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White House v. Congress: Government Contractors Bracing for the Showdown in Washington

WELCOME ATTENDEES

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Health Care

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Mark Troy

ACA: The Supreme Court to Decide

- The Case: *King v. Burwell*
- The Issue: Can Federal Govt. provide ACA Tax Subsidies to People on Federal Exchanges?
- The Four Words: "Established by the State"
- The Timing of a Decision: June/July 2015
- The Likely Result: The Government wins & ACA subsidies for federal exchanges upheld

ACA: The Supreme Court to Decide

- Why Does the Government Likely Win?
- Solid Votes for the Government: 4 votes – Justices Sotomayor/Breyer/Kagan/Ginsburg
- Solid Votes for the Plaintiff: 3 votes – Justices Scalia/Thomas/Alito
- Swing Votes: Justices Roberts & Kennedy
- Justice Kennedy as Swing Vote Likely to Back the Government which is 5/9 votes for ACA

The Congressional Response

- What Does Congress Do if Plaintiff Wins?
- Option # 1 – Nothing – “Let Them Eat Cake”

  But leave 5-8 million people w/o coverage
- Option # 2 – Pass New Law to Kill ACA

  But Lack Senate Democratic Votes & Veto
- Option # 3 – Pass New ACA Temporary Fix
- Likely Bi-partisan Support for Temporary Fix through 2015 & maybe 2016 elections

How does King impact California

- California operates a state exchange, called Covered California, that will not be impacted by an adverse decision in *King v. Burwell*
- Covered California enrollees will continue to be eligible for federal subsidies

ACA Impacts on the Health Care Industry

- 16.9 million new enrollees for health insurers
  - 11.2 Million in Exchanges
  - 12.6 Million in Medicaid Expansion
  - 5.9 lost coverage
- Medicaid expansion beneficiaries are often covered by managed care contracts between state agencies and health plans, including in California

Changes in Provider Delivery System

- Medicare ACOs have spurred significant changes in the health care delivery system
- Private insurers have adopted ACO-like models to deliver health care on a more efficient basis with incentives for quality of care

Changes in Provider Delivery Systems

- Providers obtaining insurance/health plan licenses
- Payers acquire providers
- Providers integrate with other providers
- Risk-based payment arrangements
- Payer/Provider affiliations

Hospitals

- Establishing MA Plans by obtaining state managed care or insurance licenses and contracting with CMS
- Obtaining licenses to directly compete in the commercial market
- Obtaining licenses to assume financial risk under managed care contracts
- Entering into ventures with insurers involving profit sharing

Health Plans

- Health Plan acquisition and development of physician practices
- Health Plan acquisition of care management entities
- Establishment of private ACOs with willing provider participants
- Narrow network products with provider partners

Physician Groups

- Obtaining risk-bearing licenses and other authority to assume financial risk
- Participants in ACO MSSPs, Pioneer ACOs and private payor ACOs
- Targets for hospitals, health plans and other larger providers

Legal Challenges for Providers and Payers

- Corporate Practice of Medicine
- Insurance/Risk-Bearing Entity Licensing
- Physician Incentive Plan Regulations
- Fraud and Abuse
- Antitrust
- Flow down requirements from government contracts

HEALTHCARE – ENHANCED FOCUS ON INFORMATION/DATA SECURITY

Healthcare Entities' Obligations for Protecting Patient Privacy

- HIPAA
- California Laws

Evolving Healthcare IT Environment

HIPAA – WHO IS REGULATED?

- Covered Entities: health plans, providers, clearinghouses
- Business Associates: anyone else who has access to PHI from a CE, including subcontractors
  - Includes vendors, cloud providers, contractors
  - "Conduit" exception very narrow

WHAT INFORMATION IS PROTECTED?

HIPAA: Information that relates to:

- an individual's past, present or future physical or mental health or condition,
- the provision of health care to the individual, or
- the past, present, or future payment for the provision of health care to the individual,
- and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.

WHAT INFORMATION IS PROTECTED?

CALIFORNIA CIVIL CODE SECTION 1798.82:

- “Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted:
  - (1) Social security number
  - (2) Driver's license number or California Identification Card number
  - (3) Account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account
  - (4) Medical information
  - (5) Health insurance information

HIPAA

Privacy Rule

- Defines what has to be protected and how it may be used within an organization and disclosed to third parties

HIPAA

Security Rule

- Establishes parameters for how electronic protected health information must be protected from unauthorized disclosure

HIPAA

Security Rule

- Three kinds of safeguards:
  - Administrative (e.g., security awareness and training)
  - Physical (e.g., secure location of servers)
  - Technical (e.g., access control (passwords) and transmission (secure e-mail))

HIPAA

Breach Notification Rule

- Requires a covered entity to notify specified individuals/entities of a breach
- Common breaches:
  - Employee/Vendor Negligence
  - Lost laptop or hard drive
  - Inadvertent transmission

HIPAA

Breach Notification Requirements

- Presumption is that impermissible use or disclosure is a breach requiring notification
- Requires written notification to affected individuals without unreasonable delay but *no later than 60 days from discovery*
- Content Requirements
- Notification to HHS/Media

HIPAA

- The Secretary of HHS has authority to audit covered entities and business associates, investigate complaints and impose penalties
- The Breach Notification Rule makes it easier for the Secretary to learn of potentially non-compliant activities and conduct targeted audits
- The Secretary is now all but required to impose fines and penalties for anything but the least culpable violations
- States' attorneys general have authority to bring actions on behalf of state residents to enjoin unlawful practices and obtain some measure of damages

CALIFORNIA LAWS

- Confidentiality of Medical Information Act (Civil Code Section 56 et seq.)
- Insurance Information and Privacy Protection Act (Insurance Code Section 791 et seq.)
- California Customer Records Act (Civil Code Sections 1798.80 – 1798.84)

Confidentiality of Medical Information Act (CMIA) (Civil Code § 56.36)

- Prohibits "disclosure" of "medical information" regarding a patient without authorization.
- Mandatory and permissive exceptions.
- Requires covered entities that create, maintain, preserve, store, abandon, destroy or dispose of medical records to do so in a manner that preserves confidentiality.

California Insurance Information and Privacy Protection Act (California Insurance Code Sections 791-791.28)

- Sets standards for use and disclosure of information including, but not limited to, medical records and "personal information" broadly defined
- Prohibits disclosure without authorization
- Exceptions to rule requiring authorization exist for agents, fraud detection and law enforcement
- Insurance Commissioner can bring enforcement action and affected persons can sue

CALIFORNIA CUSTOMER RECORDS ACT (Civil Code Sections 1798.80 – 1798.84)

- Requires disclosure of "any breach of the security of the system" to any California resident whose "personal information" was acquired by an unauthorized person.

