



## ***09. Federal Policy Updates***



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# CH CH CH CH CHANGES IN FEDERAL LAW, POLICY AND PROCEDURES

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# Small Business Relief

- New FAR Clause 52.232-40 Accelerated Payments by Primes to Subs
- OMB Policy Memorandum and Agency Guidance For Accelerated Payments to Primes
- Prime Reporting Obligations

# New Whistleblower Regulations

- 2013 National Defense Authorization Act extended whistleblower protections to subcontractors
- Employees of subcontractors now have the same protections for whistleblower actions than government and prime contractor employees
- The new protections apply to all solicitations and contracts that exceed the simplified acquisition threshold, including contracts for the purchase of commercial items and commercially available off-the-shelf (COTS) items

# New Whistleblower Regs (cont'd)

- The new rules:
  - Protect employees from reprisals from executive branch officials
  - Protect the disclosure of information to courts, grand juries, company management, or company employees charged with investigating misconduct (not just to Congress or to the Inspector General's Office)

# New Whistleblower Regs (cont'd)

- Scope of information protected also expanded to include disclosures about “abuse of authority” in the management of a DoD grant or contract (old standard was just gross mismanagement, waste, violation of law, or danger to public health or safety)
- Also applies to violations of rules and regulations related to DoD contracts and participation in any judicial or administrative proceeding related to waste, fraud, or abuse on a DoD contract or grant
- Exemption for intelligence community contractors and subcontractors

# New DFAR Part 239.7300/Clause 252.239-7017/18 Supply Chain Risk

- Implements Section 806 of FY2011 NDAA Authorizing DoD to Restrict Course of Supply from IT Procurements Supporting Certain National Security Systems (“Covered Systems”)
- NSSs are Information Systems Involved in Intelligence Activities, Cryptologic Activities Related to National Security, Command and Control of Military Forces, Integral Parts of Weapon systems, or Critical to Fulfillment of Military or Intelligence Missions
- Interim Rule But Effective Immediately Before Comment Based on Urgency Finding (Expires September 30, 2018)

# New DFAR Part 239.7300/Clause 252.239-7017/18 Supply Chain Risk (cont.)

- Gives Military Agencies Right to Exclude Sources of Supply (Primes and Subs) if They Fail to Meet Qualification Standards or Meet Accepting Evaluation Factor Rating in Evaluation of Proposals AND Limit Disclosure of Basis for Action (Making Decision Unreviewable in a Bid Protest)
- Number of Procedural Steps Must be Taken in Order to Make Exclusion Decision (Likely Limiting Frequency)
- All DoD Solicitations and Contracts Involving Development or Delivery of IT (Services and Supplies, Hardware and Software, including Commercial Items) Must Include Clauses. Contract Clause Includes Mandatory Flow-Down



# New DFAR Part 239.7300/Clause 252.239-7017/18 Supply Chain Risk (cont.)

- Contractors Must “Maintain Controls in the Provision of Supplies and Services to the Government to Minimize Supply Chain Risk.”
- Defined as “Risk that an Adversary May Sabotage, Maliciously Introduce Unwanted Function, or Otherwise Subvert the Design, Integrity, Manufacturing, Production, Distribution, Installation, Operation, or Maintenance of a National Security System . . . so as to Surveil, Deny, Disrupt, or Otherwise Degrade the Function, Use or Operation of Such System”
- No Guidance on Qualification Standard and Evaluation Factor – Unclear Whether Agency Will rely on National Institute of Standards and Technologies Security Controls for Supply Chain Protection

# NEW DFAR CLAUSE 252.204-7012

## Safeguarding of Unclassified Controlled Technical Information

- DoD Contractors and Subcontractors With Information Systems Containing Unclassified Controlled Technical Information Must Assess Compliance with Security Standards – AND
- Ensure Procedures To Promptly Report and Investigate Cyber Incidents in Connection with Future Contracts
- MANDATORY and applicable to all Contracts (including Commercial Items and Small Business Contracts) if Contractor has Access to or Stores “Controlled Technical Information”

# NEW DFAR CLAUSE 252.204-7012

## Safeguarding of Unclassified Controlled Technical Information (cont.)

- Broad Definition: Information with “Military or Space Application” that is TD, CS and any other Technical Information Covered by two DoD Directives. Includes ITAR but What Else?
- Contractors’ Information Systems Must At Minimum Comply with NIST Special Publication 800-53 Relating to 14 Factors, including Access Control, Awareness and Training, Audit and Accountability, CM, Contingency Planning, Identification and Authentication, and Incident Response
- Mandatory 72-Hour Cyber Incident Reporting with No Safe Harbor on Compliance

# Suspension and Debarment Trends

- Perceived recent push to “crack down on” – *i.e.*, suspend and debar, more contractors
- Aug. 2011 GAO Report stated that several agencies needed to improve their suspension and debarment programs, specifically calling-out HHS
- Trends – joint suspensions and debarment investigations by IGs: 41 in 2010; 208 in 2011; 365 in 2012.
- Total suspensions and debarments rose from 4,485 in 2009 to 5,805 in 2013
- SUSPEND Act coming?

