Cybersecurity Information Sharing
- DOJ/FTC Policy Statement "Sharing of Cybersecurity Information"
- Cybersecurity Information Sharing Act (CISA)
  - Any "non-federal entity" can share information with federal government "notwithstanding any other provision of law."
  - Information-sharing portals
  - Liability protections
- NIST Guide to Cyber Threat Information Sharing (NIST Special Publication 800-150, 10/16)

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Information Sharing Considerations

- Privacy and information security
- Antitrust
- Contract terms: IP and vendor agreements
- Weighing benefits and risks
- Sector best practices

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Managing Government Contracts Information Security and Privacy Risk

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Current Threat Environment

- Government Agencies, Systems, and Data
- Government Contractors, Vendors, and Subs
- Critical Infrastructure
- Private Sector

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New National Archives Controlled Unclassified Information (CUI) Program, 32 C.F.R. § 2002

- Government-wide, consistent approach to identifying and handling sensitive information
- September 2016 final rule speaks to agency requirements
- Still waiting on corresponding FAR Clause for contractors
  - Requirements for marking, handling, and transmitting CUI
  - Imposing NIST SP 800-171
  - Reporting non-compliance

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Revised DFARS 252.204-7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting*

- Revised and final rule issued October 2016
  - CUI + DoD = Covered defense information
  - Requirements for external cloud services
  - Articulates sub notifications to primes
- NIST SP 800-171 Rev. 1 published December 2016
  - New control requiring system security plans
- Industry Information Day announced
  - June 23, 2017 in Alexandria, VA

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Federal Systems & Federal Information

- FISMA (2014 revision)
  - Increased accountability, reporting and oversight for data security and privacy
- Revised OMB Circular A-130 (July 28, 2016)
  - Data security and privacy are "crucial elements of a comprehensive, strategic, and continuous risk-based program"
  - Agency contracts must "enable agencies to meet Federal and agency-specific requirements pertaining to the protection of Federal information"
- Privacy Training Requirement, FAR Subpart 24.3 (Dec. 20, 2016; eff. Jan. 19, 2017))
  - Applies to all who work with Privacy Act systems of records and federal PII, with flowdown requirement
  - Specified training requirements include Privacy Act, working with federal PII, incident response, and potential civil and criminal consequences for violations

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Tackling Insider Threats (Change 2 to DOD 5220.22-M (NISPOM)

- Contractors with cleared facilities must "establish and maintain an insider threat program [ITP] that will gather, integrate, and report relevant and available information indicative of a potential or actual insider threat"
  - ITP scope: information covered by 13 personnel security adjudicative guidelines.
  - Annual self-inspection by ITPSO, report subject to DSS inspection
- "Insider threat" – Use of "authorized access, wittingly or unwittingly, to do harm to the national security of the United States," including "harm to contractor or program information" that impacts "obligations to protect classified national security information."

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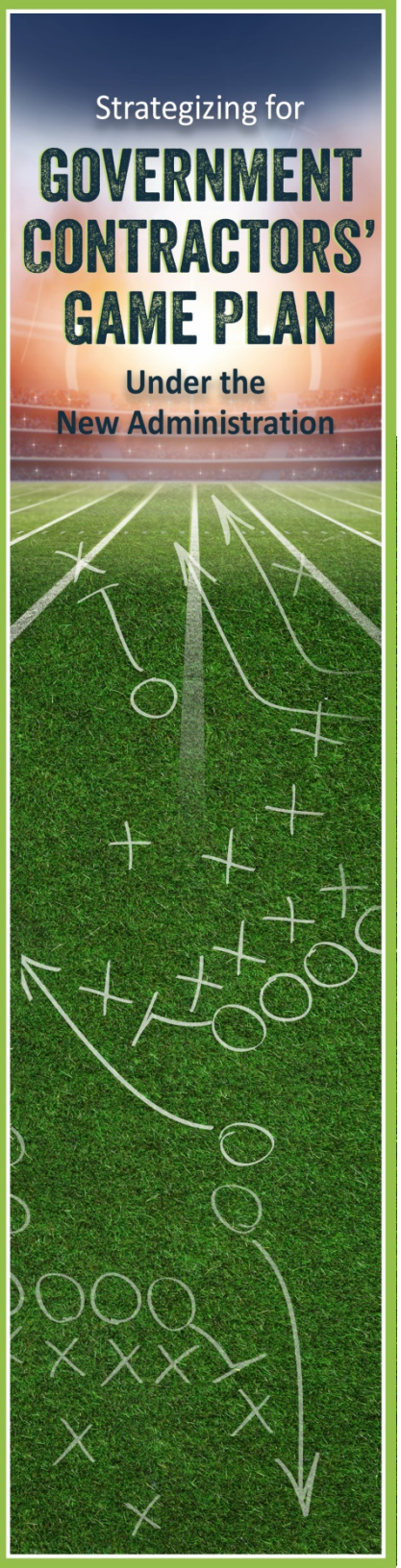
Tackling Insider Threats (cont.)

- Training and awareness requirements (3-103)
  - Specific content requirements
  - Initial training prior to access, then annually
  - Training records subject to DSS review
- Information Security Controls (Chap. 8)
  - DSS-provided information system security controls, including monitoring notice
  - Controls based on FISMA and NIST
- ITP implementation tips
  - Create an interdisciplinary ITP team (HR, OGC, IT, and operational components)
  - Review policies and procedures, particularly with regard to information security and privacy
  - Tailor ITP resources to organization's size, activities, and risks



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Managing Information Security and Privacy Risk During the Business Lifecycle

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Managing Ordinary and Government Contract Risk Throughout the Business Lifecycle

- Governance
- Corporate policies and procedures, especially Incident Response Plan
- Vendor management, compliance terms, and flowdown
- Business transactions and privacy and information security due diligence
- Training and awareness

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Post-Game Wrap-Up: Managing Information Security & Privacy Risk

- Identify and Classify Data and Systems (CUI? Classified? PII? Regulated?)
- Implement Physical, Technical, and Administrative Controls to address risks, compliance and otherwise
- Establish Appropriate Governance
- Review and Update Policies & Procedures Regularly
- Evaluate Whether Public-Facing Statements on Security and Privacy Match Current Practices
- Prepare for Data Incidents in Advance (Incident Response Plan, Team, Tabletop, Data Breach Toolkit)
- Review Vendor Management Process
- Analyze Audit and Reporting Processes
- Conduct Training
- Participate in Industry and Government Partnerships

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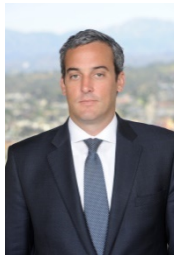

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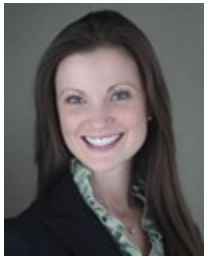

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Investigations: Protecting the Company in a New Environment

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Recent Developments and Impact

- Focus on Individuals: Impact of the Yates Memo
- Criminal Referrals: Enhanced process and resources
- Impact on investigation dynamics and considerations

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The Yates Memo

- Requirements for corporate cooperation credit based on individual accountability
- Focus on individuals from inception of investigation
- Disclosure of all relevant facts regarding individuals involved in misconduct
- Corporate resolution will not protect individuals
- Applies equally to criminal *and* civil matters
  - *e.g.,* "Yates lists" in civil FCA cases

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Criminal Referrals

- Automatic review of all *qui tam* complaints by DOJ Criminal Division
  - More centralized and coordinated process in procurement fraud cases
- Enhanced resources
  - New prosecutors focused on criminal procurement fraud cases
- More criminal procurement fraud investigations stemming from civil FCA cases?

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Impact on Investigations

- Injecting criminal considerations into civil and administrative investigations:
  - Separate counsel for individuals
  - Fifth Amendment invocations and adverse inferences
  - Common-interest agreements
  - Forced disclosure of fruits of internal investigations
  - Self-disclosure of criminal conduct

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Protecting the Privilege

- Continued importance of *Upjohn*
  - *U.S. v. Blumberg* (D.N.J. 2017)
  - *U.S. v. Merida* (10th Cir. 2016)
- Former employees
  - *Newman v. Highland Sch. Dist. (Wash. 2016)*
- *KBR* --- AGAIN!!!

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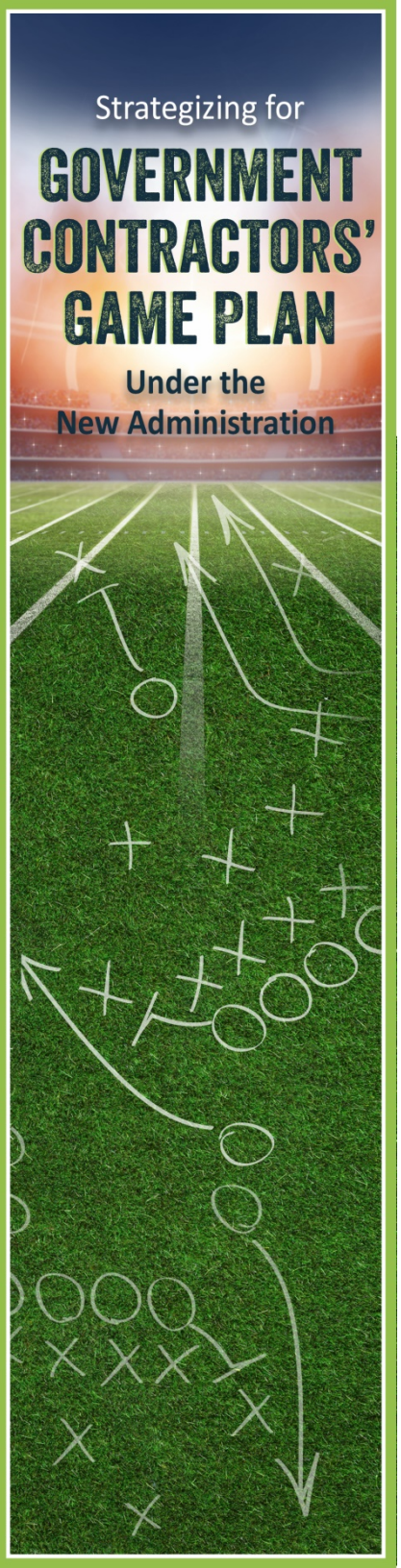
Preservation of Documents/ESI

- Triggering the Duty to Preserve
- Scope of the Duty
- Sanctions for Failure to Preserve
  - *Ala. Aircraft Indus., Inc. v. Boeing Co.* (N.D. Ala. 2017)
- Preservation Practices



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False Claims Act: What Every Contractor Needs to Know This Year

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Agenda

- Enforcement and a New Administration
- Materiality Rules! *Escobar* Changes the Game
- Case Developments and Impacts

