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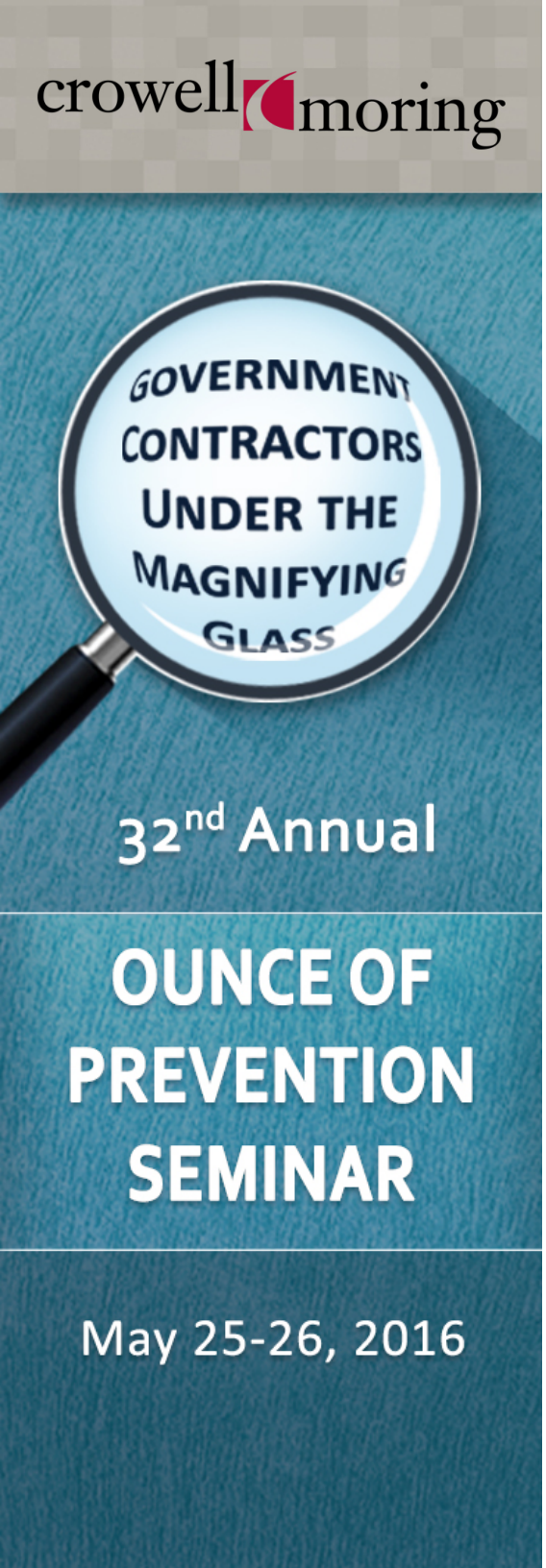
32nd Annual

OUNCE OF PREVENTION SEMINAR

May 25-26, 2016

Welcome Attendees



Driving Change in Today's Contracting Environment

Angela Styles

Rob Burton

Roger Waldron, The Coalition for Government Procurement

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May 25-26, 2016

"Oh, and Do This, Too"

Executive Actions Impose Ever-Expanding Labor-Related Burdens on Contractors

Trina Fairley Barlow

Jason Crawford

Kris Meade

Rebecca Springer

Fair Pay and Safe Workplaces

Status

- May 2015: FAR Council and DOL issued proposed rule and guidance.
- May 4, 2016: Draft final rule and guidance arrived at the Office of Information and Regulatory Affairs ("OIRA").
- OIRA is supposed to complete its review within 90 calendar days.

New Requirements

- Contractors bidding on contracts valued over $500,000 to disclose whether they have received any "administrative merits determinations," "arbitral awards or decisions," or "civil judgments" within the preceding three-year period for 14 enumerated labor laws.
- CO required to consider disclosures as part of responsibility determinations.

Day-One Readiness

- Proposed Rule imposes a 3-year look-back
- Start gathering relevant information about "violations"
- Coordinate with compliance, HR, IT, Legal
- If necessary, prepare description of any mitigating factors and remedial measures

Key Unknowns

- **Timing**: High likelihood of litigation – impact on implementation
- **State Law**: In a departure from the EO, the only "equivalent state laws" identified in proposed rule are OSHA-approved state plans. More to come?
- **Reporting of Subs**: Proposed rule requires contractors to obtain from subs the same labor compliance history disclosures. Change in Final Rule?

Paid Sick Leave
Covered Contracts

- Service contracts under the Service Contract Act
  - Prime contracts $2,500+; subcontracts no threshold
- Construction contracts under the Davis-Bacon Act
  - Prime contracts $2,000+; subcontracts no threshold
- "Concessions contracts" – purpose is to provide food, lodging, etc.
- Contracts for services on federal property - lessees
- Same as Executive Order 13658 (minimum wage for contractors)

Paid Sick Leave
Covered Employees

- All employees working on or "in connection with" a covered contract or subcontract
- Both non-exempt and exempt – includes supervisors and managers
- Exception: No coverage for employees who work less than 20% of the time in connection with a covered contract in a work week

Paid Sick Leave Requirements

- Accrue one hour for every 30 hours worked or 56 hours per year granted up front
- Accrued leave carries over year to year
- "Reinstatement" of paid sick leave required upon re-hire by same contractor or successor

FLSA Final Regulations

- Issued May 18, 2016
- "Salary level" increased to $913 per week or $47,476 annually
- "Salary level" will be updated every three years
- No changes to the "job duties" test
- Employers have until December 1, 2016 to comply with the new regulations.

Next Steps for Contractors

- Identify employees who will need to be re-classified
- Analyze financial impact of change
- Consider impact of new FLSA salary thresholds on other legal obligations
  - E.g., Service Contract Act
  - E.g., Executive Order 13658
- Carefully and precisely track hours worked for non-exempt employees

Joint Employer Liability

- National Labor Relations Board
  - *Browning-Ferris Industries*
    - Announced a new and broader standard for determining "joint employer" liability
    - Discarded 30 years of NLRB precedent
    - Actual control not required
    - "Indirect control" and "reservation of rights" may be sufficient to create joint employer liability

Joint Employer Liability

- Department of Labor
  - Issued Administrative Interpretation (No. 2016)
    - Confirmed that the FLSA and MSPA cover "joint employment."
    - Definition of "employ" is broad under these statutes.
    - Provides guidance on the scenarios in which joint employment will be found.
    - Adopted the "economic realities" test for analyzing vertical employment relationships.

Considerations for Contractors

- Assessment of how, if at all, these broader definitions of "joint employment" impact business models.
- Weighing and understanding the impact of "reservation of rights" clauses.
- Understanding and minimizing risks associated with a "joint employer" finding.

