

crowell  **moring**



Strategizing for

**GOVERNMENT
CONTRACTORS'
GAME PLAN**

**Under the
New Administration**



Identifying and Pursuing Affirmative Recovery Opportunities and Navigating the Trump Era

Dan Forman

David Ginsberg

Steve McBrady

Brian Tully McLaughlin

Skye Mathieson

Sharmi Das

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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)

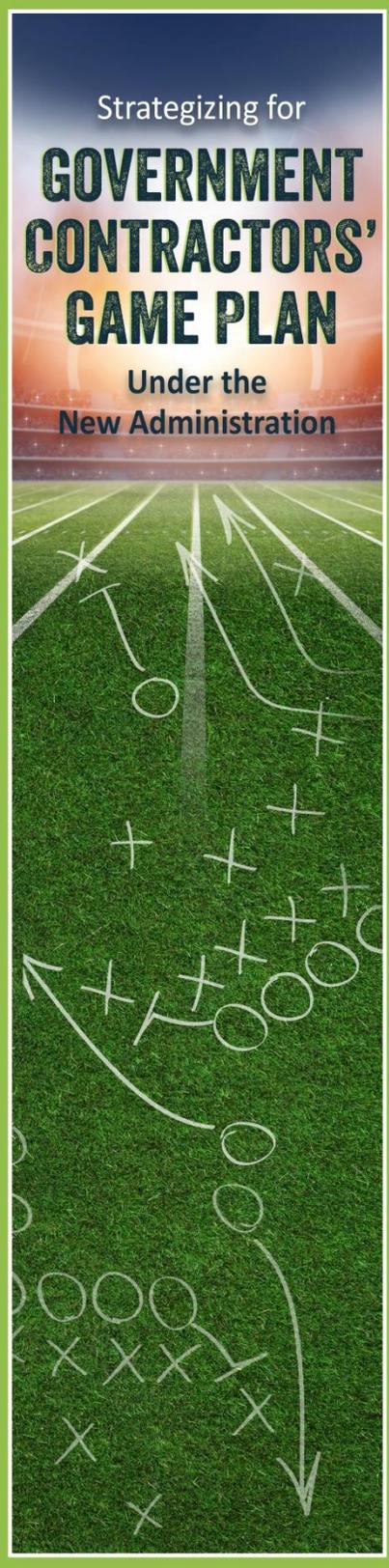
Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

Affirmative Recovery

- Identifying Affirmative Recovery Opportunities
- Pursuing Claims Recovery



Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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.

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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.

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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)

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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.

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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.*)

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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)

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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)

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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.

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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?

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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?

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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

Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

Under the
New Administration

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**

Contacts / Questions



Dan Forman
Partner
202-624-2504
dforman@crowell.com



David Ginsberg
Partner
213-443-5545
dginsberg@crowell.com



Brian Tully McLaughlin
Partner
202-624-2628
bmclaughlin@crowell.com



Steve McBrady
Partner
202-624-2547
smcbrady@crowell.com



Skye Mathieson
Counsel
202-624-2606
smathieson@crowell.com



Sharmi Das
Associate
202-624-2692
sdas@crowell.com