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FY 2016 Enforcement

- Nearly 850 new FCA matters filed – 2nd highest number on record
- More than 80% filed by relators
- $4.7+ billion recovered – 7 year-streak of recoveries > $3 billion
  - Only 2% from non-intervened cases
  - $2.6B from health care
  - DOD-related recoveries down ($122M)

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Enforcement: Penalties Rising

- Prior Range: $5,500 to $11,000
- New Range: $10,781 to $21,563
- Retroactive?
  - violations that occurred after November 2, 2015
- Implications?
  - significant "club" for both DOJ and whistleblowers especially in the health care realm where "claims" can be numerous
  - whistleblowers incentivized to file more suits
- Penalties will adjust *annually* for inflation

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DOJ FCA Enforcement

- Attorney General on the FCA
  - "valid and effective method of rooting out fraud and abuse"
  - "caused companies to be more cautious"
- Resources
  - Health Care
  - Procurement
- Focus on Compliance Programs

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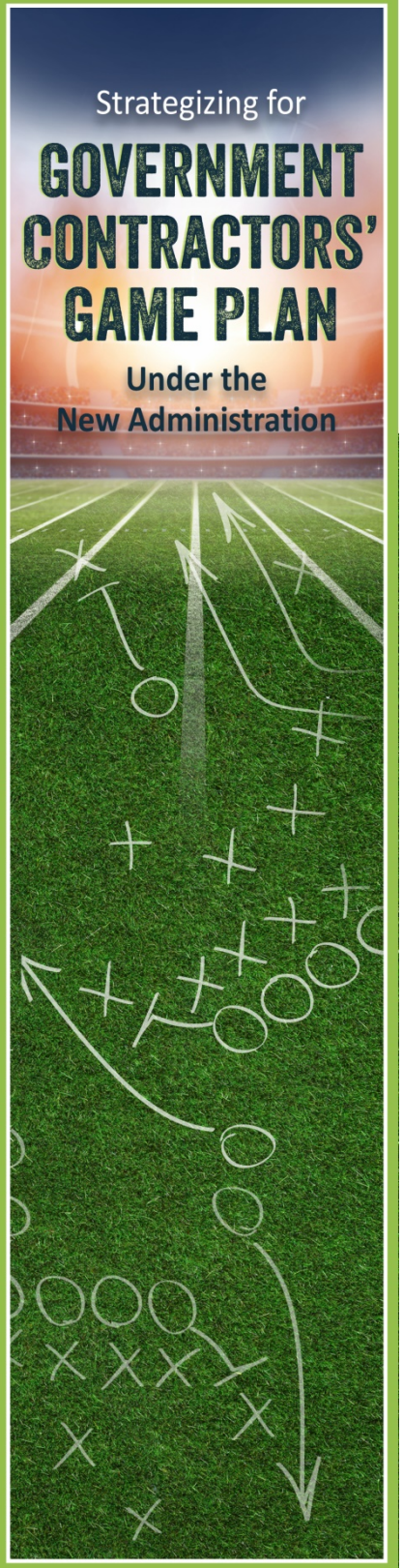
Enforcement Under a New Administration

Prosecution of Individuals for Corporate Wrongdoing



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Individual Prosecution

- Where have you gone, Ms. Sally Yates?
  She's left (but her memo remains).
- DOJ policy to find and prosecute culpable individuals for corporate fraud (Yates memo Sept. 20, 2015)
- Prejudgment writs of attachment per 28 U.S.C. § 3001. Can the government seize defendants' fund before the case begins?
- Who pays the settlement or judgment: corporation, individuals, or both?
  DOJ challenging the rule of joint and several liability

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Enforcement Under a New Administration

Whistleblowers in the Workplace

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Whistleblowers in the Workplace

- Best practices – "show your work" when dealing with the government
- Safeguarding privilege while enforcing potential relators' "release" of claims.
  - Preserving the privilege before litigation; how to consult regulatory counsel.
  - Preserving the privilege while investigating allegations of wrong doing; why disclosure of investigation may be necessary to enforce a relator's "release" of claims.

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Enforcing Potential Relators' "Release" of claims

- Relators are often former employees who may have signed a "release" of all claims upon their termination.
- Judge-made doctrine permits relators to pursue released FCA claims if the government had no knowledge of the alleged fraud when release was executed.

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Enforcing potential relators' "release" of claims

- Affirming enforcement of release to bar relator's FCA claim because government already had access to documents that the relator attached to his complaint
  - *U.S. ex rel. Radcliffe v. Purdue Pharma., L.P.* (4th Cir. 2010)
  - *U.S. ex rel. Ritchie v. Lockheed Martin Corp.* (10th Cir. 2009)
  - *U.S. ex rel. Hall v. Teledyne Wah Chang Albany* (9th Cir. 1997)
- Declining to enforce relator's release of a *qui tam* claim because the government first learned of the alleged fraud when the relator filed a *qui tam* complaint
  - *United States ex rel. Green v. Northrop Corp.* (9th Cir. 1995)

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Materiality Rules! *Escobar* Changes the Game

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Universal Health Servs. v. U.S. ex rel. Escobar, 136 S. Ct. 1989 (2016)

Escobar held that an implied certification claim may proceed at least where two conditions are satisfied:

(1) the claim for payment "makes specific representations about the goods or services provided"; and

(2) "the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."

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Living in A Material World

Out with the Old Tests!

No showing of materiality simply because:

- Compliance was designated as a condition of payment (relevant, but not dispositive)
- Government would have option not to pay

And no materiality where non-compliance is minor or insubstantial.

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Living in A Material World

Proof of materiality can include evidence that the Government consistently refuses to pay claims based on noncompliance with the particular requirement.

Conversely, if the Government regularly pays a particular claim or type of claim despite its actual knowledge that certain requirements were violated, that is "very strong evidence" that those requirements are not material.

DOJ's Position on *Escobar*

According to DOJ, the question of materiality requires consideration of several factors:

(1) The label of the requirement that was violated—*i.e.*, is it labeled a condition of payment;
(2) Whether the violation goes to the essence of the government program or contract;
(3) How the government treats violations of the requirement; and
(4) Whether the violation was minor or insubstantial.

New Standard, Same Result: Remanded Cases Apply *Escobar*

- *Universal Health Servs., Inc. v. U.S ex rel. Escobar*, 842 F.3d 103 (1st Cir. 2016);
- *Weston Educ., Inc. v. U.S. ex rel. Miller,* 840 F.3d 494 (8th Cir. 2016);
- *U.S. ex rel. Nelson v. Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016); and
- *Triple Canopy, Inc. v. U.S. ex rel. Badr*. (4th Cir. argued January 26, 2017).

Government Payment Despite Knowledge of Noncompliance

- In *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. 2017) the relator asserted Serco's monthly cost reports did not comply with guidelines from the American National Standards Institute (ANSI).

- In affirming summary judgment, the 9th Circuit found that the government accepted the cost reports and paid Serco despite knowing that such cost reports were not in compliance with ANSI guidelines.

Agency Inaction

- In *U.S. ex rel. McBride v. Halliburton*, 848 F.3d 1027 (D.C. Cir. 2017) the court, affirming summary judgment, held that false headcounts at morale, welfare, and recreation centers were not material to the government's decision to pay.

- Army witnesses testified that headcount data had no bearing on costs billed to Gov't
- Rejected ACO's declaration that he "might" have investigated further / disallowed some costs had he known about the false headcounts.
- ***DCAA investigated the relator's claims about headcount data and did not disallow any charged costs.***

Agency Inaction, cont.

- In *D'Agostino v. ev3 Inc.*, 845 F.3d 1 (1st Cir. 2016) relator alleged that defendant misled the FDA to secure approval for a medical device. Citing the facts that, in the six years since relator's allegations surfaced, (1) CMS had not ever denied reimbursement and (2) FDA had not withdrawn its approval of the device, the 1st Circuit found the alleged false statements were not material and affirmed dismissal with prejudice.
  - "The FCA exists to protect the government from paying fraudulent claims, not to second-guess agencies' judgments about whether to rescind regulatory rulings."

- In *Abbott v. BP Exploration & Production*, 851 F.3d 384 (5th Cir. 2017) the 5th Circuit affirmed summary judgment after finding that compliance with certain engineering regulations was not material because the government allowed BP to continue drilling after an investigation into relator's allegations in which the DOI concluded that the defendant was in compliance.

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Post-*Escobar*: Circuit Splits on Materiality?

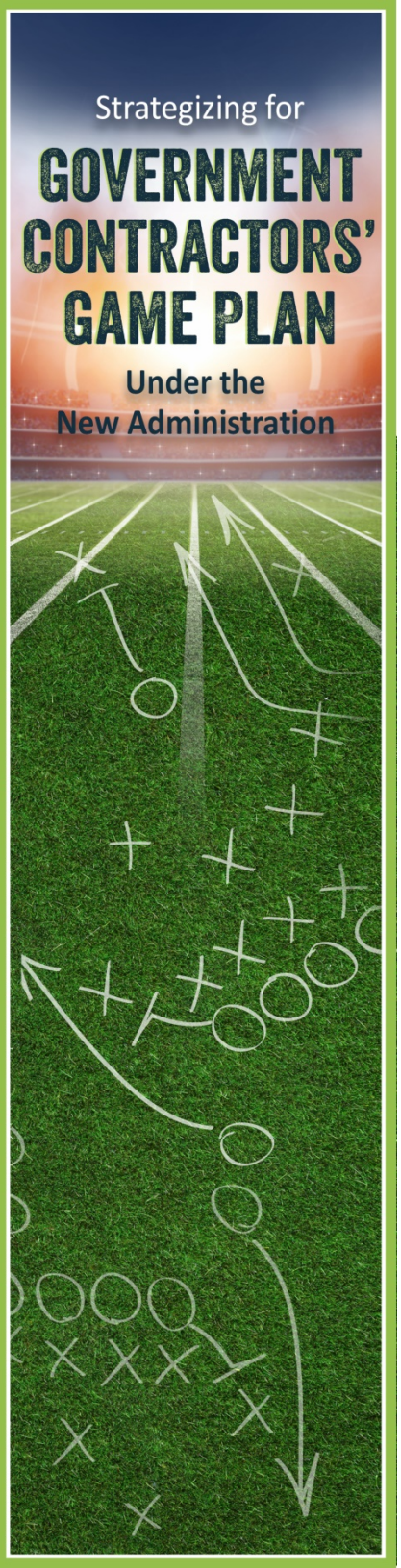
- Is materiality measured only at the time of payment?
  - 1st Circuit says so: "we find no evidence that MassHealth had actual knowledge of the violations at the time it paid the claims at issue" *Escobar*, 842 F.3d 103 (1st Cir. 2016) (on remand, denying MTD)
  - D.C. Circuit holds otherwise: DCAA investigation of relator's qui tam allegations (after the fact) led to no disallowed charges, undermining materiality – *McBride*, 848 F.3d 1027 (D.C. Cir. 2017)
- Knowledge of actual noncompliance, or just allegations of noncompliance?
  - "mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance" *Escobar*, 842 F.3d 103 (1st Cir. 2016)
  - *D'Agostino*, 845 F.3d 1 (2d Cir. 2016) – no agency action in wake of relator's allegations enough to find no materiality
- Is an FCA action still viable where agency/gov't investigation of allegations at issue finds no actual wrongdoing?
  - *E.g.*, *Abbott v. BP*, 851 F.3d 384 (5th Cir. 2017) (Note that court ruled that requirement at issue was not material, even though basis was agency investigation concluding that requirement was not violated)

Impact on Discovery

- Parties must introduce evidence of materiality into the record in order to prevail at the summary judgment phase or trial.
- Uptick in *Touhy* requests*?* Defendants may disprove materiality with discovery about the agency's knowledge of non-compliance and the agency's prior conduct.
- Use of former government employees and experts to demonstrate that the government does not base payment decisions on compliance with the regulation in question.