CALIFORNIA BREACH NOTIFICATION LAW

- If personal information is potentially comprised, must comply with California breach notification law
  - CA Attorney General has enforcement authority
  - Timing: "in the most expedient time possible," "without unreasonable delay"
  - Personal notice, letter or electronic, is required when the identities of the affected individuals are known
  - Substitute notice is required in all other instances meaning posting on the business web site, and notice to "major statewide media" meaning print, television and radio and the Office of Privacy Protection
  - Notify CA Attorney General > 500 persons affected

EVOLVING HEALTHCARE IT ENVIRONMENT

- Electronic Health Records
- Cloud Solutions

ACA Changes to FCA

- Claims submitted under a relationship that violates the AKS now also constitute false claims. *Id.*(f)(1); 42 U.S.C. § 1320a-7b(g).
- Knowledge standard was expanded to include reckless disregard and willful ignorance. *Id.*
- Affects defense based on *Hansleter v. Shalala*, 51 F.3d 1390 (9th Cir. 1995) that AKS required proof of specific knowledge of law and intent to violate it.

Implications of Changes to Plans

- Focus of FCA enforcement in health arena has traditionally been on providers that submit claims for services under federal health programs.
- Changes bring plans into FCA cross-hairs.
- Any false claim, record or statement resulting in receipt of any federal funds can expose plan to FCA liability.
  - Federal Employees Health Benefits Program (*e.g.*, certification of community rate);
  - Medicare Advantage (*e.g.*, plan rate bid certs.);
  - Contractor performance (*e.g.*, claims payment timeliness, claims denials, reconsiderations and appeals, marketing, utilization and accessibility of services).

Implications

- Falsification of Reports / Certifications (*e.g.*, encounter data, quality-of-care review, enrollee health status reports, or data required to be submitted to the government and used in rate setting).
- "Red-lining" (*e.g.*, insurers that provide Medicare supplemental insurance and paid on per patient basis, improperly discourage enrollment by persons they deem to be sicker or at higher risk for serious illness, to decrease risk and increase profits).
- Medicare Part D Fraud.
- Intermediary Services (*e.g.*, failure to properly monitor downstream provider quality and detect provider fraud).

U.S. ex rel. Kester v. Novartis Pharm. Corp., 43 F.Supp.3d 332 (S.D.N.Y. 2014)

- Relator brought FCA and AKS action on behalf of the U.S. and 26 states and D.C. against Novartis and CVS Caremark, Accredo and Curascript alleging Novartis conducted illegal kick-back schemes involving 5 of its specialty drugs covered by federal programs.
- Relator was a former Novartis sales employee who alleged Novartis gave volume-based rebates and performance payments based on volume or market share and patient referrals.
- Relator alleged Novartis steered new patients to the co-defendant pharmacies in exchange for rebates and performance payments.

Kester v. Novartis

- Government intervened in the action and had previously filed an FCA action against Novartis.
- Caremark contended the allegations were substantially similar to accusations against it in state court actions dating back to 2008 including attempting to persuade physicians and patients to switch to drugs to maximize rebate payments from drug manufacturers.
- Caremark entered into a nationwide settlement of the various state lawsuits which received attention from national news media.
- Defendants sought dismissal based on the public disclosures.

Kester v. Novartis

- Government contended that the publicly disclosed allegations were not "substantially similar" enough.
- The district court found that the essential elements of the fraud in the state actions was substantially similar to current allegations.
- But the court found that the allegations that Caremark continued the fraudulent practices after the state settlements was new information.
- The court set 3/23/10 as the date the claim accrued because that was the date the ACA was enacted and the state complaints ceased to qualify as public disclosures. 29 U.S.C. § 3730(e)(4)(A)(2010).

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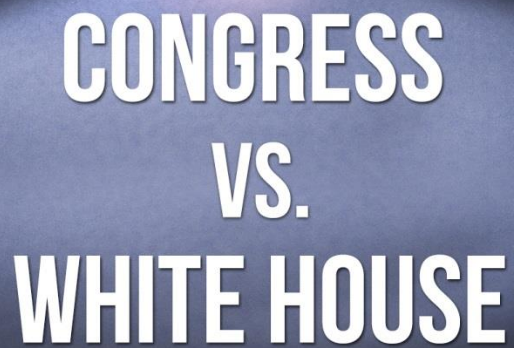

Protecting Your Intellectual Property from the Government's Assault

John McCarthy
Joelle Sires

Overview

- Recent Developments
- Be Sure to Read the Fine Print – Government IP Provisions that Will Keep You Up at Night
- What to Do When the Government Comes Knocking – Preventing & Responding to Data Rights Challenges

Recent Developments

Better Buying Power 3.0

Achieving Dominant Capabilities through Technical Excellence and Innovation

Achieve Affordable Programs
- Continue to set and enforce affordability caps

Achieve Dominant Capabilities While Controlling Lifecycle Costs
- Strengthen and expand "should cost" based cost management
- Anticipate and plan for responsive and emerging threats by building stronger partnerships of acquisition, requirements and intelligence communities
- Institutionalize stronger DoD level Long Range R&D Program Plans
- Strengthen cybersecurity throughout the product lifecycle

Incentivize Productivity in Industry and Government
- Align profitability more tightly with Department goals
- Employ appropriate contract types, but increase the use of incentive type contracts
- Expand the superior supplier incentive program
- Ensure effective use of Performance-Based Logistics
- Remove barriers to commercial technology utilization
- Improve the return on investment in DoD laboratories
- Increase the productivity of corporate IRAD

Incentivize Innovation in Industry and Government
- Increase the use of prototyping and experimentation
- Emphasize technology insertion and refresh in program planning
- Use Modular Open Systems Architecture to stimulate innovation
- Increase the return on and access to small business research and development
- Provide draft technical requirements to industry early and involve industry in funded concept definition
- Provide clear and objective "best value" definitions to industry

Eliminate Unproductive Processes and Bureaucracy
- Emphasize acquisition chain of command responsibility, authority and accountability
- Reduce cycle times while ensuring sound investments
- Streamline documentation requirements and staff reviews
- Remove unproductive requirements imposed on industry

Promote Effective Competition
- Create and maintain competitive environments
- Improve DoD outreach for technology and products from global markets
- Increase small business participation, including more effective use of market research

Improve Tradecraft in Acquisition of Services
- Strengthen contract management outside the normal acquisition chain – installations, etc.
- Improve requirements definition for services
- Improve the effectiveness and productivity of contracted engineering and technical services

Improve the Professionalism of the Total Acquisition Workforce
- Establish higher standards for key leadership positions
- Establish stronger professional qualification requirements for all acquisition specialties
- Strengthen organic engineering capabilities
- Ensure development program leadership is technically qualified to manage R&D activities
- Improve our leaders' ability to understand and mitigate technical risk
- Increase DoD support for STEM education