# Insufficient Discussions

- Insufficiency of discussions continues to be a hot topic
- 4 times in the past year GAO sustained a protest challenging misleading or insufficient discussions
- *Kardex Remstar, LLC*, GAO B-409030 (1/17/14) – discussions or clarifications?
  - GAO held that Dept. of Veterans Affairs held misleading discussions because it failed to identify a deficiency. Disagreed with VA that VA only made requests for clarifications (rather than entering into “discussions”) because VA asked for, and received, more information

# Insufficient Discussions (cont'd)

- *Piquette & Howard Elec. Inc.*, GAO, B-408435 (12/16/13)
  - GAO sustained protest on insufficient discussions grounds
  - When an agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range, and it must request final proposal revisions
  - “the acid test [for discussions] is whether an offeror has been afforded an opportunity to revise or modify its proposal”

# Insufficient Discussions (cont'd)

- *West Sound Services Group, LLC*, GAO, No. B-406583 (7/3/13)
  - GAO found that the agency did not convey its actual concerns to the protester in a manner that would have enabled the protester to meaningfully respond to the evaluated significant weaknesses in its proposal
- *Sentrillion Corp.*, GAO, No. B-406843 (4/22/13)
  - GAO sustains protest, finding Marshals Service failed to engage in meaningful discussions with protester by failing to inform protester of all of agency's concerns with its license applications

# Insufficient Discussions (cont'd)

## A Win for the Government

- *Lyon Shipyard, Inc. v. United States*, 113 Fed. Cl. 347, 356 (Fed. Cl. 2013)
  - Agency is not required to discuss every weakness appearing in a pricing proposal
  - Only significant weaknesses, not all weaknesses, must be discussed
  - Agency is not required to advise offer that its price was higher than those of its competitors



# Evaluation and Use of Past Performance Data

- New Thresholds for DoD Contracts
- *Veterans Elite, Inc.*, B-409233 (GAO February 10, 2014) Offeror Must Take Responsibility To Ensure Availability of Necessary PP Information to Evaluating Agency
- *Iyabak Construction, LLC*, B-409196 (GAO February 6, 2014) Solicitations Can Be Unduly Restrictive if they Prohibit Consideration of Past Performance of Offeror's Affiliates

# Evaluation and Use of Past Performance Data (cont.)

- Standardization of Evaluation Factors and Performance Ratings (FAR Subpart 42.15)
  - Mandatory Entry of all PP Information in Contractor Performance Assessment Reporting System (CPARS)
  - Minimum of Annual Evaluations; Standard Factors (including SB Subcontracting); Five Scale Adjectival Rating System
  - Appeals Process Remains Intact

# GAO Bid Protest Trends

	<u>FY 2013</u>	<u>FY 2012</u>	<u>FY 2011</u>	<u>FY 2010</u>	<u>FY 2009</u>
<u>Protests Filed</u>	2,429	2,475	2,353*	2,299	1,989
<u>Compared to Prior Year</u>	Down 2%	Up 5%	Up 2%	Up 16%	Up 20%
<u>Protests Sustained</u>	17%	18.6%	16%	19%	18%
<u>Effectiveness Rate</u>	43%	42%	42%	42%	45%
<u>Hearings</u>	3.36%	6.17%	8%	10%	12%
<u>ADR Used</u>	145	106	140	159	149
<u>ADR Success</u>	86%	80%	82%	80%	93%

\* 147 cases were attributable to GAO's expanded bid protest jurisdiction over task orders.

- Effectiveness means obtaining some form of relief from the agency

SOURCE: GAO, Office of the General Counsel

# GAO Protests – Upcoming Changes

- GAO announced on January 27, 2014, that it is working to develop a new online docketing system for bid protests and will charge a fee on new protests in order to support the system
- No fee set, but \$250 number has been discussed

# Incurring Cost Submissions

- *Raytheon Missile Systems* (ASBCA No. 58011 Jan. 28, 2013). Government's Claim \$17 Million Claim Based Resulting from DCAA Audit of Overhead Costs Charged Under Contract (on theory that price proposal for subcontractor violated CAS disclosure) Time Barred under Six Year CDA Statute of Limitations
- *Raytheon Co.* (ASBCA No. 57576 December 17, 2012). Contractor's ICE Submission Provided Government with Sufficient Knowledge of Indirect Costs to Start 6-Year Clock

# Incurring Cost Submissions (cont.)

- ICE Reviews Have Accelerated; DCAA Devoting More Resources and Being More Rigorous in Documentation Requirements
- DCAA Policy Memo (October 29, 2013) Giving More Flexibility to Define Submissions Below \$250 Million as Low Risk