Courts Addressing Materiality on Pretrial Motions

- In *Escobar*, the Court noted that the materiality analysis is not too fact intensive to decide on a motion to dismiss or for summary judgment.
- "Materiality is absent at the pleading stage when the relator's chronology suggests that the Government knew of the alleged fraud, yet paid the contractor anyway"—*U.S. ex rel. Kolchinsky v. Moody's,* 162 F.Supp.3d 186 (S.D.N.Y. March 2, 2017).
- To survive on summary judgment, plaintiffs must provide evidence that the alleged misrepresentations likely influenced the government's decision to pay, not just that they could have done so.



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Case Developments

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DOJ's Unreviewable Right to Veto FCA Settlements

U.S. ex rel. Michaels v. Agape Senior Cmty. (4th Cir. 2017)

- Government declined to intervene. Relators and defendants mediated and reached a tentative settlement without informing the government.
- Government later sought to veto the settlement because the amount was "appreciably less" than its own damages estimate.
- Fourth Circuit rejected relators' claim that it had a "right to conduct" (including settle) the case, holding that the plain language of the statute grants the Attorney General "absolute veto power over voluntary settlements."

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Updates on "Ambiguity"

U.S. ex rel. Donegan v. Anesthesia Ass. of Kansas City, P.C., (8th Cir. 2016)

- At issue was the interpretation of a billing regulation for anesthesia services, and the meaning of anesthesia "emergence"
- Relator failed to submit evidence refuting defendant's "strong showing" that its interpretation of "emergence" was objectively reasonable

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Updates on "Ambiguity"

U.S. ex rel. Donegan v. Anesthesia Ass. of Kansas City, P.C., (8th Cir. 2016)

- Summary judgment would not have been proper if there was evidence of government guidance that "warned a regulated defendant away" from an otherwise reasonable interpretation of an ambiguous regulation.
  - –No CMS guidance on the meaning of the term "emergence"
  - –The term has not been defined in local coverage determinations or by professional organizations.

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Updates on "Ambiguity"

Donegan ruling reflects a growing trend of courts refusing to impose FCA liability over an ambiguous rule or regulation

- *U.S. ex rel. Purcell v. MWI Corp.* (D.C. Cir. 2015)
- *Sheet Metal Workers Int'l Assoc. v. Horning Investments, LLC*, (7th Cir. 2016)
- *U.S. ex rel. Polukoff v. St. Mark's* (D. Utah 2017)

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Difference of Opinion to Prove Falsity

U.S. v. AseraCare Inc., (N.D. Ala. 2016)

- At issue was interpretation of "terminal illness" for certifying patients as eligible for hospice care.
- District court granted summary judgment for the defendant, holding that "[a] mere difference of opinion between physicians, without more, is not enough to show falsity."

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Difference of Opinion to Prove Falsity

AseraCare reasoning has been adopted in other healthcare FCA cases

- *U.S. ex rel. Geschrey v. Generations Healthcare, LLC* (N.D. Ill. 2012)
- *U.S. ex rel. Frazier v. IASIS Healthcare Corp. (D. Ariz. 2011)*
- *U.S. v. Prabhu (D. Nev. 2006)*

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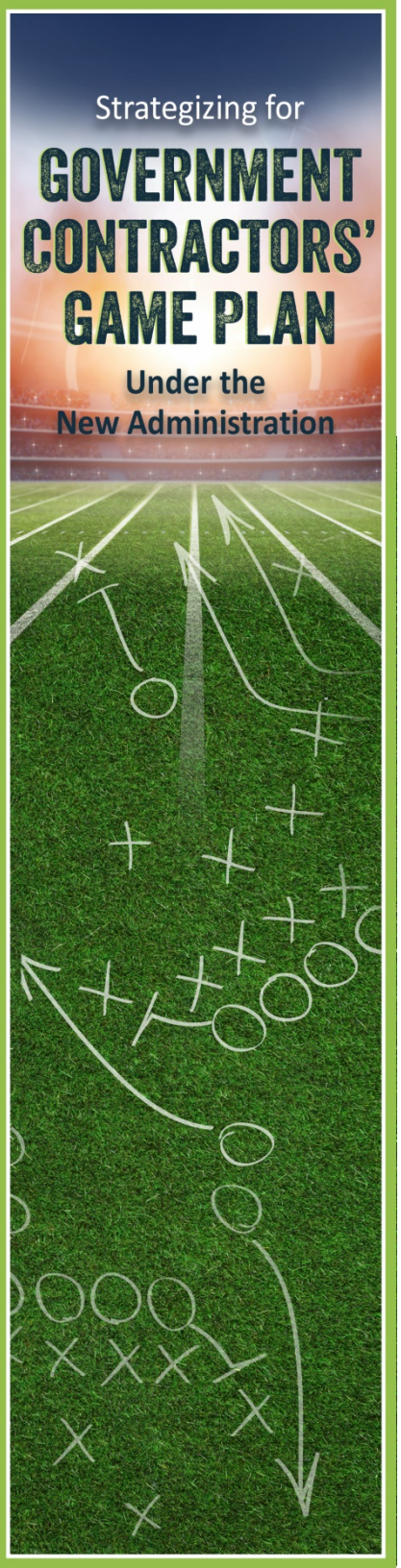
Seal Violation Does Not Mandate Dismissal

State Farm and Casualty Co. v. U.S. ex rel. Rigsby, (2016)

- Undisputed that Relator's counsel intentionally violated the seal requirement, publicizing the complaint.
- U.S. Supreme Court held dismissal based on a seal violation is discretionary, not mandatory, because the statute does not require dismissal.
- U.S. Supreme Court declined to provide guidance on factors that would justify discretionary dismissal.



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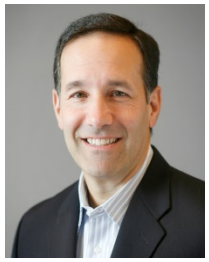

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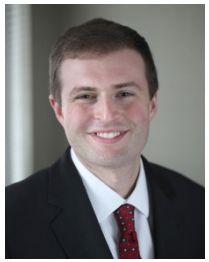

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The Shifting Sands of Government IP

John McCarthy
Karen Hermann
Jon Baker

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Overview

- What is MOSA, and why do I care?
- Proposed changes to the Bayh-Dole regulations
- Government intellectual property considerations in M&A diligence

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Modular Open System Approach

- DOD's 5 MOSA Principles
  - Establish an enabling environment
  - Employ modular design
  - Designate key interfaces
  - Use open standards; and
  - Certify conformance

DoD Open System Architecture Contract Guidebook for Program Managers, v. 1.1 (June 2013)

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MOSA-Related Changes to Data Rights Rules

- Relevant history
  - FY 2012 NDAA changes
  - Implementing regulations
- FY 2017 NDAA changes

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Data Rights – Relevant History

- FY 2012 NDAA attempted to implement MOSA principles in data rights rules
- Implemented via a proposed rule in June 2016
- Many uncertainties, many concerns

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Relevant History – FY 2012 NDAA

- Vague undefined term
  - Segregation/Reintegration Data
- Expansive deferred ordering requirements
- Broadly provides for the required delivery of and disclosure of segregation/reintegration data
- Extends the right for the Government to challenge use or release restriction from 3 years to 6 years
- Risk – Undermines the protection to contractor trade secret data and software under the current DFARS – What is not S/R data subject to disclosure

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Relevant History: Implementing Regulations for FY 2012 NDAA

- June 2016 – Proposed Rule
  - Extends the application of the FY 2012 NDAA Changes
    - Applied to software & commercial Items
    - Creates new form, fit and function exception for software
  - Provides little clarity to the definition of segregation/reintegration data
    - More than form, fit and function data
    - May include detailed manufacturing and process data
    - Segregation/Reintegration at the "lowest practicable segregable level"
  - New "unlimited term" Deferred Ordering clause required to be included in all but FAR 12 procurements

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Recent Changes - FY 2017 NDAA

- Defines MOSA
- Defines key MOSA terms
  - Major System Platform
  - Major System Component
  - Major System Interface
- Codifies requirement to use MOSA

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FY 2017 NDAA – Defines MOSA

an integrated business and technical strategy that—

(A) employs a modular design that uses **major system interfaces** between a **major system platform and a major system component**, between major system components, or between major system platforms;

(B) is **subjected to verification** to ensure major system interfaces comply with, if available and suitable, widely supported and consensus-based standards;

(C) uses a system architecture that **allows severable major system components** at the appropriate level to be **incrementally added, removed, or replaced** throughout the life cycle of a major system platform to afford opportunities for enhanced competition and innovation . . . .

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Definition – Major System Platform

means the highest level structure of a major weapon system that is not physically mounted or installed onto a higher level structure and on which a major system component can be physically mounted or installed.

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Definition - Major System Component

(A) means a **high level subsystem or assembly**, including hardware, software, or an integrated assembly of both, that can be **mounted or installed on a major system platform** through **well-defined major system interfaces**; and

(B) includes a subsystem or assembly that is **likely to have additional capability requirements, is likely to change because of evolving technology or threat, is needed for interoperability, facilitates incremental deployment of capabilities, or is expected to be replaced by another major system component**.

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Definition – Major System Interface

(A) means a shared boundary between a major system platform and a major system component, between major system components, or between major system platforms, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements; and

(B) is characterized clearly in terms of form, function, and the content that flows across the interface in order to enable technological innovation, incremental improvements, integration, and interoperability.