Continue Strengthening Our Culture of:
Cost Consciousness, Professionalism, and Technical Excellence

Attachment 1

Recent Developments

- Builds on previous versions
- Consistent themes: increased use of commercial technology and innovation
  - Seeks to eliminate unproductive processes and bureaucracy
  - DoD will "scan the commercial sector to identify and capture emerging disruptive technology"
  - BUT, proposes greater oversight for IRAD, including prior DoD approval of each IRAD project

Recent Developments

- Better Buying Power 3.0 - Highlights
  - Remove barriers to commercial technology utilization
    - Handbook of methods and best practices by July 2015
  - Improve return on investment from DoD laboratories
  - Increase productivity of corporate IR&D
    - Reduce IR&D spending on near term competitive opps
  - Increase use of prototyping and experimentation

Recent Developments

- Better Buying Power 3.0 - Highlights (continued)
  - Emphasize technology insertion and refresh in program planning
  - Use modular open systems architecture to stimulate innovation
    - Modularity and Openness metrics to be published in Oct. 2015
  - Increase access to and return on Small Business R&D
    - Transition SBIR technology to fielded systems
    - Engage with non-traditional suppliers, entrepreneurs and inventors
  - Improve DoD outreach for technology and products from global markets

Recent Developments

- DoD Looks to Silicon Valley for Innovation
- Talking points come straight out of BBP 3.0
  - Silicon Valley presence will help DoD access and use commercial technologies. “Our potential adversaries are already doing so”
  - Will offer commercial firms a route to use technology for both commercial and military purposes
  - DoD will reduce bureaucracy and trim onerous IP impediments to attract high tech
- Can DoD have it both ways?

Recent Developments

- GSA Aims to Override Certain Commercial Supplier Agreement Terms
  - RFI on proposed class deviation, 80 Fed. Reg. 15011, March 20, 2015
  - Renders unenforceable 15 types of Commercial Supplier Agreement terms & conditions
  - Implements certain standard terms & conditions to reduce need to negotiate commercial terms on a contract-by-contract basis
  - FAR 52.212-4 takes precedence over conflicting terms in Commercial Supplier Agreements

Recent Developments

- GSA Class Deviation Terms
  - Definition of contracting parties
  - Contract formation
  - Patent indemnity (contractor assumes control of proceedings)
  - Automatic renewals of term-limited agreements.
  - Future fees or penalties
  - Taxes
  - Payment terms or invoicing (late payment)
  - Automatic incorporation/deemed acceptance of third party terms
  - State/foreign law governed contracts
  - Equitable remedies, injunctions, binding arbitration
  - Unilateral termination of Commercial Supplier Agreement by supplier
  - Unilateral modification of Commercial Supplier Agreement by supplier
  - Assignment of Commercial Supplier Agreement or Government contract by supplier
  - Confidentiality of Commercial Supplier Agreement terms and conditions
  - Audits (automatic liability for payment

Government IP Provisions that Will Keep You Up at Night

- Government's assault on contractor intellectual property continues
- Proliferation of solicitation and contract provisions that disproportionately favor the Government
- Consideration of IP rights grants often included as an evaluation criteria
- Proliferation of agency unique clauses

Government IP Provisions that Will Keep You Up at Night

- Intellectual Property considerations in the evaluation criteria:

Factor: Data Rights, Computer Software Rights and Patent Rights

- “In evaluating the Data Rights and Patent Rights, the Government will use information in the proposal to assess the extent to which **the rights** in technical data (TD), computer software (CS), computer software documentation (CSD), and inventions/patents offered **to the Government ensure unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [*SYSTEM NAME*] throughout its life cycle**; allow **for open and competitive procurement** of [*SYSTEM NAME*] enhancements; and permit the **transfer of the [*SYSTEM NAME*] non-proprietary object code and source code to other contractors** for use on other systems or platforms.”

Subfactor 2. Interface Design and Management

- “The Government will evaluate the extent to which the Offeror's open system architecture approach, as documented in the Offeror's Open Systems Management Plan (OSMP), clearly defines and describes all component and system interfaces; defines and documents all subsystem and configuration item (CI) level interfaces to provide full functional, logical, and physical specifications; identify processes for specifying the lowest level (i.e., subsystem or component) at and below which it intends to control and define interfaces by proprietary or vendor-unique standards; and identifies the interface and data exchange standards between the component, module or system and the interconnectivity or underlying information exchange medium.”

DoD’s Open Systems Architecture Contract Guidebook, v.1.1.
https://acc.dau.mil/adl/en-US/664093/file/73330/OSAGuidebook%20v%201_1%20final.pdf.

Government IP Provisions that Will Keep You Up at Night

- Intellectual Property considerations in the evaluation criteria:

Subfactor 3. Treatment of Proprietary or Vendor-Unique Elements

- “The Government will evaluate the extent to which the Offeror's Life Cycle Management and Open Systems Strategy, as documented in the Offeror’s Open Systems Management Plan (OSMP), explains the use of proprietary, vendor-unique or closed components or interfaces; defines its **process for identifying and justifying use of proprietary, vendor-unique or closed interfaces, code modules, hardware, firmware, or software;** and **demonstrates** to the Government **that proprietary elements do not preclude or hinder other component or module developers from interfacing with or otherwise developing, replacing, or upgrading open parts of the system.”**

Subfactor 4. Life Cycle Management and Open Systems

- “The Government will evaluate the extent to which **the Offeror's Life Cycle Management and Open Systems Strategy**, both of which should be documented in the Offeror's Open Systems Management Plan (OSMP), **demonstrates a thorough, adequate, and feasible, strategy for the insertion of COTS technologies and other reusable NDI into the SYSTEM NAME** and **demonstrates that COTS, other reusable NDI, and other components can be logistically supported throughout the system's life cycle**.”

DoD’s Open Systems Architecture Contract Guidebook, v.1.1. https://acc.dau.mil/adl/en-US/664093/file/73330/OSAGuidebook%20v%201_1%20final.pdf.

Government IP Provisions that Will Keep You Up at Night

Intellectual Property considerations in the evaluation criteria:

Factor: Data, Software and Patent Rights

- "The Government will evaluate Data, Software and Patent Rights using information in the proposal to assess the extent to which **the rights** in Technical Data (TD), Computer Software (CS), Computer Software Documentation (CSD), and inventions/patents **offered to the Government ensure unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [*SYSTEM NAME*] throughout its life cycle**; allow for **open and competitive procurement** of [*SYSTEM NAME*] enhancements; and **permit the transfer** of [*SYSTEM NAME*] **TD, CSD and CS** to other systems or platforms."