EEO-1 Report Revisions

- Status
  - Comments submitted to DOL; OMB approval required
  - Implementation for 2017 reporting cycle
- Key Provisions
  - Adds 12 pay bands to each of the 10 EEO-1 Categories
  - Within each pay band, must disclose number of employees and hours worked by race and gender
  - Report data based upon 12-month W-2 earnings
  - Substantial time and expense; little value

EEO-1 Report Revisions

- Impact on Your Organization
  - HR, IT and Legal
- What to Do Now
  - Budget for necessary IT infrastructure
- Unknowns
  - Rescission by next administration?
  - Legal challenges?

Pay Equity Initiatives

- Status
  - Focus of Obama administration
  - State Laws – CA, NY
- What to Do Now
  - Privileged compensation analyses
  - Develop supporting documentation

OFCCP Compliance

Status

- Intensified enforcement efforts
  - Focus on compensation and hiring
- Inter-office coordination/global resolutions
- Black box approach

What To Do Now

- Conduct privileged compensation analyses
- Monitor adverse impact
- Coordinate compliance/audit responses
  - HR, IT, Legal
  - Across establishments

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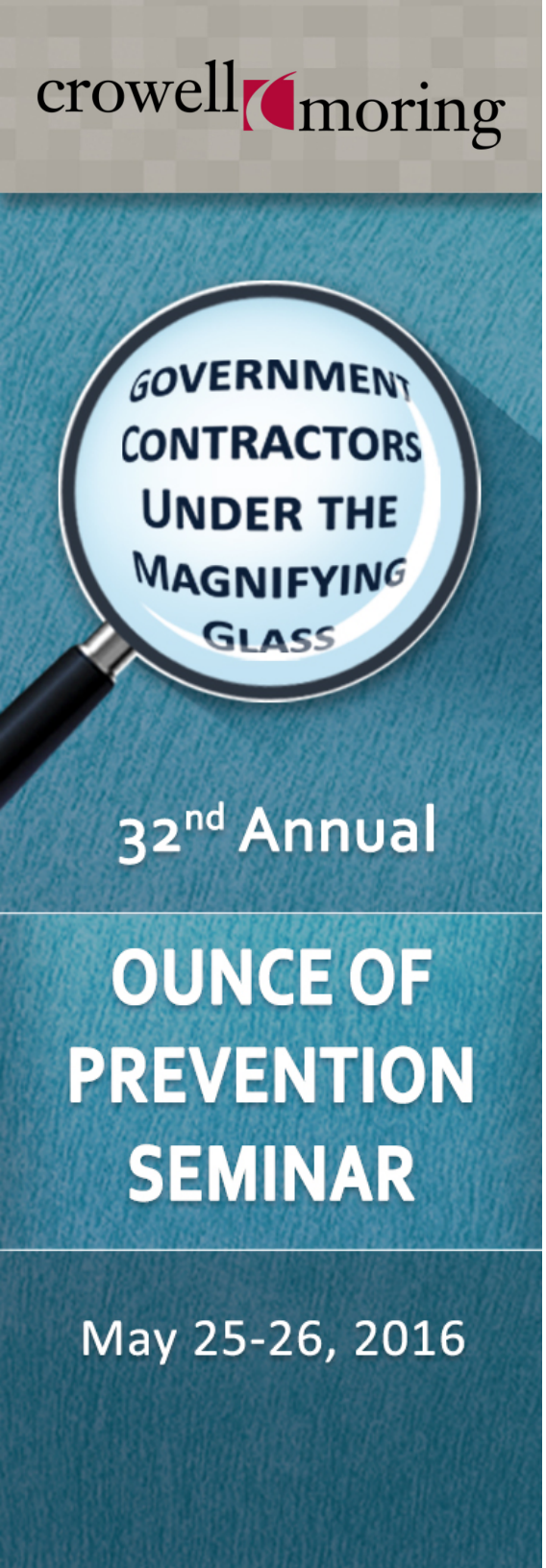

Thinking Strategically About Bid Protests: Frequently Overlooked Considerations

Thomas Humphrey
Amy O'Sullivan
James Peyster
Olivia Lynch
Robert Sneckenberg

Roadmap

- *Before* the Protest: Stepping Stones and Stumbling Blocks
- *After* the Protest: Corrective Action, Follow-on Protests, and the Impact of Acquisitions, Novations, and Restructurings

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Stepping Stones and Stumbling Blocks *Before* Filing a Bid Protest

1. Critical Importance of the Q&A Process
2. Timeliness Traps
3. Making Effective Use of the Debriefing Process

How to Use the Q&A Process to Your Advantage

- Clarify Ambiguities
- Advocate for Change
- Frame Pre-Award Protest Issues
- Escalate Concerns

Timeliness Traps to Avoid

- Narrow protest windows
- Pre-proposal protests are *not* limited to challenging RFP terms
- Elements triggering OCI protests
  - Risks of asking offeror-specific OCI questions during Q&A
  - Extension of OCI timeliness trigger to other eligibility issues?
- Timeliness following competitive range eliminations

Making Effective Use of Your Debriefing

- Timely (within 3 days, in writing) request a debriefing, and *take the first date offered*!
- Engage outside counsel quickly
- Submit questions – even if not requested by the agency

Making Effective Use of Your Debriefing

- Always ask for a debriefing, *even if you're the awardee*
- Keep debriefing open, if expecting further information
- Information provided varies by agency, contract to contract, and even what is provided after initial award v. post-corrective action
  - But know your rights: FAR 15.505(e) (pre-award), FAR 15.506(d) (post-award)

After the Protest: Corrective Action, Remedies, and Follow-on Protests

1. *Current Trend*: Increased Use of Corrective Action
2. Challenging Corrective Action
3. Post-Corrective Action Unpredictability
4. Impact of Changed Corporate Structure During Corrective Action

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Corrective Action on the Rise

	FY2015	FY2014	FY 2013	FY 2012	FY 2011
Cases Filed[1]	2,639 (up 3%)[2]	2,561 (up 5%)	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)
Cases Closed[3]	2,647	2,458	2,538	2,495	2,292
Merit (Sustain + Deny) Decisions	587	556	509	570	417
Number of Sustains	68	72	87	106	67
Sustain Rate	12%	13%	17%	18.6%	16%
Effectiveness Rate[4]	45%	43%	43%	42%	42%
ADR[5] (cases used)	103	96	145	106	140
ADR Success Rate[6]	70%	83	86%	80%	82%
Hearings[7]	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)

Challenging Corrective Action: at GAO

- Typical timing of corrective action at GAO
- Are original protest grounds rendered academic?
  - Even if not, difficulties of challenging at GAO
- What has the agency committed to do?
- What information has been disclosed?
- Make sure the original award is stayed, and watch out for issuance of notifications on bridge contracts!
- Ensure extension of deadline to destroy protected material

Challenging Corrective Action: at the COFC

- Essentially all forms of corrective action challenges that can be raised at the GAO can also be raised at the COFC
- Two additional categories of corrective action challenges available that GAO will not hear
  - Challenges to overbroad corrective action
  - Challenges to implementation of corrective action based on the agency's adherence to an unreasonable GAO remedial recommendation

Challenging Corrective Action: at the COFC

- *Sheridan Corp. v. United States*, 95 Fed. Cl. 141 (2010)
  - Awardees suffer harm from having to re-compete for an award, especially after its price has been revealed
  - Need to correct legal error will always trump awardee's harm
  - However, unnecessarily broad corrective action cannot be justified in light of harm to the awardee
    - Cannot reopen proposal revisions when only legal error can be resolved through a reevaluation of previously-submitted proposals

Challenging Corrective Action: at the COFC (cont.)