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FY 2017 NDAA – Requires MOSA

- Compels the use of MOSA "to the maximum extent practicable" for
  - Major defense acquisition program that
    - receives Milestone A or Milestone B approval after January 1, 2019,
  - to enable incremental development and enhance competition, innovation, and interoperability

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Data Rights – FY 2017 NDAA

- Walked back and/or revised elements of the FY 2012 NDAA revisions
  - Narrows focus of segregation and reintegration data with the qualifier "data pertaining to an interface"
  - Adopts focused definitions for the terms "major system component," "major system interface," and "modular open system approach" to provide further clarity

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FY 2017 NDAA - Release/ Disclosure of Technical Data

Items, components, processes developed exclusively at private expense:

May release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if—

(i) such release, disclosure, or use—

* * *

(II) is a release , disclosure or use of technical data ***pertaining to an interface*** between an item or process and other items or processes necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes

(ii) Such release, disclosure or use is made subject to prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data

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FY 2017 NDAA - Rights to Interface Data

- Interfaces developed with mixed funding:
  - Government purpose rights in data "pertaining to" the interface
  - Except if SecDef "determines, on the basis of criteria established in the regulations, that **negotiation** of different rights in such technical data would be in the best interest of the United States."

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FY 2017 NDAA - Rights to Interface Data

- Major system interfaces developed at private expense or with mixed funding:
  - Government purpose rights in data "pertaining to" the major system interface
  - Except if SecDef "determines that **negotiation** of different rights in such technical data would be in the best interest of the United States."

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FY 2017 NDAA - Rights to Interface Data

- Major system interfaces "shall be identified in the contract solicitation and the contract."
- "For technical data pertaining to a major system interface developed exclusively at private expense for which the United States asserts government purpose rights, the Secretary of Defense shall negotiate with the contractor the appropriate and reasonable compensation for such technical data."

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Data Rights – FY 2017 NDAA

- Rights in technical data pertaining to item or process developed with mixed funding
  - shall be established as early in the acquisition process as practicable (preferably during contract negotiations)
  - shall be based on negotiations between the United States and the contractor
  - except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiations would not be practicable.

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Data Rights – FY 2017 NDAA

- Deferred ordering
  - Reimposes a time cap
    - until the date occurring six years after acceptance of the last item (other than technical data) under a contract or the date of contract termination, whichever is later
  - Does not include data "utilized in the performance of a contacts" – only "generated"

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Data Rights – FY 2017 NDAA

- Section § 809(f) extends the charter of the Section 813 panel created under the FY 2016 NDAA
  - Extends the term to February 1, 2017
    - In fact, the panel has continues to meet and expects to issue its recommendations in June 2017
  - Seeks recommended changes to the DoD data rights statutes and regulations
  - Ensure that those rules are adequate for MOSA

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Proposed Changes to Bayh-Dole Rules

- 81 Fed. Reg. 78090-78097 (Nov. 7, 2016)
- Revised 37 CFR §§ 401, 404 relating to Rights to Federally Funded Inventions and Licensing of Government Owned Inventions

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Proposed Changes to Bayh-Dole Rules

- Mostly clarify existing practices
  - e.g., Bayh-Dole rules apply to large businesses
- However, there are some important changes
  - Agencies may shorten the 2-year period for contractor to provide notice of election to retain title.
  - Removes the 60-day limitation on the agency after receipt of late filed notice and/or election to retain title "to improve due diligence and enhance the ability of agencies to work with contractors."
  - Requires contractors to obtain assignments of rights to inventions from employees.

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Potential Impact on Contractors

- Contractors must plan for MOSA and data rights strategy at RFI and RFP stages
- Increased focus on process
  - Defining interface data subject to broader release
  - Negotiating rights with agencies
  - Negotiating "appropriate and reasonable compensation"
  - Assuring timely disclosure of inventions and election to retain title

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Government IP Issues in Corporate Transactions

- Sale of Government Contractors involve unique IP issues
  - IP Rights of Contractor
    - Impairment of those rights
  - USG rights
  - Other risks
- Due diligence by buyer
- Preparation by seller

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Government IP Issues in Corporate Transactions – Patents

- Conceived or first reduced to practice in the performance of a USG Contract
- Disclosure and election to retain title/agency waiver
- Compliance with reporting req'ts
- Preference for US Industry

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Government IP Issues in Corporate Transactions – Tech Data/Software

- Development involving USG Dollars
- Tracking of US Gov't Expense
- Compliance with marking req'ts
- Delivery to USG
- Open Source Software

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Government IP Issues in Corporate Transactions – Due Diligence

- What were the contracting agencies?
- Unique IP provisions
  - Government ownership/restrictions on use
- Patents
  - Key patents
  - Processes in place?
  - Processes followed?
- Tech Data/Computer Software
  - Key tech data/computer software
  - Processes in place?
  - Processes followed?
- Seller reps
- Determine impact of issues on value

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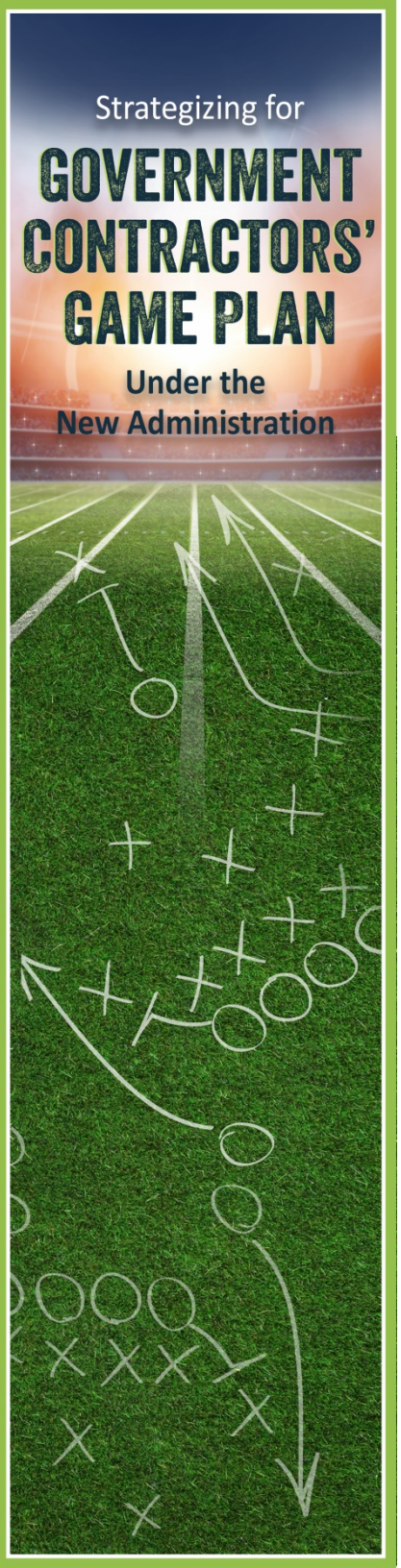
Government IP Issues in Corporate Transactions – Seller Side

- IP Audit
  - Identify assets
  - Identify issues
- Assemble/Update records
- Correct problems
- Maximize value
- Risks going forward



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Bid Protests: Continued March on Washington

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Protests Persist Despite Spending Shifts

- 2789 cases filed in FY16
  - Up 6% from FY15
  - Up from a low of 2429 cases in FY13
- Sustains: 139 in FY16 for a sustain rate of 22.56%
  - FY15: only 68 sustains
  - FY13: the second-highest number of sustains in the past 5 years (106), but sustain rate was only 18.6%

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Protests Persist Despite Spending Shifts

- Effectiveness rate has remained relatively level
  - FY16: 46%
  - During the prior four years, the effectiveness rate rose from 42% to 45%
- ADR used less than in prior years
  - ADR only used in 69 cases as compared to 103 in FY15
- Delayed impact of budget shifts on protest litigation – increased acquisition timelines, multiple rounds of awards/litigation
- Agencies looking for "quick" solutions or those less vulnerable to challenges (8(a) sole source awards, bridge contracts, GWACs, MAS, OASIS)

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Corrective Action: Background

GAO's lens on voluntary corrective action:

- Agencies have broad discretion to take corrective action where determined to be necessary
- GAO will not object to corrective action, so long as appropriate to remedy the concern causing corrective action
- GAO generally limits review to whether the agency's corrective action is appropriate to remedy the flaw prompting corrective action
- Agencies are not required to identify the flaw in its notice of corrective action
- GAO often dismisses protests over objections on scope of corrective action

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Corrective Action: Procedural Questions

- How does a protester preserve its challenges?
  - Challenges to the ground rules of corrective action are not timely filed after agency completes corrective action and announces new award decision
    - *Domain Name Alliance Registry,* B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168
  - Highlights importance of keeping protest counsel apprised of the steps taken by the agency during corrective action
- What impact does GAO's dismissal of a protest over an objection have on a protester's ability to later file a standalone protest to the corrective action?
  - GAO has heard such cases on the merits
    - *XYZ Corporation*, B-413243.2, Oct. 18, 2016, 2016 CPD ¶ 296

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Corrective Action: Challenging the Scope of Corrective Action

- Such challenges include:
  - Propriety of agency's decision to take voluntary corrective action in the first place;
  - Propriety of amendments to the RFP;
  - Whether discussions and/or clarifications should be allowed;
  - Scope of proposal revisions
- Both protesters and awardees can challenge the scope of corrective action
- Can be brought before GAO or COFC

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Corrective Action: Scope of Proposal Revisions

- *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355:
  - In sustaining initial protest, GAO recommended agency reopen discussions
  - Agency sought FPRs limited to past performance and key personnel
    - Protester challenged the agency's conduct of the corrective action
    - GAO held outcome prediction ADR and agency took corrective action again
  - Agency revised FPR instructions but protester again challenged that it excluded proposal revisions "inextricably linked" to key personnel substitutions permitted in response to the discussions

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Corrective Action: Scope of Proposal Revisions

- *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355 (cont'd):
  - The Agency contended that it was trying to prevent unwarranted "augmentation" of offerors' technical approaches
    - GAO held this was not the appropriate test
  - Even where an agency is justified in restricting discussions responses in corrective action, the agency may not prohibit offerors from revising related areas of their proposals which are materially impacted
    - In this case, the FPR instructions were unreasonable to the extent they prohibit proposal revisions arising out of the material impact of changes in key personnel

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Corrective Action: Amendment to the RFP

- *Professional Service Industries, Inc. v. United States*, 129 Fed. Cl. 190 (2016):
  - GAO sustained protest that agency improperly overlooked the fact that the awardee's proposed program manager did not meet mandatory minimum experience requirements
  - Agency took corrective action to amend the RFP, stripping out exactly those qualifications that awardee's Program Manager lacked
  - Protester challenged this corrective action at COFC arguing:
    - The agency's corrective action was not "narrowly targeted" to address the error which could have been fixed by reevaluating against the original RFP; and
    - Alternatively, that the agency had never made a determination that its needs for a program manager had changed

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Corrective Action: Amendment to the RFP

- *Professional Service Industries, Inc. v. United States*, 129 Fed. Cl. 190 (2016) (cont'd):
  - COFC concluded that the agency's action was arbitrary and capricious:
    - No evidence in the record explained why original RFP Program Manager qualifications were overstated or why new "watered down" qualifications met the agency's needs;
    - Agency could not satisfy requirement that "a reasoned explanation is needed for disregarding facts and circumstances that underlay [the prior requirement]"
  - COFC noted two concerns:
    - "[C]hanges in responsibilities and qualifications that [the agency] proposed have the effect of conforming the solicitation precisely to the experience and qualifications of [awardee's] proposal;"
    - "Rather than ensuring that an offeror's proposal conform strictly to the requirements of the solicitation, the agency has changed the solicitation to conform to an offeror's proposal"