- "Proposals **will not be rated as less than ACCEPTABLE on this factor solely because an Offeror does not offer a price for the Government Purpose Rights** Option CLIN. However, **ratings on this factor for proposals to deliver TD, CSD, or SW with less than the minimum rights specified for the Government by applicable statute (10 U.S.C. 2320) and regulation (DFARS 252.227-7013, 252.227-7014, and 252.227-7015) may be negatively impacted**. For noncommercial acquisitions, these rights include: Unlimited Rights in TD (as specified in DFARS 252.227-7013(b)(1)) and CS and CSD (as specified in DFARS 252.227-7014(b)(1)); Limited Rights in TD (as specified in DFARS 252.227-7013(b)(3)); and Restricted Rights in CS (as specified in DFARS 252.227-7014(b)(3)). The **minimum rights considered for TD associated with commercial item acquisitions are specified in DFARS 252.227-7015(b)(1**). **For commercial SW acquisitions**, evaluation of the offered rights will assess their consistency with Federal procurement law **and satisfaction of Government user needs** in accordance with the policy in DFARS 227.7202-1(a). **Ratings on this factor for proposals to deliver TD, CSD, or SW with more than the minimum rights specified for the Government by applicable statute and regulation may be positively impacted."**

DoD's Open Systems Architecture Contract Guidebook, v.1.1.
https://acc.dau.mil/adl/en-US/664093/file/73330/OSAGuidebook%20v%201_1%20final.pdf.

Government IP Provisions that Will Keep You Up at Night

- Well known problem clauses:
  - FAR 52.227-17, Rights in Data Special Works
    - Includes broad rights grant in all data delivered under the contract
    - Imposes use restriction on data produced in the performance of the contract
    - Requires Contractor to indemnify the USG
  - Reach back clauses
    - DFARS 252.227-7026, Deferred delivery clause (2 years; only predesignated tech data and computer software))
    - DFARS 252.227-7027, Deferred ordering clause (3 years; any tech data or computer software generated in the performance)
    - FAR 52.227-16, Additional Data Requirements (3 years; "any data first produced or specifically used in the performance of th[e] contract")

Government IP Provisions that Will Keep You Up at Night

- Sleeper clauses:
  - DFARS 252.227-7015, Technical Data – Commercial Items
    - Grants unlimited rights in certain categories of data (FFF, OMIT)
    - Permits release to Government support contractors
    - No liability for release if "not marked to indicate that such data are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions."
  - FAR 52.227-19, Commercial Computer Software License
    - Purports to take precedence over commercial software licenses
    - Grants non-commercial restricted rights in software
    - Requires contractors to label their commercial software with a specific FAR legend:
      - Notice—Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of the Government regarding its use, reproduction and disclosure are as set forth in Government Contract No. _________________.

Government IP Provisions that Will Keep You Up at Night

- Original clauses:

17. Proprietary Information

All data received, processed, evaluated, loaded, and/or created as a result of this delivery order shall remain the sole property of the Government unless specific exception is granted by the contracting officer.

Government IP Provisions that Will Keep You Up at Night

- The Granddaddy of them all – VA "Governing Law"
  - No commercial license effective unless attached
    - No clickwrap
    - No incorporation by reference (3rd P, OSS)
  - Restrictions re Government's use, duplication and disclosure of data "are included and made a part of this contract, and only to the extent that those provisions are not duplicative or inconsistent with Federal law, Federal regulation, the incorporated FAR clauses and the provisions of this contract"
  - Other license provision – other than Government's use, duplication and disclosure of data – not part of the contract

Government IP Provisions that Will Keep You Up at Night

- The Granddaddy of them all – VA "Governing Law"
  - Federal law and regulation, including without limitation, the Contract Disputes Act (41 U.S.C. §601-613), the Anti-Deficiency Act (31 U.S.C. §1341 et seq.), the Competition in Contracting Act (41 U.S.C. §253), the Prompt Payment Act (31 U.S.C. §3901, et seq.) and FAR clauses 52.212-4, 52.227-14, 52.227-19 shall supersede, control and render ineffective any inconsistent, conflicting or duplicative provision in any commercial license agreement.
  - Super order of precedence clause
  - Bottomline: Commercial license agreements eviscerated

Government IP Provisions that Will Keep You Up at Night

- What to do
  - Bilateral negotiations – just say no
  - Competitive procurement
    - Ask questions
    - Interpret provisions as a part of the proposal
    - Pre-award protest
    - Subcontractor – reject flowdown

Government IP Provisions that Will Keep You Up at Night

- What to do
  - Order of precedence
    - Custom order of precedence
    - FAR 52.212-4(s)
      (1) "the schedule of supplies/services;"
      (2) "the Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause;"
      (3) "the clause at FAR 52.212-5;"
      (4) "addenda to this solicitation or contract, *including any license agreements for computer software*;"
      (5) "solicitation provisions if this is a solicitation;"
      (6) "other paragraphs of this clause;"
      (7) "the Standard Form 1449 ;
      (8) "other documents, exhibits, and attachments; :and
      (9) "the specification"

Preventing & Responding to Data Rights Challenges

- Increasing number of data rights disputes

Prechallenge RFIs	Data Rights Challenge
DFARS 252.227-7037(d)	DFARS 252.227-7037(e)
Request for written explanation for data rights assertions	Formal challenge to contractor's data right assertions
CO establishes timeline for response, but can be extended by mutual agreement	60 days to respond, but must be extended upon written request showing need for additional time
Response is not certified	Response is certified
If unsatisfied with response, CO can ask for more information or issue formal challenge	CO may request more information or issue final decision

Preventing & Responding to Data Rights Challenges

- How to respond?
  - Take it seriously!
  - Provide complete and accurate response to create fulsome record
  - Request more time if necessary

Preventing & Responding to Data Rights Challenges

- What to include in response:
  - Summary of technology
  - Timeline of development history
  - Legal support for data assertions

Preventing & Responding to Data Rights Challenges

- What to include in response, cont'd:
  - Documents justifying the data right assertion
    - E.g.:
      - Documents demonstrating development at private expense, e.g.,
        - » Timekeeping records
        - » Records showing development occurred prior to USG investment, such as test reports, specifications, dated drawings
      - Documents demonstrating segregability of technology, e.g.,
        - » Drawings
        - » Software diagrams
        - » Software code analysis

Questions?

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The False Claims Act: Does the Road (to Liability) Go On Forever?

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Brian Tully McLaughlin

FCA Enforcement Trends

- Increased Criminal Prosecution
  - Jan. 2012 – AG Holder Memo re "Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings"
    - "deterrence of future misconduct"
    - "secure the full range of the government's remedies"
  - Sept. 2014 – AAG Caldwell tells relator's counsel gathering that the Criminal Division will "redouble our efforts to work alongside you. Qui tam cases are a vital part of the Criminal Division's future efforts."

