

What Will the New Year Bring? Top Headlines, Headaches, and Developments for Government Contractors to Watch in 2016

January 14, 2016

The webinar will begin shortly. The slides will be available after the webinar.

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Overview and Climate

- Government Contracting in an Election Year
- Spending Priorities and Trends
- Implementation of Acquisition Policy Initiatives
- More Reform and New Initiatives on the Horizon?



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Costs and DCAA

- There are indications that DOD is preparing to limit contractors' discretion in selecting IR&D projects
- Changes in the case law about the CDA statute of limitations
 - Because the SOL defense is no longer “jurisdictional,” it is more difficult to get the issue decided at the outset of a case
 - When the SOL begins to run on incurred cost claims has been muddied
- *Raytheon* decision about offsets for simultaneous accounting changes under CAS will be a nightmare for contractors



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Claims

- What to Watch
 - Fed. Circuit decision forthcoming re Govt's ability to argue fraud at the Boards (*Laguna Constr.*)
- Emerging Trends
 - Uptick in alleged breach of the implied duty of good faith & fair dealing
 - Terminations for convenience of Commercial Item contracts
 - Recent ASBCA decisions offer clarity, questions re FAR 52.212-4(I)



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Commercial Items

- Standards for evaluating price reasonableness
 - reconsideration of the proposed rule [DFARS Case 2013-D034]
- National Defense Authorization Act for FY 2016
 - Seeking continuity, consistency, and transparency in commercial-item determinations
 - Price reasonableness evaluations and data to consider
 - Changes to special provisions for Major Weapon System procurements
 - Preference for commercial products and services
 - Reporting of defense-unique requirements



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Defective Pricing – Storms Ahead

- 2016 Audit Plan – TINA Deluge
 - 1,000s of hours per audit plan
- Final Decisions – ASBCA Flooding
 - More claims, more appeals
- FCA Actions – Lots of Wind
 - DOJ piggybacking
- Get Ready



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GSA and VA Schedules

- Total Sales \$33.1 Billion -- 40 Schedules -- 20,000 vendors
- Focus on competition and pricing
 - Agencies directed to take advantage of opportunities to maximum cost savings
- Other issues to watch in 2016
 - New emphasis on GSA Class Deviation implementation
 - Continued focus on existing FSS “hot button” issues
- Proposed rules from 2015 may impact contract administration and/or pricing
- Attention on indirect sales
 - Potential liability for manufacturers and resellers submitting commercial pricing disclosures that are not current, accurate, and complete



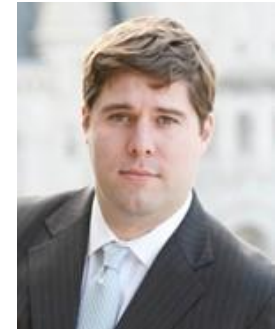
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What Contractors Need to Know About “Fair Pay” Executive Order and Employment Law Developments

- Fair Pay and Safe Workplaces Executive Order
 - New obligations for contractor and subcontractors doing business with the Federal Government
 - Timeline for implementation
 - Potential challenges by contractors and industry
 - Day One Compliance
- State Fair Pay Laws – California and New York
- OFCCP’s regulatory agenda
 - Pay transparency regulations
 - Compensation data collection tool
- OFCCP’s increased and coordinated enforcement efforts
- Whistleblowers – threatened FCA claims to extract severance



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Investigations

- Beware the Privilege: *Barko* as Cautionary Tale
 - *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), and 796 F.3d 137 (D.C. Cir. 2015)
 - Ensure internal investigations are directed by counsel
 - Fully document privileged purpose and *Upjohn* notices
- Beware the Government: Yates Memorandum as Opening Salvo
 - DOJ initiative to hold individuals responsible; both civilly & criminally
 - Sufficiency of factual disclosures (and eligibility for cooperation credit) will be measured against this purpose
 - Strategic planning and execution required in development of work product from the onset of investigation



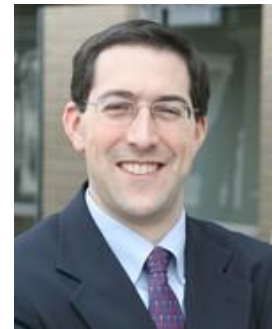
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Compliance, Ethics, Suspension/Debarment