- *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 186 (2011); 100 Fed. Cl. 198 (2011)
  - Protester raised multiple issues at GAO and won on some
  - Awardee challenged reasonableness of agency's implementation of the GAO recommendation; essentially an appeal in effect
  - GAO protester also challenged corrective action by re-raising those issues that it lost at GAO and arguing that corrective action should have addressed those alleged flaws in the procurement

Post-Corrective Action Unpredictability

- Narrow vs. Broad Corrective Action?
  - Agencies have wide discretion
  - Difficult to challenge broad corrective action. *E.g.*, *American Sys. Corp.*, B-412501.2, B-412501.3, Mar. 18, 2016, 2016 CPD ¶ 91 (agency resolicited requirements and awarded bridge contract to incumbent)
  - Agency can perform additional steps on corrective action beyond what was proposed

Post-Corrective Action Unpredictability

- New evaluation team?
  - *Compare MILVETS Sys. Tech., Inc.*, B-409051.7, B-409051.9, Jan. 29, 2016, 2016 CPD ¶ 53 (new technical evaluation panel and SSA free to reach new conclusions)
  - *with eAlliant, LLC*, B-407332.6, B-407332.10, Jan. 14, 2015, 2015 CPD ¶ 229 (same SSA reaching different conclusions is problematic)

Post-Corrective Action Unpredictability

- Other Recent Issues
  - What happens to the original award?
    - *SCB Solutions, Inc.—Reconsideration*, B-410450.2, Aug. 12, 2015, 2015 CPD ¶ 255 (original award only terminated *after* full performance)
  - Protests of multiple award procurements
    - The Easy Fix: additional awards
    - *But see Nat'l Air Cargo Grp., Inc. v. U.S.*, No. 16-362C, 2016 WL 1719258 (Fed. Cl. Apr. 28, 2016) (potential COFC jurisdiction over protests of additional awards)
  - Keep protest counsel informed!

The Impact of Acquisitions, Novations, and Restructurings

- Corrective action lengthens the procurement lifecycle
  - Greater likelihood of corporate changes impacting proposal, evaluation, and even identity of offeror
  - What should contractors do when only specific types of revisions are allowed during corrective action?
- Factors to consider:
  - Agency must evaluate offerors on the manner in which the contract would be performed;
  - Offerors must alert agency of material changes;
  - Dangers of post-FPR discussions

The Impact of Acquisitions, Novations, and Restructurings

- *FCi Federal Inc.*, B-408558.7, B-408558.8, Aug. 5, 2015, 2015 CPD ¶ 245:
  - Agency undertook corrective action 9 months after its initial award decision
  - Awardee had been sold to another company following GAO's initial decision that the agency had conducted a flawed responsibility determination
  - Agency did not solicit revised proposals and considered only the awardee's responsibility
  - The sale "materially and significantly" altered the awardee's approach to contract performance
  - GAO sustained

The Impact of Acquisitions, Novations, and Restructurings

- *Universal Prot. Serv., LP v. United States*, No. 16-126C, 2016 WL 1696761 (Fed. Cl. Apr. 7, 2016):
  - During corrective action taken in response to ABM Security Services, Inc.'s protests, ABM's parent sold ABM to Universal
  - Universal argued that it bought all assets, meaning that ABM's proposed facilities, resources, and personnel would be the same under Universal
  - Court examined if Universal is:
    - The complete successor-in-interest to ABM, and
    - If Universal can offer an identical proposal and all of the assets and services promised in the proposal by ABM
  - ABM proposal's repeated reliance on availability of resources of ABM's original parent convinced the court that Universal lacks all of the resources articulated by ABM
  - The Court ruled that Universal is not a complete successor-in-interest to ABM and, therefore, did not have standing to challenge the award

Major Procedural Changes on the Horizon?

- Senate Armed Services Committee Markup of the 2017 NDAA proposes major changes to deter bid protests:
  - Automatic loser-pays provision for unsuccessful protests by companies with over $100M in annual revenue
  - Escrowing of all profits earned by an incumbent through a bridge contract obtained due to delay from a bid protest filed by that incumbent
  - Complete removal of GAO's IDIQ task/delivery order protest jurisdiction
- Likelihood of passage uncertain at this time

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GOVERNMENT CONTRACTORS UNDER THE MAGNIFYING GLASS

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May 25-26, 2016

Regulating Information: Cybersecurity, Internet of Things, & Exploding Rules

David Bodenheimer

Evan Wolff

Kate Growley

Regulating Information

- **The Internet of Things: Peering into the Future**
- **Cybersecurity & New Regulations**
- **Balancing Information Sharing & Cyber Compliance**

Peering Far into the Future

OOPS 2006

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PRIVACY & CYBERSECURITY DILEMMAS
IN BALANCING THE HOMELAND SECURITY
MISSION TO GATHER AND SHARE INFORMATION

David Z. Bodenheimer

1. Escalating Cyber Breaches & Risks

By all measures, breaches of cybersecurity have become more common, more expensive, and more risky.

a. Bad Trends

Cybercrime and attacks have skyrocketed in recent years, as the numbers readily show:

- **3600% increase** in domestic computer crime since 1997[2]
- **237 million security attacks** globally (in the 1st half of 2005 alone)[3]
- "Cybersecurity crime **increased dramatically** in 2005, and 2006 promises even more incidents . . . ."[4]

OOPS 2016

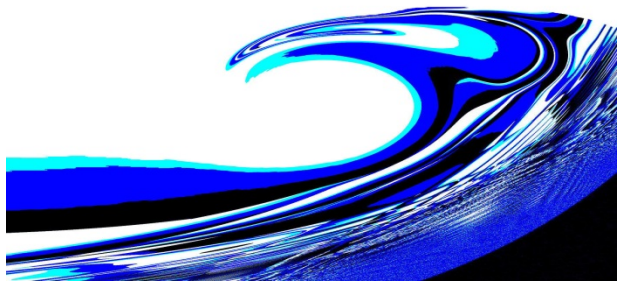
Internet of Things

- Too Big to Regulate?
- Too Ubiquitous to Miss?
- Too Fast to Keep Up?