FCA Enforcement Trends

- Increased Prosecution of Individuals
  – AG Holder (and others): Focus on individuals provides accountability, fairness and deterrence

Fraud on Tap at the High Court

- Implications of the Supreme Court's "Pending" Decision in *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*
  - Argued Jan. 13, 2015
  - Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 – Does the WSLA apply to toll the civil FCA's 6-year statute of limitations?
    - Court appears ready to rule "no"
  - First-to-File Bar, 31 U.S.C. 3730(b)(5) – Does the bar apply only while the earlier action remains "pending"?
    - Court appears ready to rule "yes" (if it reaches the question)

FCA Liability Trends

- Failure to state a claim
  - Rule 9(b): How much detail must complaint contain?
    - *U.S. ex rel. Escobar v. Universal Health* (1st Cir.)
    - *U.S. ex rel. Reiber v. Basic Contract Services Inc.* (9th Cir.)
  - Rule 8(a): Is the alleged fraud "plausible?"
    - *Gonzales v. Planned Parenthood of L.A.*, (9th Cir.)
    - *Urquilla-Diaz v. Kaplan University* (11th Cir.)
    - *U.S. ex rel. Pecht v. Ducommun* (C.D. Cal.)

FCA Liability Trends

- Implied Certification Gains Ground
  - *U.S. ex rel. Badr v. Triple Canopy*, Inc., 775 F.3d 628 (4th Cir. 2015)
  - Where is the line between fraud and breach of contract/regulatory non-compliance?
    - *WMATA* – failure to openly compete subcontracts
    - *Sanborn Map* – use of unapproved subcontractors

FCA Liability Trends

- *Qui Tam* Developments
  - Public Disclosure Bar: actual vs. legal notice to the gov't
    - *U.S. ex rel. Wilson v. Graham Cnty. Soil & Water Conserv. Dist.*, 777 F.3d 691 (4th Cir. 2015)
    - *U.S. ex rel. Whipple v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, --- F.3d --- (6th Cir. Feb. 25, 2015)
  - Original Source: hardening the knowledge requirement?
    - *U.S. ex rel. Schumann v. AstraZeneca Pharm. L.P.*, 769 F.3d 837 (3d Cir. 2014)
    - *U.S. ex rel Osheroff v. Humana, Inc.*, 776 F.3d 805 (11th Cir. 2015)

FCA Damages

- The Continuing Struggle Among the Courts to Calculate Damages
  - Government continues to assert that damages for some false certifications – those which are pre-conditions to the award of the contract – are the entire contract value.
  - Sampling and extrapolation can substitute for proof of actual damages – *U.S. ex rel. Martin v. Life Care Ctrs*. (E.D. Tenn.)
  - Estimates of how much was improperly paid were calculated by expert witnesses – *U.S. ex rel. Wall v. Circle C Constr.* (M.D. Tenn.)

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Doing Business in California

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Agenda: Doing Business In California

- Complying with California Labor and Employment Requirements
- New Developments in California Environmental Law
- Procurement Issues When Contracting with the State of California
- Nuances of the California FCA

Labor and Employment – 2014 Case Developments

- *Cochran v. Schwan's Home Services, Inc., 228 Cal.App. 4th 1137 (2014)*
  - Personal cell phone reimbursement
- *Iskanian v. CLS Transportation, 59 Cal.4th 348 (2014)*
  - Class action waivers in arbitration agreements
- *Escriba v. Foster Poultry Farms (9th Cir. 2014)*
  - FMLA

Labor and Employment – 2014 Legislative Developments

- No Mandatory Arbitration of Hate Crimes
- Training on "Abusive" Conduct
- Mandatory Paid Sick Leave
- Expanded Anti-discrimination and Anti-harassment requirements

Labor and Employment – 2015 Legislative Expectations

- 16 bills pending that could increase employer expenses
- Family Rights Act expansion
- Mandatory Arbitration prohibition

California Environmental Law

- California's desire to aggressively drive down GHG emissions will continue to shape electric supply and affect rates
- Technological advances now provide customers a greater degree of flexibility to manage energy use and participate in the grid
  - Demand response & storage
  - Distributed generation & electric vehicles
  - Virtual net metering

California Environmental Law (cont'd)

- **SB 350 - Clean Energy and Pollution Reduction Act of 2015**
  - 50% of Electricity Generated Per Year from Renewable Resources by Dec. 31, 2030
  - 50% Reduction In Petroleum Use by Motor Vehicles by Jan. 1, 2030
  - Double Energy Efficiency in Buildings by Jan. 1, 2030
- **SB 32 - California Global Warming Solutions Act of 2006: Emissions Limit**
  - Current: Reduce GHG emissions by approx. 15% from 1990 level by 2020.
  - Update: Reduce GHG emissions to 80% of 1990 level by 2050

California Environmental Law (cont'd)

- Governor Brown continues to push hard on climate initiatives
  - Executive Order B-30-15 – issued April 29, 2015
  - GHG reduction target of 40% below 1990 levels by 2030
- Federal involvement under review
  - *FERC v. Electric Power Supply Association* (US Supreme Court granted cert. May 4, 2015)

California State Procurement

CPRA & Proprietary Information

- No Express Exemption for Trade Secrets
  - Cal. Gov't Code § 6254(k):
    - "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."
  - Cal. Evid. Code § 1060
    - Record must meet the definition of a trade secret.
    - "[T]he owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege <u>will not tend to conceal fraud or otherwise work injustice</u>."

California State Procurement (cont'd)

Treatment of Contractor Bids

- Bids and resulting contracts are generally disclosable after bids have been opened or the contract is awarded. Public Contract Code §§ 10305, 10342.
- State Contracting Manual
  - "Although a rejected bid may have pages marked 'Confidential' or 'Proprietary,' the bid is a public record subject to release in response to a public records request. In order to prevent the release of bid documents that are marked 'confidential' or 'proprietary,' the bidder must obtain a court order enjoining the state from release of the document."

California State Procurement (cont'd)

Practice Pointers

- Identify and mark proprietary information and trade secrets
- Understand what state agencies consider to be releasable
- Negotiate notification into contract

California Whistleblower Statute

- Amendments to California's general whistleblower statute (Cal. Labor Code section 1102.5)
  - Whistleblower protections extended:
    - to individuals making internal reports to supervisors and compliance officers
    - to employees who are responsible for raising compliance issues as part of their duties (such as compliance officers or general counsel)
    - to instances of anticipatory retaliation

California False Claims Act

- California Adopts Implied Certification Theory
  - *San Francisco United School District ex rel Contreras v. First Student, Inc*. No. A136986, Cal. Crt. App. (Mar. 2014)
  - Holding: “a vendor impliedly certifies compliance with express contractual requirements when it bills a public agency for providing goods or services.”