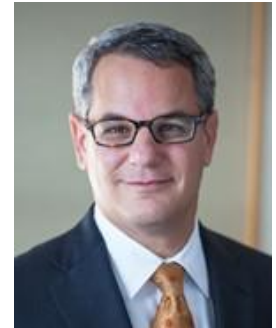
- Heightened focus on ethics and compliance
 - Recent messages from Department of Justice
 - DOJ hires first “Compliance Counsel”
 - Becoming more common element of source selection process
- Mandatory Disclosures
- Continued increase in suspension/debarment activity and evolution of non-regulatory procedures
 - Pressure from Congress, possibility of legislative reform, fact-based exclusions, increased referrals, exclusions for legacy matters
- New Year’s Resolutions - compliance and ethics program review, early preparation for crisis response



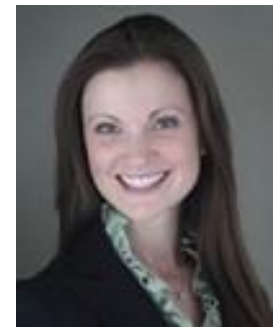
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Cybersecurity and Privacy

- Keep up with ever-changing cybersecurity regulations
 - DFARS amendments
 - Safeguarding covered defense information
 - Cloud computing requirements
 - New FAR rule on controlled unclassified information
 - NISPOM revisions
- Assess the impact of the Cybersecurity Information Sharing Act
 - Balancing information sharing and privacy concerns
 - Increased scrutiny from DHS, other agencies, and IGs
- Prepare for the year of comprehensive cyber risk management



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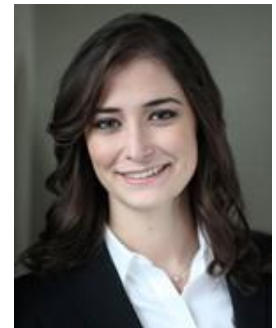
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Small Business

- Industry continues to wait for SBA to issue critical final regulations impacting the fundamentals of workshare and relationships between large and small businesses
 - Complete overhaul of the limitations on subcontracting calculations
 - Expansion of mentor-protégé program
 - Crediting (and monitoring) small business subcontracting
- Continued, multi-pronged focus on enforcement
 - Ensure small businesses are true program beneficiaries; identify sham/pass-through relationships
 - *U.S. v. Gorski* – wider net cast in small business fraud cases to include law firms, accountants
 - Active SBA, DoD, DOT OIGs; new internal focus on Agency monitoring and reporting



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Data Rights

- Pre-award IP strategy decisions will become paramount
 - Commercial licenses
 - Better Buying Power 3.0
- The Government's emphasis on the acquisition of data rights for sustainment will continue
 - Challenges to
 - Markings
 - Commercial item status
- Implementing regulations for 2012 NDAA requirements for major systems may issue
 - Expect to see rules covering integration and reintegration data



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International Issues

- Trade Agreements Act (TAA)
 - Stronger \$ has lowered thresholds
 - On horizon:
 - Origin of software
 - Origin of systems
- Domestic Preferences
 - Election year impact
 - District Court decision undermines Agency Buy America interpretations
- Foreign Military Financing (FMF)
 - New approach for identifying non-US content



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Bid Protests

- 2015 GAO Bid Protest Report to Congress Reveals Trends Likely to Continue
 - Total number of cases up 3%
 - Sustain rate drops again, to a modern era low of 12%, but overall effectiveness rate increases slightly (45%)
 - Voluntary agency corrective action continues to surge
 - Stats reflect evolving cost considerations for protesters in 2016
- Issues to Watch in 2016
 - Protests challenging cost/price evaluations
 - Protests relating to an awardee's corporate restructuring or rebranding
 - Potential resurgence of OCI protests
 - Scope of the Court of Federal Claims' subject matter jurisdiction



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Mergers, Acquisitions, and Transactions

- 2015 Year in Review- blockbuster year!
- 2016 Trends
 - Continued activity (both buying and selling) by private equity
 - Tighter defense spending/ consolidation
 - Cybersecurity, cloud computing, analytics, and healthcare IT remain hot
- Top 10 Diligence Issues for 2016
 - Include performance issues, IT systems, security



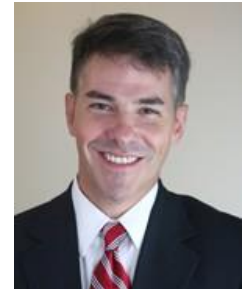
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Procurement Fraud

- Relators Go It Alone/Stiffer Penalties on Horizon
 - Record year for *Qui Tam* recoveries (\$1.15B) where DOJ declined to intervene
 - New record for relator's share of recoveries (\$598M)
 - Bipartisan Budget Act will increase civil penalties
- A Sample of What's to Come with Extrapolation
- Increased Activity in Cases Involving Ambiguous Terms
 - No Warning, No Knowing Falsity?
- Cert for Implied Cert
 - Supreme Court poised to resolve circuit split



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Thank you for joining us.