GOVERNMENT CONTRACTORS UNDER THE MAGNIFYING GLASS

IoT Technology Tsunami

- **More Devices than Humans**
  - 25 Billion Devices → 50 Billion (2020)
- **127 Devices/Second**
  - Devices added to Internet (5.4M/day)
- **$11 Trillion Global Economy**
  - $2 Trillion (2016)
  - $11 Trillion (2025)



Internet of Things?

- **What is the Internet of Things?**
  - Definitions & Examples
- **Why do we care about IoT?**
  - Benefits & Risks
- **How is IoT regulated?**
  - Congressional & Regulatory Oversight
  - Challenges & the Future

What is IoT?

White House Report

"The 'Internet of Things' is a term used to describe the ability of devices to communicate with each other using embedded sensors that are linked through wired and wireless networks."

BIG DATA:

SEIZING OPPORTUNITIES, PRESERVING VALUES

Executive Office of the President

MAY 2014

THE WHITE HOUSE
WASHINGTON

What is IoT?

Other Definitions

- FTC Report (2015)
  - Various experts
- CRS Report (2015)
  - Broadly defined
- NIST Guide (2016)
  - Being defined

The Real Answer

"Ask me what the Internet of Things is. My usual answer is, **'I don't know.'"**

Senator Fischer
quoted in Politico
(June 29, 2015)

What is IoT?

By Example

- Smart Homes
  - HVAC, lights, locks
- Healthcare
  - Inhalers, monitors
- Smart Cities
  - Pollution monitors & transportation

= Smart!

More Examples

- Smart Farming
  - Sensors, drones
- Energy
  - Clean tech
- Industrial Uses
  - Factory sensors
  - Predictive O&M
  - Supply chain

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Why care about IoT?

Senate Res. 110

- Economic Impact
- Consumer Benefits
- Business Efficiencies
- Smart Cities
- Innovation
- Global Competition

[S. Res. 110 (Mar. 24, 2015)]

114TH CONGRESS
1ST SESSION

S. RES. 110

Expressing the sense of the Senate about a strategy for the Internet of Things to promote economic growth and consumer empowerment.

IN THE SENATE OF THE UNITED STATES

MARCH 24, 2015

Mrs. FISCHER (for herself, Mr. BOOKER, Ms. AYOTTE, and Mr. SCHATZ) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

Expressing the sense of the Senate about a strategy for the Internet of Things to promote economic growth and consumer empowerment.

Whereas the Internet of Things currently connects tens of billions of devices worldwide and has the potential to generate trillions of dollars in economic opportunity;

Whereas increased connectivity can empower consumers in nearly every aspect of their daily lives, including in the fields of agriculture, education, energy, healthcare, public safety, security, and transportation, to name just a few;

Why care about IoT?

Benefit Cornucopia

- **Economics -- $$$**
  - $2 Trillion (today)
  - **$11 Trillion (2025)**
- Business Efficiencies
  - 10-20% energy savings
  - 10-25% labor efficiencies

And More

- Consumer Benefits
  - 95% auto accidents
  - Nursing home glut
  - $1.1 Trillion remote monitoring savings
- Global Innovation
  - U.S. leadership
  - Global competition

Why care about IoT?

Risks Unlimited?

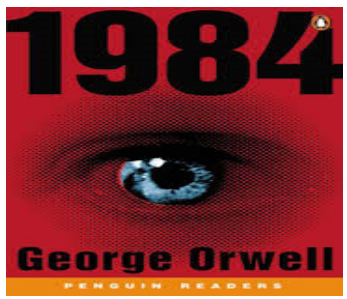
- **Cybersecurity**
  - 25 billion devices
  - 50 billion by 2020
  - Automated links
  - Supply chain length
  - Cyber espionage

"every node, device, data source . . . **a security threat**" [DHS IoT (Dec. 2015)]

And More?

- **Privacy**
  - Zettabytes of data
  - All transport
  - Smart cities
  - IoT + drones
  - Surveillance

*FTC Report
*CRS Q&A
*Hill Hearings



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Who regulates IoT?

Patchworks

- Privacy Patchwork
  - HIPAA (healthcare)
  - GLB (financial)
  - FERPA (educational)
  - Privacy Act (federal)
- Cyber Patchwork
  - FISMA (federal)
  - HIPAA/GLB, etc.

Integrated Tech

- IoT + Drones
  - "Next trillion files"
  - FAA regulate?
- IoT + Cloud
  - Big Data = Bigger
  - GSA & FedRAMP?

Who regulates IoT?

- **Congressional Committees**
  - "more than 30 different congressional committees" [*Politico* (June 2015)]
- **Congressional Hearings**
  - Senate Commerce (Feb. 2015)
  - House Commerce (Mar. 2015)
  - House Judiciary (July 2015)

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Who regulates IoT?

Federal Agencies

- FCC
  - Spectrum mgmt.
- DHS
  - Critical infrastructure
- FTC
  - Consumer devices
- FDA
  - Medical devices

And More

- DOE
  - Smart grid
- DOT
  - Connected cars
- DOD
  - IoT advanced tech
- DOJ
  - Law enforcement

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Who regulates IoT?

NIST Publication

"However, the current Internet of Things (IoT) landscape presents itself as a mix of jargon, consumer products, and unrealistic predictions. There is no formal, analytic, or even descriptive set of the building blocks that govern the operation, trustworthiness, and lifecycle of IoT. This vacuum between the hype and the science, if a science exists, is evident. Therefore, a composability model and vocabulary that defines principles common to most, if not all networks of things, is needed to address the question: "what is the science, if any, underlying IoT?"

[NIST, Draft NISTIR 8063 (Feb. 2016)]

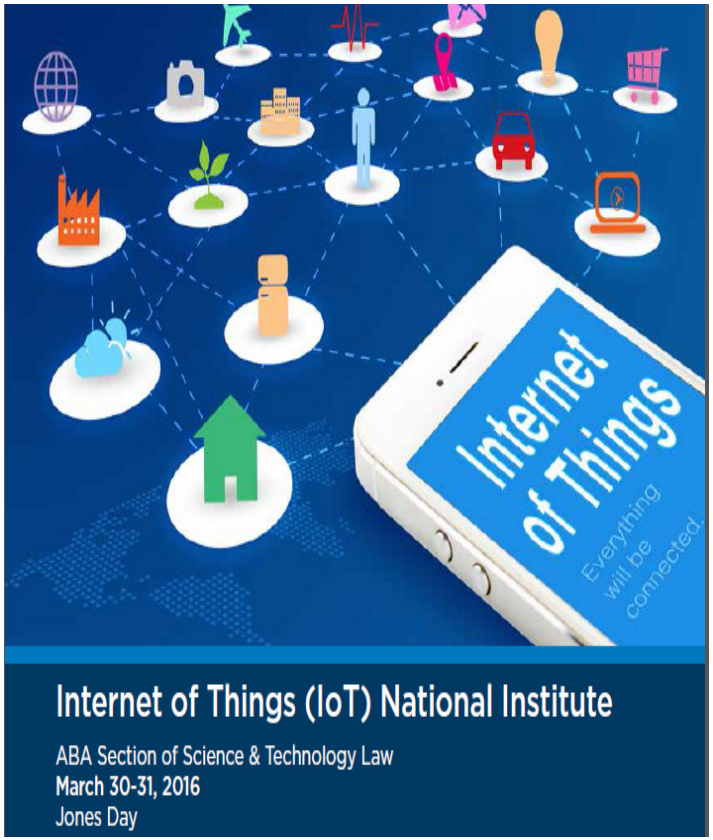
Privacy of Things

"The Internet of Things (IoT) will create the single largest, most chaotic conversation in the history of language. Imagine every human being on the planet stepping outside and **yelling at the top of their lungs everything that comes into their heads**, and you still wouldn't be close to the scale of communications that are going to occur when all those IoT devices really get chattering."