California False Claims Act (cont'd)

- Reducing Exposure to California FCA suits
  - Compliance program
  - Continuous employee training
  - Regularly audit business activities
  - Investigate whistleblower complaints

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Contract Disputes

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Overview

I. New Case Law on CDA Statute of Limitations and Impacts for Contractors

II. Asserting Defenses to Government Claims: *Maropakis* and its Progeny

III. Identifying Claims / REAs and Pursuing Affirmative Recovery Opportunities

New Case Law on CDA Statute of Limitations and Impacts for Contractors

CDA Statute of Limitations

- The Contract Disputes Act, 41 U.S.C. §§ 7101-7109, includes a 6-year SOL
- Claims submitted more than six years after **accrual** are barred by the CDA
- CDA does not define the term "accrual." The Board (and the Court) rely on the Federal Acquisition Regulation 33.201 definition:

  … **the date when all events, which fix the alleged liability** of either the Government or the contractor and permit the assertion of the claim, **were known or should have been known** …
- Until recently, SOL was held to be "jurisdictional," which meant that the boards and COFC lacked jurisdiction over claims beyond the 6-year window -- SOL could be raised at any time, by either party, or the court, and it could not be waived or tolled by agreement of the parties
- In *Sikorsky*, the Federal Circuit made a significant change in the SOL landscape

CDA Statute of Limitations

Sikorsky Aircraft Corp. v. United States, 2013-5096, -5099 (December 10, 2014)

- Government alleged that Sikorsky had allocated certain costs in noncompliance with CAS 418 during the 1999 to 2005 period.
- COFC held that the CDA SOL had not run, and concluded that the government had not shown that Sikorsky's allocation practice failed to comply with CAS 418.
- Government appealed the COFC's ruling on the merits, and Sikorsky cross-appealed, arguing that the CDA SOL had run and that the COFC's ruling on SOL had to be addressed before the merits because the CDA SOL is jurisdictional.
- Court held that the statute of limitations is "not jurisdictional" and "need not be addressed before deciding the merits."

Statute of Limitations Case Law

- Discussion – where are we now?
  - ICS Claims
  - CAS Noncompliance Claims
  - Accounting Change Claims
  - TINA

Statute of Limitations

Key considerations:

- Be on the lookout for time-barred claims
- Dealings with CO and DCAA
- SOL works both ways
- Other considerations

Asserting Defenses to Government Claims: *Maropakis* and its Progeny

Maropakis

- *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010)
  - Contract completed 467 days late
  - Maropakis requested 447 day extension
    - Letter not certified
    - Did not request final decision by CO
  - CO issues final decision on government's claim for liquidated damages
  - Federal Circuit
    - Reject Maropakis' argument that the underlying facts of its time extension request could be presented as a defense to the government's liquidated damages assessment
    - "[A] contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action."

Developments

- *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38 (2011)
  - *Maropakis* involved a defense seeking contract modification and not a "traditional common law defense that [is] independent of the means by which a party seeks equitable adjustment to a government contract."
- *TPL, Inc. v. United States*, 118 Fed. Cl. 434 (2014)
  - Court ignored "common law" labels Contractor applied to defenses in breach of contract case: impracticability, mutual mistake of fact, and unconscionability.
- *Total Eng'g, Inc. v. United States*, 120 Fed. Cl. 10 (2015)
  - *Maropakis* did not bar contractor's "defective specifications" defense to a government claim.
- *Asfa Int'l.*, ASBCA No. 57880, 14-1 BCA ¶ 35,736 (Sep 2014)
  - *Maropakis* did not bar Contractor's defense of waiver by forbearance against Government claim for liquidated damages.

Developments

- *Raytheon Co. v. United States*, 747 F.3d 1341 (Fed. Cir. 2014)
  - The government’s failure to obtain a CO's final decision on its equitable adjustment defense prohibited the Court from considering the government's defense.
- *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000 (Fed. Cir. 2015)
  - Contractor sought (1) remission of liquidated damages, asserting the LD clause was unenforceable; (2) remission of LDs, asserting entitlement to time extensions; (3) additional compensation on account of other contract changes.
  - Federal Circuit affirms COFC dismissal of the claim for remission based on entitlement to time extension.
  - Entitlement to an extension had not been properly submitted for the CO’s final decision, meaning the COFC had no jurisdiction.

Where Are We Now?

- "Seeking an adjustment of contract terms"
- "Traditional common law defenses"
- Does the label matter, if the effect is the same?

Practical Takeaways

- Be mindful of potential impacts
- Identify defenses to government claims early in the claims process
- Recognize this is a developing area of law
- Consider protective claims to the contracting officer

Identifying Claims / REAs and Pursuing Affirmative Recovery Opportunities

Identifying Potential Claims

- Key contract clauses and doctrines
- How to spot a potential “claim”
- How to document and present a potential “claim”

REA and Contract Disputes Act "Claim": Differences?

- Differences between an REA and a "Claim" under the CDA
  - What are the differences?
  - Why are these differences important?
  - How do these differences impact your approach?

REA vs. Contract Disputes Act Claim

- Key differences between CDA claim and REA
  - Timing
  - Interest
  - Cost allowability

Claims, cont.

- Nonappropriated Fund Instrumentality (NAFIs)
- Tucker Act Claims

Other considerations when filing a claim:

- Customer considerations
- Business considerations
- Costs of litigation

Case Study

- *SUFI Network Servs., Inc. v. United States*

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The Changing Landscape of Internal Investigations

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In re Kellogg Brown & Root, Inc. (Barko I)

756 F.3d 754 (D.C. Cir. 2014)

- District Court: internal investigation not privileged
  - Investigation “undertaken pursuant to regulatory law and corporate policy”
  - Conducted by in-house counsel only
  - Non-attorney interviewers
  - Interviewees not told that the purpose was to assist the company in providing legal advice

In re Kellogg Brown & Root, Inc. (Barko I)

756 F.3d 754 (D.C. Cir. 2014)

- D.C. Circuit: internal investigations are privileged
  - But-for test rejected; “one of the significant purposes” was to obtain or provide legal advice
  - Outside counsel are not “a necessary predicate”
  - Communications by and to non-attorneys serving as agents of attorneys are routinely protected
  - No “magic words” necessary to tell employees in order to gain the benefit of the privilege

U.S. ex rel. Barko v. KBR (Barko II)

- On remand, District Court found waiver through statements made by KBR's counsel during discovery and at summary judgment:
  - The shield becomes a sword
  - Rule 612
  - No retraction allowed
- Alternatively, some is fact work product only and Barko has substantial need
- Another mandamus writ filed, with oral argument at 10:00 a.m. on May 11, 2015

Barko – Lessons Learned

- *Barko I*
  - Attorney-client privilege is alive and well
  - Make clear what your purposes are
- *Barko II*
  - [Maybe…]
    - Keep your sword in its sheath
    - Minimize deponent prep materials
    - Log all responsive, privileged materials

Barko – Securities & Exchange Commission

- SEC's involvement
  - Settlement regarding allegations that KBR required witnesses in internal investigations to sign confidentiality statements that could have kept them from reporting possible securities law violations to outside authorities.