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Corrective Action: Propriety of Taking Voluntary Corrective Action

- *Jacobs Technology, Inc. v. United States*, Nos. 16-1602C, 17-88C (Apr. 7, 2017)
  - Agency took corrective action in response to protest filed at GAO
  - Awardee challenged the agency's decision to take corrective action at COFC, arguing:
    - The decision to take corrective action was flawed because the error identified was not prejudicial
  - COFC rejected the attempt to impose a prejudice requirement

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Key Personnel – Background for Harsh New GAO Rule for Mid-Procurement Departures

- Background – Bait and Switch
  - Involves knowing misrepresentation of the availability of proposed key personnel; must be known at time of proposal submission
- *Greenleaf Constr. Co., Inc.*, B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19
  - Analogous to "bait and switch" when an offeror learns of the unavailability of key personnel after proposal submission but "fails to disclose" that knowledge to agency before award
  - After reasonable passage of time, non-disclosure begins to share some hallmarks of a misrepresentation; proposal non-compliant

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Key Personnel – Background Cont'd

- *Pioneering Evolution, LLC*, B-412016, Dec. 8, 2015, 2015 CPD ¶ 385:
  - One of protester's key personnel departs unexpectedly after FPR submission; protester discloses departure in accordance with *Greenleaf* rule and attempts to submit substitute personnel
  - Agency disqualifies protester due to materially incomplete proposal on account of unfilled mandatory key personnel position
  - GAO agrees with agency that protester cannot substitute key personnel without discussions; agency was not required to re-open discussions to accommodate; protest denied

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Key Personnel – New Proposal Risk Cont'd

- *General Revenue Corp. et al.*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 WL 1316186:
  - First case applying *Greenleaf* and *Pioneering Evolution* rules in same decision to find a contract award was unlawful due to unavailability of key personnel
  - Numerous awardees (and protesters) in large-scale multiple-award procurement saw departure of key personnel during lengthy evaluation period
  - None of the offerors disclosed departures; agency never considered the issue

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Key Personnel – New Proposal Risk Cont'd

- *General Revenue Corp. et al.* holding:
  - Offerors should have disclosed; if they had, would have been ineligible
  - "When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal."
  - Rule applies even when offerors are free to choose what positions are "key"
    - If designated as key by offeror, must be treated as such
  - Agency must go back and figure out how it wants to fix the problem:
    - Either open discussions, or
    - Disqualify all incomplete proposals

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Implications of *General Revenue Corp.*

- Extremely difficult for agencies to manage this issue without altered approach to discussions (last minute refresh opportunities)
- Companies must constantly monitor their personnel and provide disclosures
- Disclosures will lead to disqualifications unless discussions are conducted
- Must monitor competitors for loss of known key personnel
- Similar rule for team members and subcontractors?
- How does the rule function in corrective action if personnel were lost after award during pendency of a protest?

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New Precedent Requiring Opportunity to Fix Clerical Errors in Proposals

- Can an agency abuse its discretion not to conduct clarifications or discussions with offerors, even when the RFP advises offerors of the possibility of award based on initial proposals?
- GAO: No - not reviewable
- COFC in *Level 3 Communications, LLC v. United States*, 129 Fed. Cl. 487 (2016): Yes

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Changing Law on Clarifications and Discussions?

Evolution of GAO's Rule

- Prior to 1993, rule is unclear
- *The Jonathan Corp.; Metro Mach. Corp.*, B-251698.3, May 17, 1993, 93-2 CPD ¶ 174:
  - "Even where solicitation states that the agency intends to award a contract without holding discussions unless discussions are necessary, the decision that discussions are not necessary must be reasonably based on the particular circumstances of the procurement, including consideration of the proposals received and the basis for the selection decision."
  - Protest sustained where discussions were unreasonably bypassed

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Evolution of GAO Discussions Rule

- Since 1993, GAO distancing from *The Jonathan Corp.*
- In 2012, officially repudiated the holding:
  - "An agency's decision not to initiate discussions is a matter we generally will not review. To the extent our decision in *The Jonathan Corp.*, establishes a different rule, it will no longer be followed." *Booz Allen Hamilton, Inc.*, B-405993, Jan. 19, 2012, 2012 CPD ¶ 30 (citations omitted).
- GAO simply will not consider this issue

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GAO on Clarifications

- Similar rules regarding less-invasive clarifications process for addressing clerical errors. Common GAO refrain:
  - "It is well-settled that an offeror has the obligation to submit a well written proposal free of ambiguity regarding its merits or compliance with solicitation requirements and that an offeror fails to do so at its own risk."
  - "In a FAR Part 15 procurement, an agency may, but is not required to, engage in clarifications and give offerors an opportunity to clarify certain aspects of their proposals or to resolve minor or clerical errors; the agency has broad discretion to decide whether to engage in clarifications with an offeror."
  - GAO has never found a circumstance where agency's "broad discretion" has been abused

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COFC Takes Different Position on Clarifications

- *BCPeabody Construction Services, Inc. v. United States*, 112 Fed. Cl. 502 (2013):
  - Protest sustained where simple clerical error which could easily be resolved was left unresolved and led to agency disqualifying protester's higher rated, lower cost proposal
  - "The FAR allows, but does not require, such exchanges to take place. Taken at face value, this court concurs with such a statement, but it cannot accept the implication that there are never situations in which a contracting officer's discretion would be abused by a failure to seek clarification."
  - Decision does not address discussions, only clarifications
- GAO has explicitly declined to follow *BCPeabody*

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COFC on Clerical Errors

- *Level 3 Communications, LLC v. United States*, 129 Fed. Cl. 487 (2016):
  - First case to adopt *BCPeabody* holding on failure to conduct clarifications
  - Agency knew it was clerical error and what offeror actually intended; relied on the error and passed up $38M in savings rather than clarify
  - "In this case, as in BCPeabody, the CO had virtually overwhelming cause to seek clarification from Level 3, because of its significantly lower price." (Emphasis added)
  - Clear disagreement with GAO on reviewability

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COFC: Mandatory Discussions?

- *Level 3 Communications*
  - Goes beyond *BCPeabody:* even if correction of obvious clerical error would rise to "discussions" instead of "clarifications," agency still abused its discretion not to conduct discussions
  - "In this case, the CO failed to consider an important aspect of the problem: the fact that Level 3's offer was approximately $38.6 million less than Verizon's. Under these circumstances, the CO should have entered into negotiations with offerors, since [the RFP] expressly reserves that right."
- Is this aspect of the holding less likely to be followed?
  - Difficult to draw bright lines

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Developments in Timeliness Rules for Raising Certain OCI Allegations

The Concourse Group, LLC v. United States, No. 17-129 (Mar. 13, 2017):

- Introduces major difference in interpretation by COFC v. GAO on when many OCI allegations must be timely raised
- If new approach is adopted by GAO, will create new pressure on companies and in-house counsel to identify and advance OCI concerns earlier in the procurement process

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New Law on OCI Protest Timeliness

Background on GAO's OCI timeliness rules:

- "As a general rule, a protester is not required to protest an agency's OCI determination until after contract award." *See, e.g., REEP, Inc.*, B-290688, Sept. 20, 2002, 2002 CPD ¶ 158
- However, OCI allegations must be raised pre-award:
  - (1) "where the protester is aware of the operative facts regarding the existence of an actual or potential OCI regarding a prospective offeror," AND
  - (2) "the protester has been advised by the agency of the agency's position on the offeror's eligibility to compete." *See, e.g., Honeywell Tech. Solutions, Inc.*, B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49

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New Law on OCI Protest Timeliness

- COFC has limited case law on OCI timeliness and has not previously directly engaged with the GAO rule
- In *The Concourse Group, LLC v. United States*, the COFC found:
  - Documents indicating incumbent-awardee's interest in procurement were "easily recognizable or obvious" facts;
  - Basis of OCI allegation was know to protester pre-award
  - Court holds: "Concourse failed to timely raise its OCI claims prior to the award of the contract despite the opportunity to do so and its easy access to the knowledge upon which it now relies. As a result, Concourse's OCI claims are waived."

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New Law on OCI Protest Timeliness

- Is *Concourse* a COFC repudiation of GAO's timeliness approach?
  - GAO would almost certainly have ruled differently because agency never provided indication of its view on the OCI issue prior to proposal submission;
  - COFC never mentions GAO rule;
  - Grounds decision in *Blue & Gold Fleet* waiver doctrine under the Tucker Act, not CICA timeliness rules that are applicable to GAO;
  - However, no clear basis for distinction under the two statutes;
  - Analysis of COFC's precedent in *CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698, 712 (2011), *aff'd*, 475 F. App'x 341 (Fed. Cir. 2012) overlooks key distinction points

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New Law on OCI Protest Timeliness

- What is the COFC's vision for OCI protests?
  - If a firm knows that a competitor has a likely unequal access OCI, but does not know if mitigation has been implemented, *Concourse* suggests a protest must still be raised
  - What agency action is the Government defending? Agency has not even had a chance to investigate the matter or review a mitigation plan
  - What is the Court going to review if such a protest is raised pre-award? (There is no record)
  - What remedy will the Court issue?