[Geoff Webb, *How will billions of devices impact the Privacy of Things?* (Dec. 7, 2015)]

IoT in the Future

IoT in 2016



IoT in 2017

1.9 Billion More Devices

Another $2 Trillion

More Hill Scrutiny

Expanded IoT Regulation

Harder Cyber Issues

ABA IoT National Institute

April/May 2017

Washington, DC

What is the DFARS Safeguarding Rule?

- Mandatory in all defense contracts and solicitations
  - DFARS 252.204-7012 (NOV 2013), *Safeguarding Unclassified Controlled Technical Information*
- Requires "adequate security" to protect information systems with "unclassified controlled technical information"
  - Defaults to 51 controls in NIST SP 800-53
- Imposes cyber incident reporting requirements
  - Report incidents that "affect" UCTI within 72 hours
  - Requires all reporting to go through prime

How has it been amended?

- Interim Rule issued on August 26, 2015
  - Without prior public comment
  - Opened for comment only after issued
- Expanded scope, default security controls, and reporting requirements
- Second Interim Rule issued on December 30, 2015
  - Again without prior public comment

How has the scope expanded?

- Requires "adequate security" to protect information systems with "covered defense information"
  - Unclassified controlled technical information
  - Information critical to operational security
  - Export-controlled information
  - "Any other information, marked or otherwise identified in the contract, that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Government policies"
- Retitled *Safeguarding Covered Defense Information and Cyber Incident Reporting*

How have the security controls expanded?

- "Adequate security" defaults to NIST SP 800-**171**
  - Includes 109 security controls
  - Only partially comparable to prior 51 controls
- Primary focus of December 30 amendment
  - Implementation deadline extended to December 31, 2017
  - But requires status reports with new contracts

How have the reporting requirements expanded?

- Requires reporting of any cyber incident that "affects" information systems *or* CDI therein
  - Still imposes 72-hour timeline
- Requires primes *and* subs to report cyber incidents directly to DoD
  - Still requires that subs report to their primes

What else should I be thinking about?

- Expect further guidance and/or Final Rule this year
- Becoming competitive differentiator
- Growing concerns over liability risks
  - Supply chain compliance
  - False Claims Act
- Expect parallels in pending FAR Rule on controlled unclassified information (CUI)

FAR 52.204-21: Basic Safeguarding of Covered Contractor Information Systems

- Newly published (5/16/16), effective in 30 days (proposed rule dates back to 8/4/12)
- Safeguards systems rather than specific information
- Covers any contractor and subcontractor information system that "processes, stores, or transmits" information "not intended for public release" that is "provided by or generated for" the Government
- Does not pre-empt more specific security requirements (DFARS, classified, CUI, agency, etc.), including "forthcoming FAR rule to protect CUI"
- "[I]ntent is that the scope and applicability of this rule be very broad, because [it] requires only the most basic level of safeguarding."
  - No exemption for simplified acquisition threshold
  - Applies to commercial acquisitions, but exempts Commercial Off the Shelf (COTS) items

FAR 52.204-21: Basic Safeguarding of Covered Contractor Information Systems

- Requires contractors and subcontractors to implement 15 controls taken from NIST SP 800-171
  - Access Control (4 specific controls)
  - Identification and Authentication (2)
  - Media Protection (sanitization and disposal) (1)
  - Physical Protection (2)
  - System and Communications Protection (2)
  - System and Information Integrity (4)
- "[A]s long as the safeguards are in place, failure of the controls to adequately protect the information does not constitute a breach of contract."

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Lifecycle Cyber and Privacy Risk Management

1. Identify And Classify Sensitive Data And Regulated Systems

- What Are The "Crown Jewels"?
- Who Has Responsibility?

2. Implement Controls To Protect Data And Systems

- Asset Management
- People / Talent Management
- Compliance / Regulatory Mgmt.

3. Establish Clear Governance

- Roles & Responsibilities
- Audit/Reporting Processes
- Communication Structure

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Lifecycle Cyber and Privacy Risk Management

4. Review And Update Policies & Procedures

- Regular Intervals
- Understand Risk Drivers
- Industry Best Practices

5. Prepare For An Incident

- Incident Response Plan
- Incident Response Team
- Retain Outside Experts
- Conduct Training

6. Think About External Risks

- Vendor / Supply Chain
- Organized Crime
- Nation States
- Hacktivists

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Lifecycle Cyber and Privacy Risk Management

7. Think About Internal Risks

- Negligent / Disgruntled Employees
- Insider Threats
- Network Vulnerability

8. Participate In Industry And Government Partnerships

- CISA / ISACs
- Evolving Regulatory Landscape

9. Export Risks

- M&A
- Insurance
- SAFETY Act
- Managed Services

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OUNCE OF PREVENTION SEMINAR

May 25-26, 2016

False Claims Act: Trends and Emerging Issues

Bob Rhoad

Brian Tully McLaughlin

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Judy Choi

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Agenda

- Stats and Trends: Relators Go It Alone / Stiffer Penalties on the Horizon
- A Sample of What's to Come With Extrapolation
- Liability Involving Ambiguous Terms
- High Court to Rule on Implied Cert.