Barko – Securities & Exchange Commission (cont.)

Original provision

- "I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment"

Revised provision

- "Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures"

Barko – SEC Lessons Learned

- Review existing policies to assess potential risk
- Consider using carve-out language
  - Nothing in this agreement shall prohibit you from communicating directly with…
- Affirmative language noting no obligation for prior counsel approval (or anyone else in the company)

Wal-Mart Stores, Inc.

- *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264 (Del. 2014)*
- Wal-Mart shareholder, IBEW, seeks access to internal investigation documents during a derivative action
- Del. Court of Chancery orders Wal-Mart to produce investigation files
- Del. Supreme Court agrees, applying *Garner* exception

Wal-Mart Stores, Inc. (cont.)

- *Garner* doctrine allows disclosure of privileged materials to shareholders for "good cause"
- Court found good cause

Wal-Mart Stores, Inc. Lessons Learned

- Attorney-client privilege may take a back seat when fiduciary duties are involved
  - *Wal-Mart* unlikely to have sweeping impact on ACP
- Attorneys must be mindful of the fiduciary exception when communicating with corporate officials and conducting internal investigations

Bank of China

- *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013)
- Wultz family bring suit against BOC under the Antiterrorism Act for allegedly providing material support and resources to terrorist organization
- Seek production of BOC's anti-money laundering compliance procedures and investigations
- BOC argue that documents are privileged

Bank of China (cont.)

- S.D.N.Y. look at choice of law and determine Chinese law applies to some docs; US law applies to others
- Where Chinese law applies
  - Chinese law does not recognize ACP or AWP, so neither privilege applies
- Where US law applies
  - Unlicensed Chinese in-house counsel not entitled to privilege
  - BOC fail to show that documents were prepared "in anticipation of litigation" so AWP does not apply

Bank of China Lessons Learned

- Foreign companies – importance of retaining U.S. counsel when possibility of litigation in the U.S. arises
- Importance of educating foreign clients regarding the attorney-client privilege and attorney work product doctrine in the United States

Freeh Investigation

- Where *Freeh Firm* not retained to provide legal services, its communications were not privileged.
- Court focused on the "**Scope of Engagement**" section of the firm's engagement letter:
  - Engaged to serve as "independent, external legal counsel" – NOT ENOUGH
- In contrast, the Freeh Firm's retention of the Freeh Group, "**for the purpose of providing legal services**", allowed Penn State to assert privilege over communications with the Freeh Group.

Freeh Investigation Lessons Learned

- Take extra caution when drafting engagement letters
- Beware Subject Matter Waiver

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Bid Protests: Avoiding Common Procurement Pitfalls

Dan Forman
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State of GAO Bid Protests

- Sustain in FY2014 dropped to 13%, the lowest in recent history
- So far in 2015, very few published decisions sustaining protests
  - Only 15 in first six months of FY2015
- Heavy push to resolve cases through voluntary agency corrective action prior to final GAO decision
- Fewer decisions means less educational guidance to the contract community

FY 2014 Bid Protest Statistics

	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010
Cases Filed[1]	2,561 (up 5%[2])	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)	2,299 (up 16%)
Cases Closed	2,458[3]	2,538	2,495	2,292	2,226
Merit (Sustain + Deny) Decisions	556	509	570	417	441
Number of Sustains	72	87	106	67	82
Sustain Rate	13%	17%	18.6%	16%	19%
Effectiveness Rate[4]	43%	43%	42%	42%	42%
ADR[5] (cases used)	96	145	106	140	159
ADR Success Rate[6]	83%	86%	80%	82%	80%
Hearings[7]	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)	10% (61 cases)

Common Procurement Risks Which Can Be Avoided by Early, Smart Intervention

- In era of record-high rates of correction action, being able to convince the agency to defend your award is critical
- Three areas where contractor mistakes early in the procurement process can lead to major bid protest exposure down the road:
  1. Hiring and Use of Former Government Employees
  2. Proposed Staffing of New Contracts Via Incumbent Capture With Overaggressive Compensation Cuts
  3. Bidding on Government Contracts While in the Midst of Corporate Reorganization/Restructuring

NAVIGATING THE REVOLVING DOOR

Revolving Door Statutes

- Limitations on employment negotiations with current government officials
  - 18 U.S.C. § 208 – generally applicable
  - 41 U.S.C. § 2103 – for officials involved in procurements
- Limitations on compensation/hiring government officials
  - 41 U.S.C. § 2104
- Representational Bans for Former Gov't Officials
  - 18 U.S.C. § 207 – numerous different categories of bans

Role of the Ethics Official

- Interpretation of the scope and applicability of revolving door statutes are the province of the Designated Agency Ethics Official ("DAEO")
- DAEOs issue opinions which provide guidance to current and former government officials about what they can and cannot do
- Proceeding without DAEO consultation is a MAJOR RISK

The DAEO vs. The Contracting Officer

- While DAEOs interpret revolving door statutes, only the Contracting Officer is authorized to make procurement integrity determinations, per FAR subpart 9.5
- A DAEO "clean letter" to be hired by a firm does not mean the former government official is clear to do any and all work for that firm
- Use of former government officials can still give rise to unfair competitive advantages in a procurement
- The Contracting Officer must sign-off on the participation of the former official or else there is a risk of disqualification from the procurement
  - Significance of the risk is highly circumstantial

Unfair Competitive Advantage

- When a former government officials participates in the effort to obtain a contract, he/she is presumed to use any inside information he/she has which may be competitively useful
  - *Health Net Fed. Servs., LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220
  - *International Resources Group*, B-409346.2, Dec. 11, 2014, 2014 CPD ¶ 369
- Entire proposal team may be tainted

Early Disclosure to Contracting Officer

- The best way to resolve a potential unfair competitive advantage situation is to seek early guidance from the contracting officer
  - If CO reasonably investigates the situation and deems it acceptable, that determination is entitled to substantial deference and is very difficult to challenge successfully
- Inadequate investigation may lead to protest sustain
  - *International Resources Group*, supra.
  - *PCCP Constructors, JV et al.*, B-405036.6 et al., August 4, 2011, 2011 CPD ¶ 156