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New OCI Protest Rules: Industry Impact

- Potential Impact for Industry and In-House Counsel:
  - For now, no indication GAO is backing down from its rule, so protests can still be raised at GAO post award
  - Ability to raise certain post-award OCI allegations at the COFC may be limited
  - If GAO adopts *Concourse* approach, companies must be aggressive challenging eligibility of competitors pre-award or forfeit right later
    - Increased burden on in-house counsel to help contracts personnel to identify OCI and convince management to approve preemptive litigation
    - Added costs and more challenges of piecemeal litigation

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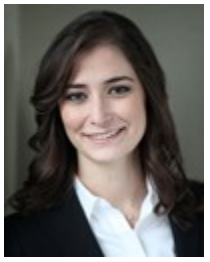

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Strategizing for
GOVERNMENT CONTRACTORS' GAME PLAN
Under the New Administration

WELCOME

Turbulent Seas – Competing Policies Roil International Procurement

Addie Cliffe

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International Procurement

- Tension between protectionist, "America First" rhetoric on the one hand, and internationalism/leveraging U.S. leadership on the other
- In first 100 days, this tension has resulted in conflicting goals and policies and swift changes in course
- Uncertainty in terms of government contracting rules and regulations even more pronounced with respect to international issues

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Domestic Preferences

- No new requirements or changes to existing laws yet, but signals heightened enforcement on domestic source restrictions, and potential renegotiation of trade treaties
  - EO 13788 on Buy American and Hire American
  - EO on Establishment of Office of Trade and Manufacturing Policy
  - Pending Legislation
  - Recent CBP Determinations

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National Security Import Reviews

- Section 232 Investigations of Imported Steel & Aluminum
  - 270 days to conclude
  - Impact of imports on national security
  - Broad authority to address
- Industry
  - May be required to provide information
  - Should monitor if significant inputs could become subject to exclusion or tariffs

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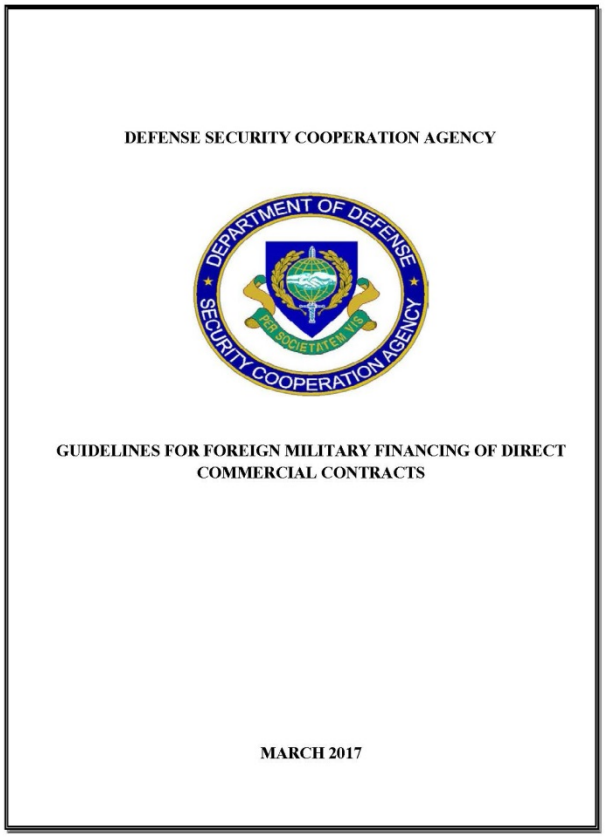
March 2017 FMF Guidelines

- 1st Revision in 8 years
- Focused on Key Trouble Areas:
  - Commissions
  - Non-US Content
- Audits of sales thru Resellers



DEFENSE SECURITY COOPERATION AGENCY

GUIDELINES FOR FOREIGN MILITARY FINANCING OF DIRECT COMMERCIAL CONTRACTS

MARCH 2017

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Key Changes to FMF Rules

- Commissions
- Calculating U.S. vs. non-U.S. vs. Host Country content
  - 1st Tier Subcontractors
  - Subsidiaries
- Special content rules
  - IT hardware
  - Software
  - Inventoried Raw Materials|Components

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Export Controls

- **Export Control Reform marches on?**
  - Definitions, rounding out the USML revisions (Categories I-III), refreshing/revising USML going forward
  - Export control modernization - DDTC moving to automated forms VSDs/M&A notices, web-based CJs
- **Other priorities in new Administration?**
  - BIS intrusion and surveillance rule/ Wassenaar updates
  - DOJ/NSD voluntary disclosure guidance

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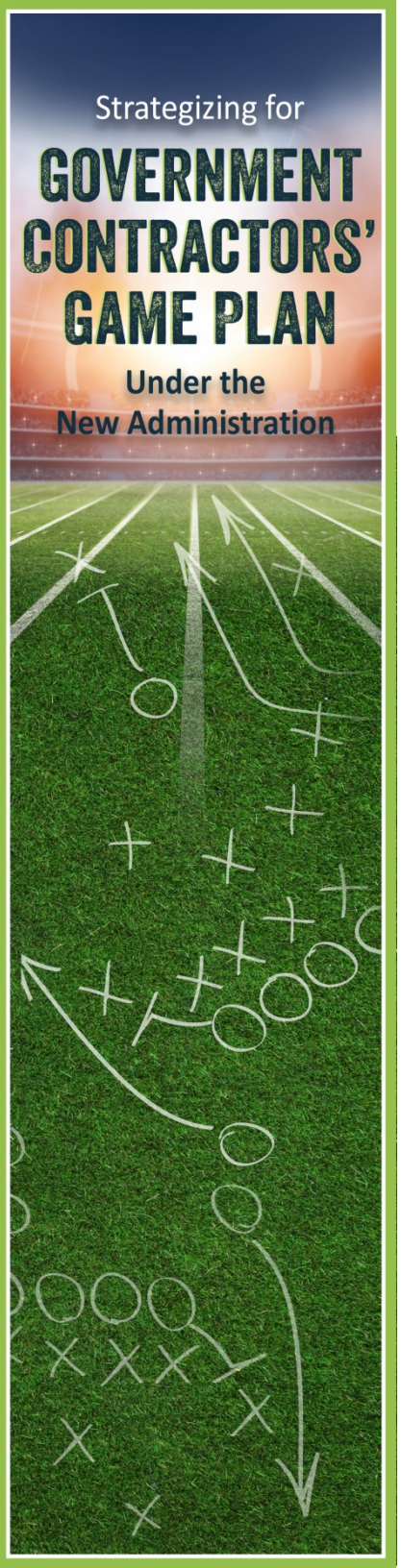
Sanctions

- **Iran:**
  - New sanctions & narrower interpretation of the JCPOA?
- **Cuba:**
  - Rolling back opening of trade and investment?
  - Prospect for legislative repeal?
- **Russia:**
  - Relationship reset or stronger measures?



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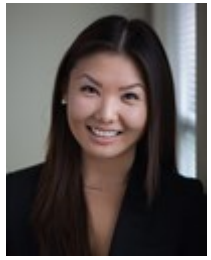

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Labor and Employment Update

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Rebecca Springer

Labor & Employment Update

- Obama-Era Executive Orders and Regulatory Actions
  - EO on Fair Pay and Safe Workplaces – "don't let the door hit you . . . ."
  - Paid Sick Leave Final Rule
  - FLSA Final Rule
  - EEO-1 Report Revisions – compensation submission

Labor & Employment Update

- New Regulatory Actions
  - "Hire American"
    - Stated purposes
      - Create higher wages and employment rates for workers in the United States
      - Prevent fraud and abuse in immigration system
    - Action – "ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries"
  - Davis-Bacon Act – rollback possibility?

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Enforcement Landscape

- Department of Labor
  - Alex Acosta Confirmed April 27
  - OFCCP
    - January 2017 – "Beat the Clock"
      - JP Morgan and Oracle – substantive complaints alleging systemic discrimination in pay
      - Google – "show cause" notice on production of data – focus on pay issues
    - Current audits
  - Joint Employer

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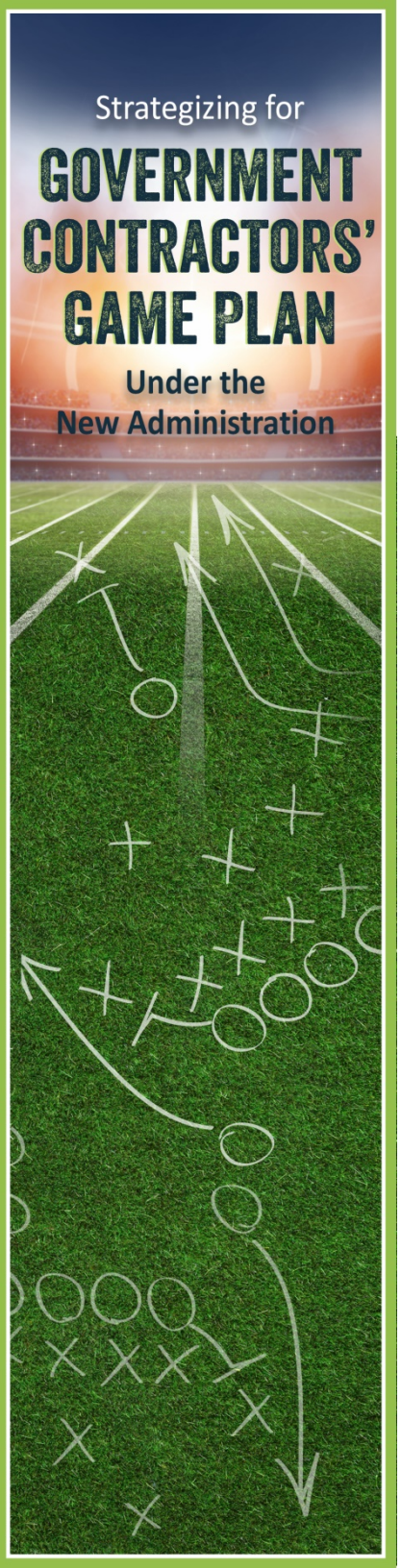
Enforcement Landscape

- EEOC
  - Subpoena fights
  - Potential shift from systemic to individual cases
- NLRB
  - Slower to change



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All Contracting is Local: Insight into State and Local Procurement Process

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Trump Administration Focus

- Information Technology
  - State Cyber Resiliency Act
  - National Association of State CIOs
  - 80% of states lack funding to develop sufficient cybersecurity efforts
- Cooperative Purchasing
- Expected Investment of approximately $1 trillion in infrastructure
  - Rebuilding roads, bridges, airports, schools, hospitals
  - "If you have a job that can't start within 90 days, we're not going to give you the money for it"
- Public Private Partnership – P3

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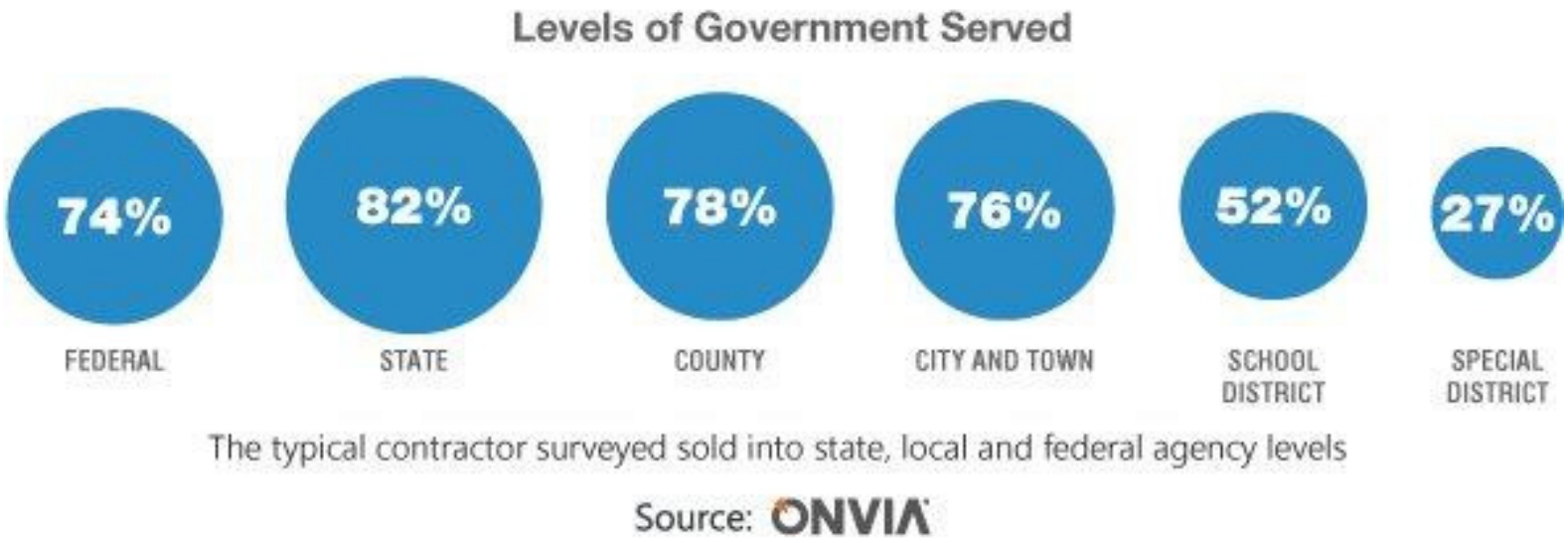
Federal Contractors . . . Take Note