2015 FCA Recoveries

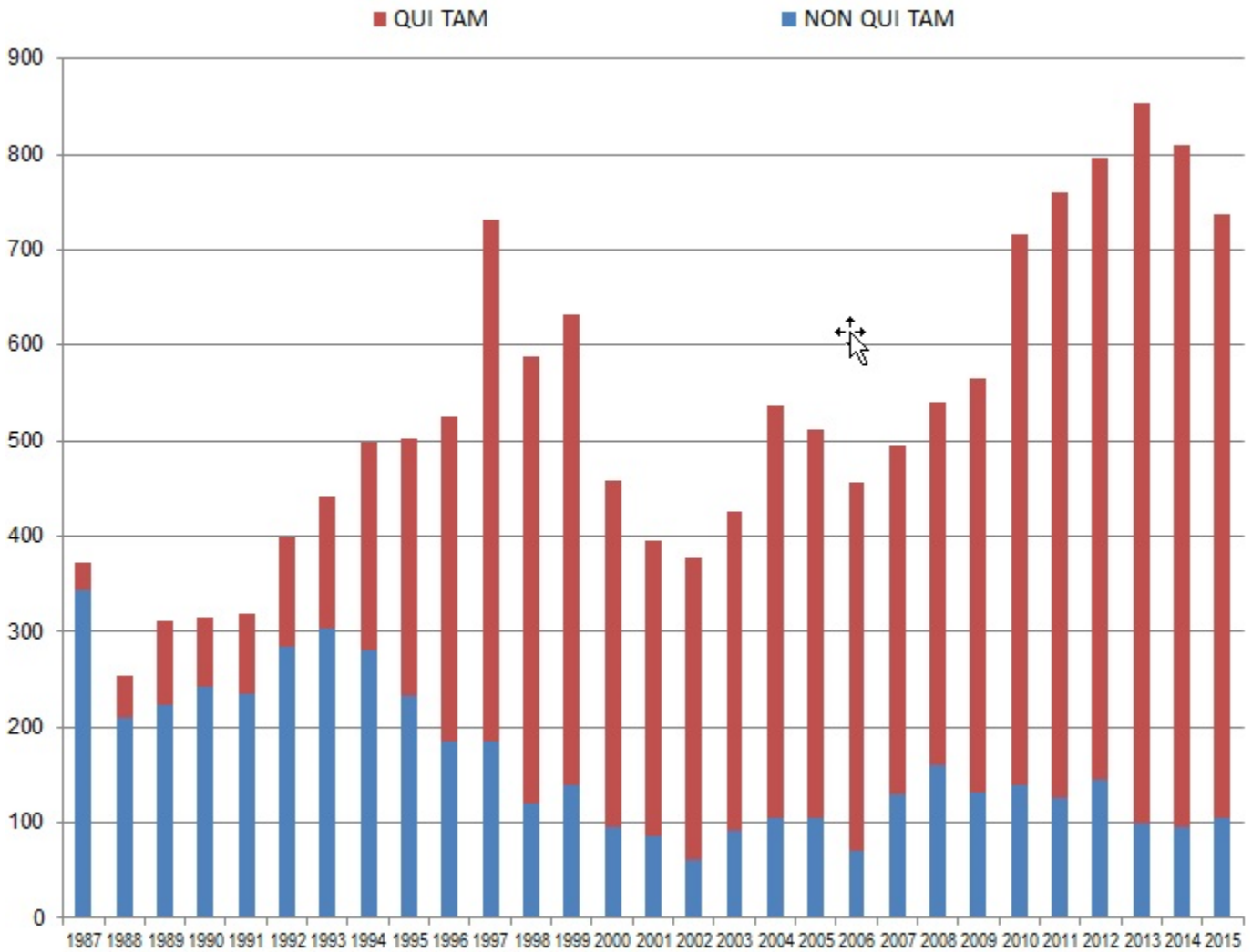
- $3.6 billion recovered in FCA settlements or judgments in 2015
  - Decrease from 2014 record-breaking recovery of almost $5.7 billion
- Over $21 billion recovered in last 5 years

Qui Tam Activity Steady and High

- *Qui tam* actions continue to be majority of suits filed under FCA
  - FY 2015: Whistleblowers initiated approximately 86% of the FCA cases
  - 1986: only 8% of FCA suits initiated by whistleblowers
- 5th consecutive year in which relators filed 600 or more matters

GOVERNMENT CONTRACTORS UNDER THE MAGNIFYING GLASS

Number of FCA New Matters



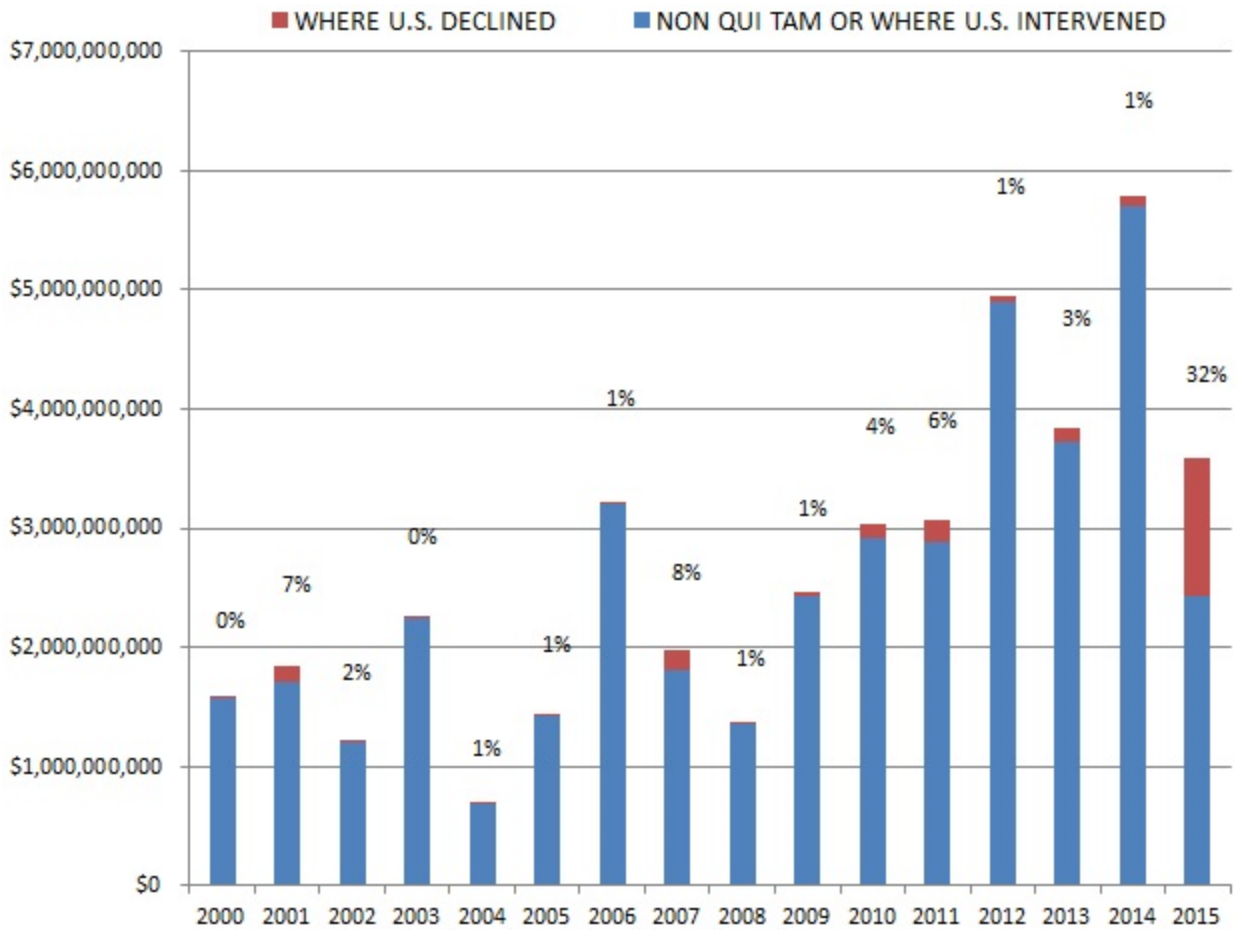
Source: DOJ "Fraud Statistics – Overview" (Nov. 23, 2015)

