What Will the New Year Bring?

Top Headlines, Headaches, and Developments for Government Contractors to Watch in 2014

January 9, 2014

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 2014

January 9, 2014
Costs and DCAA

- Anticipate continued statute of limitations problems due to audit backlogs
- Expect more limitations on contractor compensation
- Understand how to handle costs associated with discovery and remediation of counterfeit parts
- Expect more DCAA challenges to reasonableness under cost reimbursement contracts
Claims, Disputes, and Contractor Recovery

- Post-shutdown recoveries
- Continued “down hill” effects of tightened budgets
- Terminations, de-scopes, and other changes
- Protecting recovery rights and mitigating risks
Suspension and Debarment

- Uptick in suspension/debarment activity likely to continue through 2014
  - Actions by agencies historically not active
    - New types of fact-based actions
- Increased coordination of remedies
- Role of Congress
  - SUSPEND Act
  - Push for new causes for mandatory suspension and debarment
Compliance and Ethics

• Focus on compliance and ethics as distinct, but essential and inextricably linked, subjects

• Expanding compliance and ethics risk areas
  – HR, labor, employment
  – Procurement and supply chain
  – Information technology
  – Environmental, health, safety

• Renewed focus on internal investigations and mandatory disclosure rule
Cybersecurity and Privacy

- Cybersecurity compliance & risk management
  - Security incident response & reporting obligations
  - IT Governance
- Cybersecurity Executive Order Implementation
  - NIST Cybersecurity Framework
  - Cyber threat information sharing
- DoD Cyber Rule Proliferation
  - DFARS “Safeguarding” Rule
  - DoD Cyber Patchwork: § 941, Policies & Flow down
  - DIB organizational and threat changes
- Data Breach Aftermath for Contractors
  - Cure notices, adverse past performance, lost awards, class actions, shareholder actions, FCA suits, & more
OFCCP

• The new VEVRAA and Section 503 regulations
  – Self-identification of veteran and disability status
  – Utilization goals and hiring benchmarks
  – Outreach efforts
  – Flow-down clauses

• Preparing for the March 24, 2014 effective date
  – Recruiting and HRIS systems
  – Policies and procedures
  – Documentation and recordkeeping

• Enforcement activity – what to expect in 2014
Small Business

• Limitations on Subcontracting - Changed and Changing Calculations
  – Effective 12/31/13 - new period of time for determining compliance and new regulatory provision addressing requirements on orders
  – Awaiting implementation of significant calculation changes from FY13 NDAA

• Continued Spotlight on Suspension and Debarment
  – MicroTechnologies proposed debarment and the “Washington Post effect”
  – Vulnerability and implications for individuals, subcontractors, and other related entities

• DOT Crackdown on DBE Program Compliance
  – Trickle-down effect of DOT pressure on state/local agencies
  – Imposition of heightened standards and new compliance challenges

• Awaiting Expansion of Mentor-Protégé Program
Data Rights

• Continued aggressive government pursuit of IP rights
• Commercial software service providers and licensors beware
  – Terms of service/license restrictions
• Is this the year for the implementation of Section 815 of the 2012 NDAA?
• Is this the year for the final rewrite of the DFARS data rights regulations?
Bid Protests

• 2013 GAO Bid Protest Report to Congress Reflects Impact of Heavy Caseload and Understaffing
  – Second most total cases filed in GAO history; more cases than ever resolved via voluntary agency corrective action (over 660, 26%).
  – Reduced frequency of hearings continues; down 72% since 2009.

• Interesting Substantive Trends in Bid Protest Decisions Portend New Frontiers for Future Bid Protests
  – **GAO**: Expanding view of when an agency is required to conduct a price-realism review in firm, fixed-price procurements. Where RFP warns that a proposal may be rejected if a low price reflects a lack of technical competence or failure to comprehend the requirements, a price realism evaluation is required even if not called for by name.
  – **COFC**: New recognition that contract awardees may challenge the scope of corrective action taken by an agency, including when the agency is adopting GAO’s recommended corrective action steps; increased recognition that awardees have powerful equitable position to mitigate impact of its price being disclosed during initial award announcement.
International Issues - Inward

• Domestic Preferences vs. Global Sourcing Imperatives
  – Treatment of Software in the Substantial Transformation analysis
  – Expansion of application to grant programs
  – Aggressive enforcement

• CFIUS Review of Foreign Investment
  – Uptick in M&A likely to expand docket
  – If Smithfield Ham implicates Nat’l Security, what doesn’t?
  – *Ralls Corporation* effort to obtain judicial review
International Issues - Outward

- International Sales and Offsets
  - Increased focus on selling to foreign governments & markets
- Export Controls & Sanctions
  - ECR in 2014
    - Last 8 USML Categories to be completed?
  - Sanctions Abound
    - Iran at crossroads
- FCPA Enforcement
  - Things of Value
    - Charitable contributions
    - Jobs for relatives
  - More trials; more judicial decisions addressing problematic issues under the Act
Procurement Fraud

• False Claims Act and *qui tam* enforcement – statistics and trends
• False Claims Act cases to watch – Supreme Court and Circuit Courts
• Legislative Initiatives – U.S. Chamber of Commerce
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