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Information Technology

- Mission Critical for State & Local Governments
  - State Cyber Resiliency Act
- Evolving Role of IT in Government
- Custom Solutions vs COTS
- Standardized Risk management
- Cloud Services
- Outdated IT Systems

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Cooperative Agreements

- A growing trend in state and local contracting that assists public procurement officials in:
  - Leveraging collective buying power
  - Reducing administrative time and expense
  - Stimulating competition
  - Obtaining best value
- Gives contractors the opportunity to grow volume of business with reduced costs.

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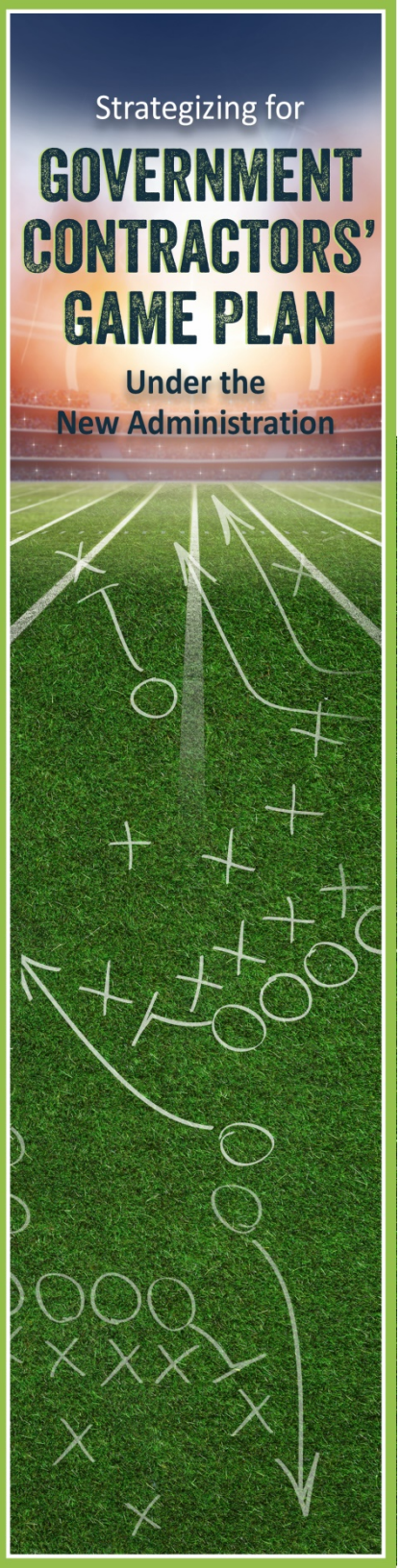
Models of Cooperative Purchasing

- **Types of Cooperatives**
  - ***True Cooperatives:*** Two or more organizations combine their requirements and solicit bids or offers for goods or services.
  - ***Piggyback Options:*** One or more organizations represent their requirements and includes an option for other organizations to "ride" or "bridge" the contract as awarded.
  - ***Third Party Aggregators:*** Organizations that create and market cooperative contract opportunities to governmental entities.



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State and Local Cooperative Purchasing Options

NASPO ValuePoint
formerly WSCA-NASPO

U.S. COMMUNITIES
GOVERNMENT PURCHASING ALLIANCE

VIRGINIA ASSOCIATION OF STATE COLLEGE & UNIVERSITY PURCHASING PROFESSIONALS
VASCUPP

WICHE
Western Interstate Commission for Higher Education

TX MAS

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Cooperative Purchasing under the GSA Schedule

- State Purchases under GSA Schedules
  - Authority Section 211 of the E-Government Act of 2002 (Public Law 107-347)
  - Schedule 70 and Schedule 84
  - Additional terms and conditions may be included and should not conflict with existing GSA FSS terms and conditions, such as:
    - Disputes Clause
    - Patent Indemnity Clause
    - Certain Commercial Item Terms and Conditions

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Cooperative Purchasing Challenges

- Complying with state and local laws
- Battle of the forms/terms
- Ensuring adequate competition
- Small business participation

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Public Private Partnership – P3

- What is P3
  - Agreement between government and private entity
  - Private entity provides funding and typically assumes risk for project (financial, operational, technical)
  - Alternative method of financing
  - Sharing of resources expertise

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Public Private Partnership

Success Stories

- Dulles Toll Road - Virginia
- Union Station – Washington DC
- Chesapeake Forest Partnership
- Watervliet Arsenal – New York

Planned projects

- UC Merced campus expansion
- New Courthouse – Howard County, Maryland
- New VA Medical Facility – Omaha Nebraska

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Public Private Partnership – *Legal Considerations*

- Government Property typical long-term lease
- Private partner performance/payment bonds
- Policies/procedures governing rights/responsibilities in case of termination or material default

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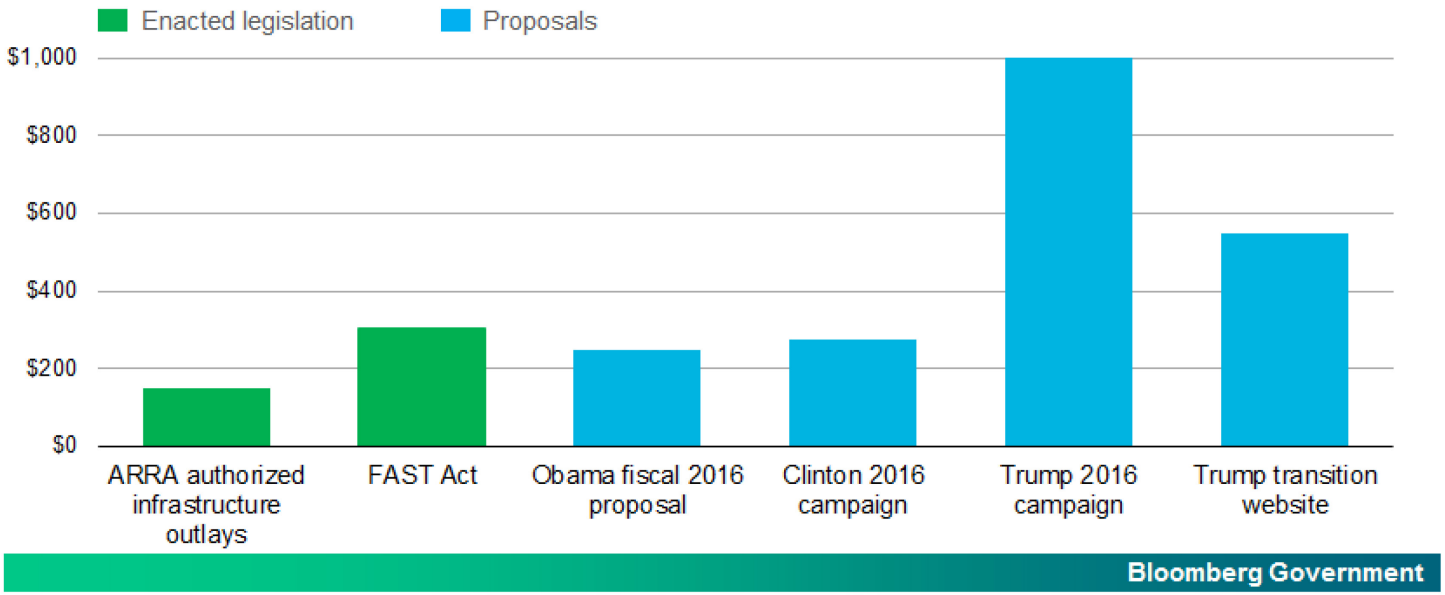
Infrastructure Developments

Recent Infrastructure Legislation and Proposals

Budget authority in billions of current dollars



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State and Local Contracting Considerations

Uniformity (or Lack thereof)

- Contracting Entity
  - State
  - Local
  - University
  - Multi-Sate Consortium
  - Concern regarding Federal Funding
  - Grants/procurements

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State and Local Contracting Considerations

Protests

Protest Process

- Some states have more robust systems than others
- Protest relief differ by state
- Protest procedures are more difficult to identify *(May not be in the solicitation)*
- Timing
- Pre-award vs Post-award Protests

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State and Local Contracting Considerations

Public Records

- Freedom of Information or Public Records Act
  - State statutes vary widely and often do not follow Federal Act (FOIA)
  - Procedure, timeliness and level of access vary

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Specific Terms and Conditions

Limitation on Contractor Liability

State and local agencies typically include limitation of liability provisions that favor state position

- Limitation to Contract Value
- Other Calculation Methods

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Specific Terms and Conditions

Limitation on Indemnity

- State and local governments may not permit mutual indemnification clauses
- Prepare for alternative means of protection

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Specific Terms and Conditions

In-State Preference

- Preference for In-State Vendors
  - Geographic location
  - Residency requirement
  - Origination of product

Any public entity may procure materials, supplies, and equipment from federal General Services Administration supply schedules in compliance with the Federal Acquisitions Streamlining Act (Public Law 103-355) and regulations adopted pursuant to that law, and with rules and regulations which may be adopted by the central purchasing agency of the division of administration. Such purchases need not comply with the competitive bidding requirements of this Chapter. However, such materials, supplies, or equipment shall not be purchased at a price higher than the price of the same item listed on any available state purchasing contract. No use shall be made of federal General Services Administration supply schedules under ***the provisions of this Section without the participation of a Louisiana licensed dealer or distributor.***