Dramatic Increase in Qui Tam Recoveries

- $1.1 billion of recoveries (32%) from cases filed by relators where government declined to intervene
  - Prior years' relator filings resulted in only 1% of amount of recoveries, and never as much as 10%
- Relators increasingly willing to pursue case after government declination

Increase in Qui Tam Recoveries

Cases where Government declined intervention as percentage of Total FCA Recoveries



Source: DOJ "Fraud Statistics – Overview" (Nov. 23, 2015)

Penalties Set To Increase

Federal Civil Penalties Inflation Adjustment Act Improvements Act

- Agencies must increase FCA penalties to account for inflation
  - One-time "catch up" adjustment to FCA penalty levels
  - Penalty range (currently at $5,500 - $11,000) can potentially double
  - Additional annual adjustments per the CPI

Impact of Penalty Adjustments

- Penalties will increase A LOT
  - Example: Railroad Retirement Board
- Greater discrepancies between penalties and damages
- Potential for more Eighth Amendment and Due Process challenges to penalties
- Increased Settlement Leverage

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A Sample of What's to Come with Extrapolation

Background

- Statistical sampling historically used in antitrust, voting rights, and mass tort cases
- Until recently, sampling rarely used in FCA cases and never used at trial, without the consent of the defendant, to prove liability

Background (cont.)

- In FCA context, sampling used to determine damages where defendants did not contest liability
  - *U.S. v. Cabrera-Diaz*, 106 F. Supp. 2d 234 (D.P.R. 2000); *U.S. v. Fadul,* No. CIV.A. DKC 11-0385 (D. Md. Feb. 28, 2013)
- The *Fadul* and *Cabrera-Diaz* courts looked to well-established use of sampling in administrative context

Recent Developments

- *United States ex rel. Martin v. Life Care Centers*, No. 1:08-cv-00251-HSM-WBC (E.D. Tenn. Sept. 29, 2014)
  - Government alleged nursing home operator violated FCA, charging Medicare for unnecessary services
  - Government argued case involved too many claims to litigate on case-by-case basis
  - Government's statistical expert used random sample of 400 patient admissions (out of 54,396 admissions)

Life Care (cont.)

- Life Care moved for summary judgment, arguing Government cannot prove liability to claims outside the sample by extrapolation
- Court recognized that "using extrapolation to establish damages when liability has been proven is different than using extrapolation to establish liability"
- However, court found that judicial precedent and FCA's legislative history does not prohibit use of statistical sampling to prove liability

U.S. ex rel. Michaels et al. v. Agape Senior Community, No. CA 0:12-3466-JFA (D.S.C. June 25, 2015)

- South Carolina nursing home allegedly submitted fraudulent claims to Medicare and Medicaid for care that was not medically necessary
- In discovery, relators told court that it would cost between $16M to $26M to have experts review more than 50,000 individual claims
- Court ruled that it will not allow statistical sampling; recommends parties conduct bellwether trial of 100 claims
- Parties settled

Agape (cont.)

- Government, who did not intervene, objected to settlement
- Relators moved to enforce settlement
- Court denied motion to enforce judgment, stated its reasons for disallowing stat sampling and certified ruling for interlocutory appeal
- On Sept. 29, 2015, Fourth Circuit agreed to hear appeal

Litigating Cases with Sampling

- Until area of law is settled, defendants should be prepared to challenge use of statistical sampling at various stages of litigation
  - Consider making arguments in FRCP 9(b) that plaintiffs have failed to allege fraud with particularity by failing to identify submission of individual false claims

Daubert Challenges

- In *U.S. ex rel. Ruckh v. Genoa Healthcare LLC et al.*, relator moved *in limine* to admit expert testimony on statistical sampling (prior to any expert performing sampling)
- Court denied motion as premature, but stated there is no universal ban on sampling in *qui tam* action
- Court underscore importance of *Daubert* motions to challenge purported sample, noting defects in methodology or other evidentiary defects can exclude expert's sampling analysis

Battle of Experts

- If defendants are unsuccessful at excluding sampling evidence, might introduce competing testimony to challenge plaintiff's methodology
  - In *Life Care*, the court noted Life Care could challenge Government's use of extrapolation by cross-examination of Government's expert and introducing competing testimony

Bifurcation of Issues

- *U.S. v. AseraCare Inc.*, No. 2:12-CV-245-KOB
  - Court allowed Government to use statistical sampling and expert testimony to provide falsity element
  - Government planned to introduce pattern and practice evidence, including some prejudicial emails, to prove knowledge element
  - Court bifurcated falsity element and remaining elements (knowledge, materiality) into two separate trial

AseraCare (cont.)

- At conclusion of phase one trial, jury found false claims submitted for 104 of sample patients
- Judge granted defendant's motion for new trial after deciding it erred in refusing to give defendant's jury instruction
- In March 2016, judge threw out suit

What's Next?

- Fourth Circuit expected to rule in *Agape* in June 2016
  - If Fourth Circuit allows for sampling in cases where individualized evidence is available, likely Government and relators will bring more FCA cases and rely on sampling to support case-in-chief
  - Defendants will have to rely heavily on evidentiary motions to restrict use of sampling and provide competing expert testimony

Ambiguous Terms: No Warning, No Knowing Falsity

- *United States ex rel. Purcell v. MWI Corp.* (D.C. Cir. 2015) – reversing FCA jury verdict where regulation is ambiguous, and defendant's interpretation was reasonable
  - C&M represented MWI at trial and appeal

MWI Background

- MWI: Small exporter of water pumps and irrigation equipment
- Export-Import Bank: finances and facilitates export of U.S. goods and services by providing loans to foreign purchasers, contributing to jobs/employment
- Sales agents: used by exporters to market/sell, working on commission

MWI: The Sales, The Loans, The Commissions

- MWI sold $82 million in irrigation equipment to 7 Nigerian states
- Ex-Im financed ~$75 million via 8 separate loans
- MWI's sales agent paid commissions of 24-35%, totaling ~$26 million on the successful sales

MWI: The Certification

- Supplier's Certificate: MWI required to certify that it had not paid "any discount, allowance, rebate, commission, fee or other payment in connection with the sale"

except

"regular commissions or fees paid or to be paid in the ordinary course of business to our regular sales agents . . . and readily identifiable on our books and records as to amount, purpose, and recipient."

