

# What Will the New Year Bring: Top Headlines, Headaches, and Developments for Government Contractors to Watch In 2017

January 25, 2017

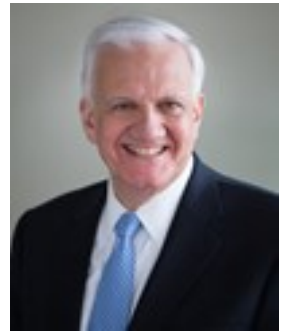
*The webinar will begin shortly. The slides  
will be available after the webinar.*

# **What Will the New Year Bring: Top Headlines, Headaches, and Developments for Government Contractors to Watch In 2017**

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# Overview and Climate

- New Administration's Priorities
- Fewer Regulatory Burdens
- More Competition
- Better Program Management
- Increased Focus on Reducing Fraud, Waste, and Abuse



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# Update on Executive Orders and Other Labor/Employment Matters

- Fair Pay and Safe Workplaces EO/Regulations
- Other Obama Labor-Related EOs
- FLSA Regulations
- DOL Persuader Rule
- Enforcement Posture – DOL, EEOC, and NLRB



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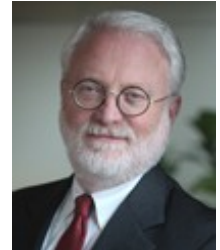
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# Int'l Issues: Looking Overseas

- Export Controls and Sanctions
  - US Sanctions – Reversing course or more of same?
  - ECR – Getting to 1 or petering out?
- FMS/FMF
  - America First – Encouraging sales or backlash?
  - New FMF Guidelines
- Anti-corruption
  - Impact of *McDonnell* and relaxed view of conflicts of interest



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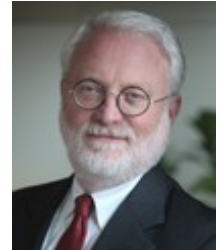
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# Int'l Issues: Coming to America

- Domestic Preferences
  - Hire American/Buy American –  
Translating campaign slogan into effective policy?
- CFIUS
  - Reconciling importing jobs with national security concerns?
  - China policy



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# Costs and DCAA

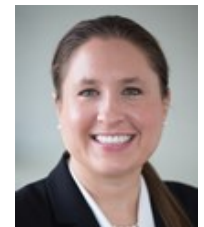
- **LMIS decision about subcontractor management**
  - Recent Government attempts to charge contractors with unreasonable responsibilities to “manage” their subcontractors may be relaxed after ASBCA dismissal of Government’s \$100M breach of contract claim, finding it was “based on nothing more than a plainly invalid legal theory”
- **Final Rule on Allowability of IR&D Costs**
  - Requires contractors to engage in technical interchanges with DoD
  - Likely administrative burden and chilling effect on IR&D investment
- **FY 2017 NDAA**
  - Revisions to CAS statute
  - Creation of Defense CAS Board
- **DCAA Audit Progress**
  - DCAA’s ability to provide audit support for non-Defense agencies revived in late September 2016 when DCAA issued a memo indicating that it had “met the requirement of less than 18 months of incurred cost inventory”



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# Claims and Disputes

- **Dynamics with the Change in Administration**
- **Navigating Commercial Item Contract Changes**
  - Are unilateral government changes breaches?
  - What is an “Equitable Adjustment” in this context?
- **Fraud at the Boards**
  - New ASBCA jurisdiction over Gov’t CDA claims demanding 100% forfeiture on contracts tainted by *performance* fraud (FCA, kickbacks)
- **Defective Pricing**
  - More DP audits and litigation on the horizon
  - Aggressive new DP audit theories – what to watch for
- **Labor Mapping**
  - Uptick in hyper-zealous audits of employee résumés and floor duties
  - Rubber-stamped final decisions demand forfeiture of all hours billed



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# Commercial Item Contracting, GSA and VA Schedules



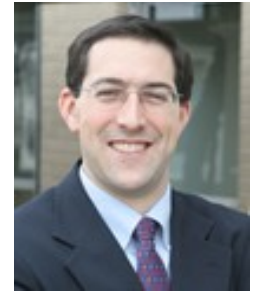
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- **Emphasis on Commercial Item Contracting**
  - Rejection of Obama Administration Procurement Policies. . . potentially increased outsourcing
  - FY 2017 NDAA
- **GSA Transactional Data Reporting Final Rule, 81 Fed. Reg. 41104 (June 23, 2016) (Pilot Program)**
  - Purpose: “Embrace modern technology while moving away from outmoded practices . . .”
  - Scope: The new rule covers certain GSA Multiple Award Schedules as well as GSA’s GWAC and IDIQ contracts.
  - Impact: Final Rule represents the most significant change to the GSA MAS program since 1994
- **Department of Veterans Affairs Schedule Program**
  - Acquisition of non-TAA Compliant Pharmaceuticals

There are a lot of unknowns with the new administration but we expect a renewed emphasis on Commercial Item Contracting

# Transactions and Strategic Alliances

- Expected themes for 2017
  - Increased deal flow
  - Hot areas
  - Larger combinations
- Our “top ten” diligence list for 2017
- Minimizing protest risk associated with corporate transactions



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# Investigations

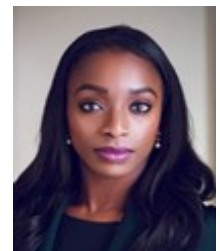
- **Yates Memo**
  - More focus on individual accountability
- **Criminal Division Review of *Qui Tam* Complaints**
  - Heightened risk of parallel criminal investigations
- **Impact on FCA and Internal Investigations**
  - Individuals as defendants: separate counsel, taking the fifth, joint defense agreements
  - Potential *de facto* waivers of privilege and work product
  - Self-disclosure of criminal conduct