# CO's Duty of Good Faith and Fair Dealing

- *Metcalf Constr. Co. v. U.S.*, 2014 U.S. App. LEXIS 2515 (Feb. 11, 2014)
  - Under *Precision Pine & Timber, Inc. v. U.S.*, 596 F.3d 817, law appeared to require “specific targeting” (*i.e.*, conduct specifically designed to reappropriate benefits the other party expected to obtain)
  - Court holds “specific targeting” is not required
    - Also, breach of the covenant claim does not require reliance on a specific provision of the contract
  - Lack of diligence and interference with or failure to cooperate in the other party's performance can be a violation

# But See ....

- *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. Jan. 7, 2014)
  - A separate Federal Circuit panel held, “BH alleges that the Government breached its obligation of good faith and fair dealing .... ***BH has not, however, presented any allegations that the Government engaged in conduct that reappropriated benefits promised to BH under the contract.***”



# Does the *Christian* Doctrine Apply to Subcontractors?

- *Braddock v. Harris* (U.S. District Court for DC, March 30, 2013)
- Affirmed Determination by DOL Administrative Review Board that Hospitals Under Contract with HMO for OPM Were Subject to EEO Requirements Applicable to Government Contractors
- Requirements Were Read Into Contract (Consistent With Executive Order and Implementing Regulations Requiring Clauses to be Incorporated in All Qualifying Contracts and Subcontracts)

# Does the *Christian* Doctrine Apply to Subcontractors? (cont.)

- Court Specifically Cited *Christian* Doctrine and Found No Basis to Not Apply it to Subcontractors Which Lack Knowledge that They Are Providing Services that Subject Them to Affirmative Action Requirements. Constructive Knowledge Based on Receipt of Payments.

# Executive Compensation

- FY 2014 NDAA and Bipartisan Budget Act of 2013 Both Contained Caps (\$625,000 and \$487,000). President Signed the Budget Act Last Making the Lower Cap Law
- All Compensation Paid Above \$487,000 Unallowable (limited exceptions for Scientists and Engineers)
- Applies to All Employees – Not Just Senior Executives
- Applies to All Costs Incurred Under Contracts Entered Into on or After June 24, 2014
- Will Affect All Pricing Actions Subject to Cost Principles
- Existing Statutory Formula Resulted in a \$952,308 Cap for FY2012 Costs. Congress and President Rejected Industry's Attempt to Keep Survey-Based Cap

# New Minimum Wage E.O.

- February 12, 2014 - President Obama signed new Executive Order raising the minimum wage to \$10.10 per hour for workers under new and renegotiated federal contracts
- Also contains provisions relating to tip and disabled workers
- The Order takes effect January 1, 2015, and implementing regulations are due out in October 2014

# Organizational Conflicts of Interest

- Organizational Conflicts of Interest (OCIs) remain a topic of interest, fueled by:
  - Industry consolidation
  - Growth in Government outsourcing
  - Increased Agency reliance on large multiple-award indefinite-delivery/indefinite quantity (IDIQ) contracts

# OCIs (cont'd)

- Case Study – SAIC (Science Applications Int'l Corp.)
  - SAIC dissolved into Leidos and spun-off new SAIC
  - Corporate restructuring motivated in part to eliminate OCIs
  - SAIC Oct. 4, 2013 Press Release:

“SAIC was spun-off to eliminate government organizational conflict of interests (OCI) caused in substantial part by the predecessor's products or development business. By eliminating OCIs in the spin-off transaction, SAIC's addressable markets are estimated to increase by approximately \$25 billion.”

# OCIs (cont'd)

- SAIC claimed it was being bogged down with its OCI process, with 10,000 business opportunities being routed for OCI determinations annually
- *United States v. Science Applications Int'l Corp.*, No. 04-1543 (D.D.C) – complaint alleges SAIC breached its OCI obligations to the NRC by engaging in relationships with organizations that created an appearance of bias
- July 22, 2013 – Court denies SAIC's motion for summary judgment, finding that evidence could show that SAIC employee knew firm was noncompliant with its OCI obligations

# OCIs (cont'd)

- OCIs also played a role in:
  - L-3 Communications' decision to move its government services business to Engility in 2012
  - Lockheed Martin's sale of Enterprise Integration Group to Veritas Capital in 2010
  - Northrup Grumman's sale of TASC government advisory business in 2009



# Changes to SBA Subcontracting Rules

- 2013 National Defense Authorization Act (“NDAA”) changed certain SBA rules.
- Two key changes:
  - for service contracts, the 50% limitation on subcontractors is now based on the total amount paid to the subcontractor (including materials), not just the cost paid for subcontractor personnel
    - E.g., if the total cost to perform is \$10 million, but total personnel costs are only \$8 million, under the old rule you only had to do \$4 million of the work yourself (50% of the personnel costs). Now, you have to do \$5 million of the work yourself (50% of the total performance price)

# Changes to SBA Subcontracting Rules

- prime contractors may meet the performance requirements by subcontracting to other “similarly situated” small businesses – *i.e.*, those either small under the same standard or participating in the same small business program
  - So if a subcontractor is a “similarly situated” small business its work does not count against the limitation on subcontractors
  - *I.e.*, the new rule treats the “similarly situated” subcontract as if the prime performed the work