Early Disclosure to Contracting Officer

- Risk of disclosure is that the contracting officer may not give you the answer you want
  - May require onerous mitigation measures
  - In rare instances, could disqualify a firm from the competition
- While CO determinations are entitled to deference, mistakes of fact can still be challenged
  - *VSE Corporation*, B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268

Practical Tips to Navigating the Revolving Door

- For revolving door statutory restrictions, know the rules, obtain DAEO letters before employment or employment discussions, and do due diligence on the disclosures underlying the DAEO letter
- If considering former government official for involvement in competitive procurement proposal strategy or preparation
  - Disclose fully to contracting officer far enough in advance to permit agency investigation and determination before official begins involvement in proposal OR
  - Wall off the former government official from all involvement in proposal preparation
- Be alert to, and analyze, hires of agency officials by potential competitors

RISKS OF RELYING ON INCUMBENT CAPTURE TO STAFF SERVICE CONTRACTS

Proposing Incumbent Capture

- Common fact pattern:
  - Contractor bidding on service contract, hoping to unseat incumbent contractor
  - RFP requires a staffing plan to account for challenge of staffing a large or sophisticated contract
  - Contractor does not have a sufficient surplus of qualified employees to staff the contract from current ranks
  - Contractor wants to rebadge some or all of the incumbent workforce

Proposing Incumbent Capture

- Common mistakes:
  - Relying on incumbent capture while also committing to employee compensation and/or labor rates which reflect substantial reductions from the status quo
  - Misrepresenting commitments from key personnel

Underpricing Incumbent Employees

- Relying exclusively on incumbent capture for some or all of staffing creates evaluation risk in many different procurement circumstances:
  1. Upward cost adjustment in cost realism review
  - *Magellan Health Servs.*, B-298912, Jan. 5, 2007, 2007 CPD ¶ 81: Cost realism evaluation of awardee's proposal improper where, although knowing that awardee had proposed to recruit the incumbent workforce, agency failed to adjust awardee's proposed labor rates as part of its cost realism evaluation where labor rates were unrealistically low

Underpricing Incumbent Employees

- Evaluation risks (continued)
  2. Rejection of price or down-scoring of proposal in price realism evaluation (firm fixed price procurement)
  – *Health Net Federal Servs., LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220: Evaluation of compensation of awardee's proposed staff unreasonable where awardee relied on high percentage of incumbent capture yet proposed substantially lower salaries than current incumbent salaries. Price realism review was required to consider risk of unsuccessful incumbent capture.

Underpricing Incumbent Employees

- Evaluation risks (continued)
  3. Direct penalty in technical evaluation
     – *Alutiiq Pacific, LLC*, B-409584, June 18, 2014, 2014 CPD ¶ 196: Even where RFP had no price realism evaluation, awardee's high staffing evaluation rating in staffing subfactor unreasonable where agency evaluators gave substantial credit for incumbent capture plan, yet gave "no consideration to [the awardee's] proposed compensation reductions"

Best Practices to Avoid Penalties

- Propose multiple staffing approaches, of which incumbent capture is one
- Avoid quantitative commitments to particular level of incumbent capture (i.e. 50% or 70% capture)
  - GAO has recently denied protests where an awardee's staffing plan did not rely exclusively on incumbent capture and, instead, "identified multiple sources for staffing the task order and the agency's evaluation reflected that multi-faceted approach"

Bait and Switch, Defined

- The "bait and switch" definition closely tracks the broader "material misrepresentation" standard
- *CACI Technologies, Inc.*, B-408858, Dec. 5, 2013, 2013 CPD ¶ 283: "In order to establish an impermissible 'bait and switch,' a protester must show:
  1. that an offeror either knowingly or negligently represented that it would rely on specific personnel that it did not expect to furnish during contract performance,
  2. that the misrepresentation was relied on by the agency, and
  3. the agency's reliance on the misrepresentation had a material effect on the evaluation results."

Bait and Switch vs. Incumbent Capture

- In dozens of cases over the past 20 years, GAO has rejected bait and switch claims in which a new contractor attempts to hire incumbent key personnel after naming other key personnel in the proposal
- *PricewaterhouseCoopers LLP; IBM U.S. Federal*, B-409885, Sept. 5, 2014, 2014 WL 4923905:
  - "IBM complains that E&Y engaged in an improper bait and switch because the awardee began an '***extensive effort to recruit IBM's incumbent key personnel' within days of contract award***. We have reviewed IBM's allegation and conclude that the protester has not satisfied [the bait and switch] requirements here. ***The mere fact that E&Y was seeking to hire additional qualified personnel to meet the needs of the RFP does not demonstrate that E&Y failed to propose appropriate personnel in its proposal or misrepresented the availability of the personnel***."

Strategies for Mitigating Bait and Switch Risk

- Honesty is the best policy
- NEVER represent a commitment from anyone who has not made such a commitment
- Always clearly represent that your proposed list of key personnel is ready to perform the work as promised, even if you hope to supplement with incumbent personnel
  - Of course, this needs to be a truthful representation!

CONTRACTING DURING CORPORATE RESTRUCTURING

Corporate Changes

- All forms of corporate restructuring create potential contracting issues due to questions of privity of contract and the possible need to novate agreements
  - Many issues relate to contract administration
  - But there are also contract formation and procurement-related concerns arising from:
    - Corporate restructuring
    - Mergers
    - Acquisitions
    - Name Changes

Changes Affecting Ongoing Evaluations

- Corporate structural changes can affect the accuracy and validity of pending proposals
  - *Wyle Laboratories, Inc.*, B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16: Protest sustained where awardee's proposal in cost reimbursement procurement contained assertions about corporate finances, including overhead rates, that were rendered inaccurate by mid-procurement split of major defense contractor
- Other potential issues:
  - Past performance evaluations where newly structured firm relies on contracts performed by predecessor entity
  - New OCI risks from newly acquired entities *e.g.*, *Guident Technologies, Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166

Other Technical Contracting Issues

- Questions of privity and acceptance - Who is the offeror and who can accept?
  - What if a company submits a proposal under one name and that name is changed during the procurement?
  - Offeror in ongoing procurement absorbed by another firm and ceases to exist by time of award, *e.g., ITT Electronic Sys*., B-406405, May 21, 2012, 2012 CPD ¶ 174
  - Offerors bidding under predecessor entity's GSA schedule contract

Practice Tips

- Some of these challenges are unavoidable
- Others can be mitigated or resolved through careful planning prior to corporate changes being instituted
- Communication with the Contracting Officer can resolve many of these concerns
- Update proposals during proposal revision opportunities to avoid accusation that the proposal contained stale or inaccurate information

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