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# False Claims Act

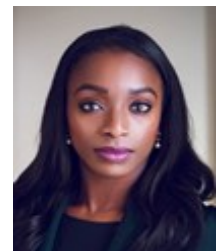
- **FY 2016 Statistics**
  - \$4.7 billion recovered
  - 845 new suits filed
- **Supreme Court Issues Landmark Decision in *Escobar***
  - Upheld implied certification theory and articulated amorphous materiality standard that leaves significant room for interpretation
  - Early application of materiality standard in lower courts
- **Higher Penalties Increase Leverage for Government and Relators Alike**



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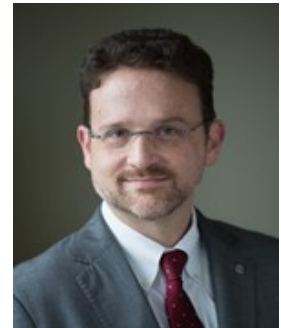
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# Compliance, Ethics, Suspension/Debarment

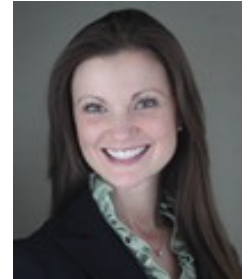
- **Convergence of ethics and compliance & other fields**
  - **Labor & Employment:** *Whistleblower reprisal* matters may require teamed labor/employment and government contracting expertise and overhang from failed Fair Pay causes more *intra-government communication re labor issues* and requires further proactive communication from contractors; increased **DoL debarment** efforts
  - **White Collar & Investigations:** *Parallel proceeding risk* increasing with continued emphasis on companies and individuals facing multiple enforcement inquiries
  - **False Claims Act and Disclosures Collateral Consequences:** SDOs involved rapidly in FCA cases, and continuing involvement after disclosures – consider parallel proceeding and debarment risk early
- **Disclosure regime expands** – MDR, counterfeit parts, TIP, data breach, etc., with broad benefits/reduced regulatory interest when “fronting” matters to the government rather than reacting



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# Cybersecurity and Privacy

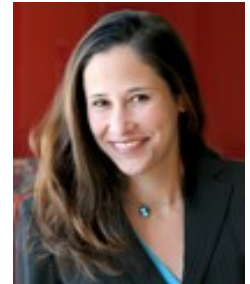
- Continuing impacts from 2016
  - Finalization of DFARS 252.204-7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting* (OCT 2016)
  - Implementation of DSS insider threat program
- What to watch for in 2017
  - Pending FAR case regarding controlled unclassified information (CUI) and agency-specific implementation
  - Recent focus on personally identifiable information (PII)
    - OMB M-17-12, *Preparing for and Responding to a Breach of Personally Identifiable Information*
    - FAR 52.224-3, *Privacy Training* (JAN 2017)



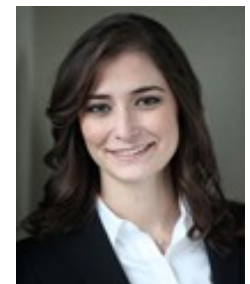
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# Small Business

- Rollout of New All Small Mentor-Protégé Program
  - Vastly expanded eligibility with same benefits as original 8(a) MPP
  - Competition and race for the best teammates
  - Streamlined electronic application process – current approvals issued on average in 8 days!
  - Challenges/Questions on new MP joint ventures
- Challenges During of Period of Uncertainty with New Limitations on Subcontracting and Credit for Lower-Tier Subcontractors
  - Effective June 30, 2016, SBA overhauled the method of calculating compliance with LOS but FAR 52.219-14 still unchanged
  - Effective January 23, 2017, SBA’s regulations allow credit for lower-tier subcontractors on individual subcontracting plans but FAR 52.219-9 still unchanged
  - Requesting pre-proposal guidance and clarification is essential
- Stricter Enforcement of Subcontracting Plans
  - Impact of new notice requirements to subcontractors and “whistleblower” provisions
  - Potential for rise in imposition of liquidated damages?
  - Implications for past performance evaluations
  - Evolving case law and potential for FCA actions



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# Data Rights

- NDAA for FY 2017
  - Walks back some of changes from NDAA for FY 2012
  - Promotes use of modular open system architecture
  - Deferred ordering
- Proposed amendments to Bayh-Dole regulations
- Impact of new IR&D procedures



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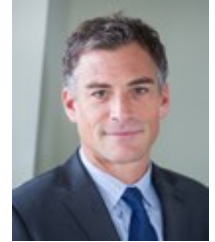


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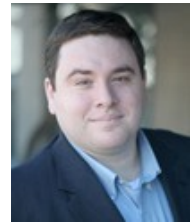


# Bid Protests

- **2016 GAO Statistics & Implications for Protesters**
  - More sustained protests (22.56%), similar overall effectiveness (46%)
  - Less ADR, less corrective action?
- **Key Issues Worth Monitoring**
  - Mid-procurement corporate changes
  - Keeping track of key personnel
  - Awardee standing to file protests
- **Legislative Developments**
  - Task Order jurisdiction
    - Civilian task order jurisdiction made permanent
    - DoD threshold increased (\$25 million)
  - Other changes on the horizon?



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*Thank you for joining us!*