- *La. Stat. Ann. § 38:2212.1*

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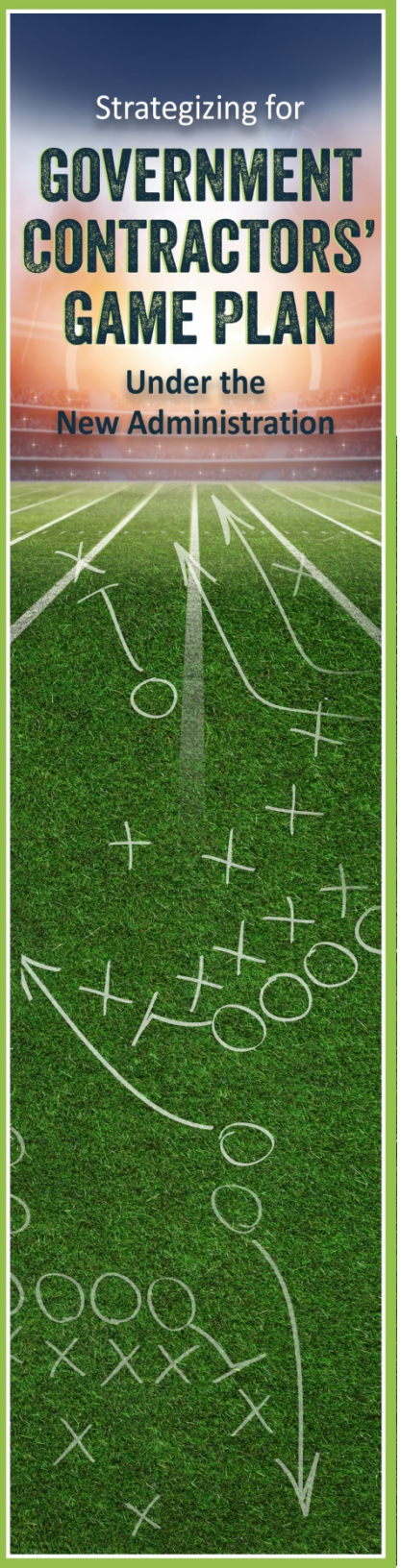
Specific Terms and Conditions

- Choice of Law
- Specialized Court for Claim Against State
- Insurance Requirements
- Local Registration Requirements
- Best Pricing Requirements
- Audits
- Lobbying



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Cost and Pricing Issues

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Liz Buehler
Charles Baek

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Game Plan

- Commercial Pricing
- DCAA Audit Progress
- 2017 NDAA
- 2016 NDAA Section 809 Panel
- Prime Contractor Responsibilities for Managing Subcontractors
- Trends in Statute of Limitations Cases
- Intersegment Pricing
- Allowability of Various Costs

Promoting Commercial Acquisition

And

Making Commercial-Item Pricing More Commercial

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Increasing emphasis on Commercial Acquisition by DoD

- Congressional Action through Nat'l Defense Authorization Acts
- Court decisions adding strength
- DoD implementation catching up

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Promoting a Commercial Approach

Congressional Action in Recent NDAAs

- IT products and services – 2016 NDAA § 855
  - Required DoD to establish procedural hurdles to acquisition of IT products and services as anything other than commercial items [*See* DFARS Proposed Rule, 81 Fed. Reg. 53101 (Aug. 11, 2016)]
- Other services – 2017 NDAA § 876
  - Requires DoD guidance with preference for commercial acquisition of facilities related services, knowledge-based services (except engineering), construction services, medical services, transportation services

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Promoting a Commercial Approach

Congressional Action in Recent NDAAs

- Preference for maintaining commercial status
  - 2016 NDAA § 851, Amended TINA (10 U.S.C. § 2306a)
  - Default to reliance on prior Commercial-Item Determinations by DoD/Military department / Defense agency
  - Imposes special review requirements if change approach

[*See* DFARS Proposed Rule, 81 Fed. Reg. 53101 (Aug. 11, 2016)]

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Promoting a Commercial Approach

Nontraditional Defense Contractors

- 2016 NDAA (Generally)
  - 10 U.S.C. § 2380a - allows COs to treat acquisition from NDC as commercial
  - DFARS proposed rule:
    - "intended to enhance defense innovation and create incentives for cutting-edge firms to do business with DoD."
    - NDC may include "business segments . . . established under traditional defense contractors"
- 2017 NDAA (Services)
  - 10 U.S.C. § 2380a(b) – requires treatment of services from NDC as commercial:
    - To the extent services "use the same pool of employees" as used for commercial customers; and
    - If priced "using methodology similar to methodology used for commercial pricing."

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Promoting a Commercial Approach

Commingled Items

- 2017 NDAA § 877
- New requirement (at 10 U.S.C. § 2380B) to treat as commercial items:
  - "valued at less than $10,000";
  - purchased by a contractor for use in the performance of multiple contracts "with the Department of Defense and other parties"; and
  - not identifiable to any particular contract

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Promoting a Commercial Approach

Court Decisions

- *Palantir USG, Inc. v. United States* (COFC 2016)
- *CGI Federal Inc. v. United States* (Fed. Cir. 2015)

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Pricing Commercial Items

DCMA Commercial Item Group

- 2016 NDAA § 851 created 10 U.S.C. § 2380
  - Required a centralized DoD capability to oversee CIDs
  - Required public access to determinations
- 2017 NDAA § 873 Amended 10 U.S.C. § 2380
  - Changed "oversee" to "provide assistance"
  - Removed public access requirement
  - Added requirement to support price-reasonableness analyses
- DCMA Commercial Item Group
  - Operational June 2016
  - Maintains public list of CIDs reviewed (w/out determination) http://www.dcma.mil/commercial-item-group/

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Pricing Commercial Items

Market Research

- 2017 NDAA § 871
- Adds 10 U.S.C. § 2377(d) "Market Research for Price Analysis"
  - Requires DoD to conduct or obtain market research to support the determination of price reasonableness in commercial-item procurements
  - May require the offeror to submit "relevant information"
  - For Major Weapon System procurements, use information submitted under 10 USC § 2379(d)

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Pricing Commercial Items

Value Analysis

- 2017 NDAA § 872
- Adds a new 10 U.S.C. § 2379(d)(2) [Major Weapons Systems]:
  - Offeror may submit information re the "value" of a commercial item to aid in the determination of price reasonableness
  - CO may consider that information "in addition to" information such as prices paid for the same or similar item, or other relevant information authorized under 10 U.S.C . § 2379(d)(1)
  - Similar to FAR 15.404-1(b)(4)
- New draft DoD *Guidebook for Acquiring Commercial Items* (Feb. 24, 2017)

DCAA Audit Process and 2017 NDAA

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DCAA Audit Progress

- September 2016 DCAA Memo
  - Revival of DCAA's ability to provide audit support for non-Defense agencies because DCAA had "met the requirement of less than 18 months of incurred cost inventory"
- FY 2016 Report to Congress
  - Impact of hiring freeze on audit backlog
- April 2017 HASC Hearing on Defense Contract Auditing Process
  - Concurrent auditing v. multi-year auditing
  - Involvement of independent public auditors

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2017 NDAA – Audit Process

- **Section 820**
  - Requires DCAA (without performing additional audits) to accept a summary of findings prepared by a commercial auditor under certain circumstances
    - Limits DCAA audit authority to direct costs unless contractor has "predominantly" cost-type contracts
  - Revises CAS statute
  - Creates Defense CAS Board

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2017 NDAA – Audit Process

- **Section 892**
  - Requires DoD to select audit service providers on a best value, not LPTA, basis
- **Section 893**
  - Allows contractors to use third-party independent audits of their contractor business systems in certain circumstances, thereby eliminating the need for further DoD review

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2017 NDAA – Cost Principles

- **Section 823**
  - Repeals most retroactive aspects of executive compensation ceiling
- **Section 824**
  - Requires contractors to report IR&D and B&P separately from other allowable indirect costs (and separately from each other)
  - Codifies and limits requirements for disclosure of IR&D efforts
  - Applies to indirect costs incurred on or after 10/1/17
  - Requires DoD to established an annual goal limiting amount of reimbursable B&P costs

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2017 NDAA – Statutory Preferences

- **Section 831**
  - Establishes preference for performance-based payments (PBPs)
  - May not limit PBPs to costs incurred
  - Requires non-traditional contractor's accounting system to be GAAP-compliant to qualify for PBPs, but does not require development of government-unique accounting systems or practices as a prerequisite
  - DFARS revision within 120 days of enactment

2016 NDAA Section 809 Panel

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2016 NDAA Section 809 Panel

- Panel to review all DOD procurement issues
- 9 subpanels, one for CAS and other accounting issues
- Potential issues
  - Relocate DCAA
  - Relocate CAS Board
  - Need for DCAS Board
  - Offsetting multiple changes
  - Coverage issues

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Prime Contractor Responsibilities for Managing Subcontractors

- *LMIS* decision about subcontractor management
  - ASBCA dismissed Government's $100M breach of contract claim for failure to state a claim, finding it was "based on nothing more than a plainly invalid legal theory"

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Trends in Statute of Limitations Cases

- *Kellogg Brown & Root Servs., Inc.*, ASBCA No. 58518, 16-1 BCA ¶ 36,408 (June 16, 2016)
- *Crane & Co. v. Dep't of the Treasury*, CBCA No. 4965, 16-1 BCA ¶ 36,539 (Nov. 8, 2016)
- *Adamant Group for Contracting & Gen. Trading*, ASBCA No. 60316, 16-1 BCA ¶ 36,577 (Nov. 29, 2016)
- *Sparton DeLeon Springs, LLC*, ASBCA No. 60416, 17-1 BCA ¶ 36,601 (Dec. 28, 2016)
- *Technology Sys., Inc.*, ASBCA No. 59577, 17-1 BCA ¶ 36,631 (Jan. 12, 2017)
- *Thorington Elec. & Constr. Co.*, ASBCA No. 60476, 2017 WL 840393 (Feb. 16, 2017)

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Intersegment Pricing

- *A-T Solutions, Inc.*, ASBCA No. 59338, 2017 WL 706919
  - Concerned the pricing of items transferred between a contractor's commonly controlled subdivisions
  - Transfer at price under FAR 31.205-26(e) permitted where the company demonstrated an "established practice" of pricing interorganizational transfers at other than cost for commercial work, as evidenced by records and testimony
  - FAR 31.205-26(e) does not impose any "economic substance" requirement

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Allowability of Various Costs

- *Raytheon Co.*, ASBCA No. 57743, *et al.* (Apr. 17, 2017)
  - Lobbying costs
    - Unclear whether Board found salary paid to employees engaged in lobbying is expressly unallowable (but probably did)
    - Clear that Board found that such costs are unallowable as "directly associated costs" and subject to penalties on that basis
  - Design and build costs of an M&A application intended to be used both for general planning and specific M&A purposes, but terminated before completion and never used in connection with any M&A target, are allowable economic and market planning costs
  - Testimony and other credible evidence be used to demonstrate allowability of consultant costs in the absence of perfect documentation
  - Contractor has burden to prove CO's decision not to waive penalty for expressly unallowable costs is an arbitrary and capricious abuse of discretion

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