MWI: What Does "Regular" Commission Mean?!

- Ex-Im never provided any guidance or definition of "regular commissions"
- DOJ proffered definitions during litigation, one of which was accepted by the district court for trial: those "normally and typically paid by the exporter and its competitors in the same industry" → an industry-wide standard

MWI: What Does "Regular" Commission Mean?

- MWI's interpretation: the commissions it paid were "regular" because they were consistent with what MWI had been paying the same agent for over 12 years and were based on the same commission formula MWI used for all agents → the individual-agent standard

MWI: From Trial to Appeal

- Jury finds for DOJ, but verdict is for $7.5 million (not $75 million as DOJ sought)
- In post-trial proceedings, court offsets all damages, imposing only penalties of $580,000
- DOJ appeals damages ruling; MWI cross-appeals on liability

MWI's Cross-Appeal Arguments

- Ex-Im failed to provide MWI with fair notice of its interpretation, violating due process
- A reasonable interpretation of an ambiguous term precludes a finding of falsity *or* scienter
- The evidence was insufficient to show that MWI submitted knowingly false claims

MWI: DC Circuit Overturns Jury Verdict

- "Regular commissions" is ambiguous
- MWI's interpretation was reasonable
- Ex-Im failed to warn MWI away from its reasonable interpretation
  - "Absent evidence that the Bank, or other government entity, had officially warned MWI away from its otherwise facially reasonable interpretation of that undefined and ambiguous term, the FCA's objective knowledge standard . . . did not permit a jury to find that MWI "knowingly" made a false claim." [Citing *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007)]

MWI: DC Circuit Overturns Jury Verdict

- "Authoritative Guidance"
  - Evidence that a Bank officer told MWI that there were no definitive guidelines but commissions should be somewhere near 5 percent = insufficient
  - In *Safeco*, an informal letter written by agency staff was inadequate (551 U.S. at 70 n.19)

MWI: DC Circuit Overturns Jury Verdict

- Bad Faith is Irrelevant When a Party Reasonably Interprets an Ambiguous Term
  - Evidence that MWI employees were concerned that the commissions should be disclosed did not prove scienter
  - "subjective intent—including bad faith—is irrelevant when a defendant seeks to defeat a finding of knowledge based on its reasonable interpretation of a regulatory term" (citing *Safeco*, 551 U.S. at 70 n.20)

MWI: DC Circuit Overturns Jury Verdict

- "Had the government wanted to avoid such consequences [payment of large commissions], it could have defined its regulatory term to preclude them. Of course, the government may instead determine that its goals are better served by not doing so, much as the Bank officials' testimony implied. This may be the government's choice, but then the FCA may cease to be an available remedy if the government concludes after the fact that a particular commission is not 'regular' because it is too high."

MWI: The Damages Dance

- DOJ argued that loans would not have been issued had the commissions been disclosed, and sought the full value of the loans as damages ($75m x 3 = $225m)
- (Mis)applying *Bornstein v. U.S.*, 423 U.S. 303 (1976), the district court on the eve of trial excluded all evidence of loan repayment
  - **Loans were fully repaid by Nigeria**
  - **Ex-Im received $108m, including $33.7m in interest/fees**
- In spite of the excluded evidence, the jury rendered a verdict for just $7.5m, not $75m
- In post-trial hearing, court applied *Bornstein* again, ruling that the $108m in undisputed loan payments were "compensatory" and applied them as an offset, zeroing out any damages
- TAKE NOTE: DOJ and relators are more frequently seeking to widen the application of *Bornstein* to support full contract value damages theories and exclude benefit of the bargain evidence

Implied Certification: High Court Set To Resolve Circuit Split

- *Universal Health Services v. United States ex rel. Escobar*
- Whether FCA allows an implied false certification theory of liability
- If so, whether regulation at issue must contain an explicit condition of payment to trigger liability
- Decision expected before end of June term

Background

- Relators' daughter died following treatment from unlicensed and unsupervised counselors
  - Facility owned/operated by UHS
- Alleged UHS violated FCA when it presented reimbursement claims to Medicaid
  - Counselors were not supervised as required by Massachusetts regulations
- Clinic did not explicitly certify compliance

Procedural History

- District Court
  - Dismissed relators' complaint
  - Massachusetts regulations at issue imposed only conditions of participation in the government program, not preconditions to payment as required for FCA liability
- First Circuit
  - Reversed District Court
  - Regulations at issue were in fact conditions of payment, even if they did not expressly state that they were

Arguments Before the Court

- UHS
  - A claim cannot be false or fraudulent without an affirmative misstatement
  - FCA liability should only attach if requirements expressly provide that compliance is a condition of payment
  - Challenged assertion that FCA's knowledge element provides sufficient protection
- Relators
  - Claim for payment impliedly represents that provider is entitled to payment
  - Claim is false if it is submitted by provider not entitled to payment
  - Limiting liability to violations of requirements expressly made conditions to payment would create loophole

Reaction From Justices

- Asked very few questions regarding viability of the implied certification theory
  - Questions focused on where the line should be drawn
- Little discussion of limiting liability to violations of provisions expressly made conditions to payment
  - Questions focused on how to determine when a violation is "material"

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Investigations – Part I: Figuring Out the Facts

Peter Eyre

Gail Zirkelbach

Phil Inglima

David Ginsberg

Jacinta Alves

Scenario 1: Facts

- Two days before BAFOs are due, capture lead hears a rumor that the pricing team "knows" the pricing of the two other offerors in the competitive range
- Capture lead reports this rumor to legal

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Scenario 1: Considerations

- Sequencing of investigation
- Preservation issues
- Disclosures
- Corrective actions

Scenario 2: Facts

- On a hardware development contract, prime contractor has outsourced the pre-delivery testing to a subcontractor
- The government has rejected several deliveries due to quality issues
- Prime contractor's program manager confronts the subcontractor's CEO, who
  - admits that testing was not being done regularly
  - says that he had previously told the prime's COO
- Prime contractor program manager seeks advice

Scenario 2: Considerations

- Dealing with Subcontractors
  - Proactively
  - Reactively
- Yates Memo – handling potential individual liability
- Others?

Scenario 3: Facts

- During a routine compliance review at a hospital system, a risky billing practice is discovered, *i.e.*, choosing claim codes when elements are missing without the necessary clinical expertise or knowledge of the medical record
- Compliance notifies Legal and performs a limited sample audit targeting the billing practice
- Due to billing and claims data storage and tension between billing and compliance, the results of the internal audit suggest overbilling, but is inconclusive as to overpayments

Scenario 3: Considerations

- Investigational Interviews
  - Order
  - Upjohn Warning
- Dealing with Experts
  - Expert Selection
  - Defining Scope
  - Preserving privilege
- Corrective Action
  - System Modifications
  - Internal Controls
- Board Notification
  - Duty
  - Timing

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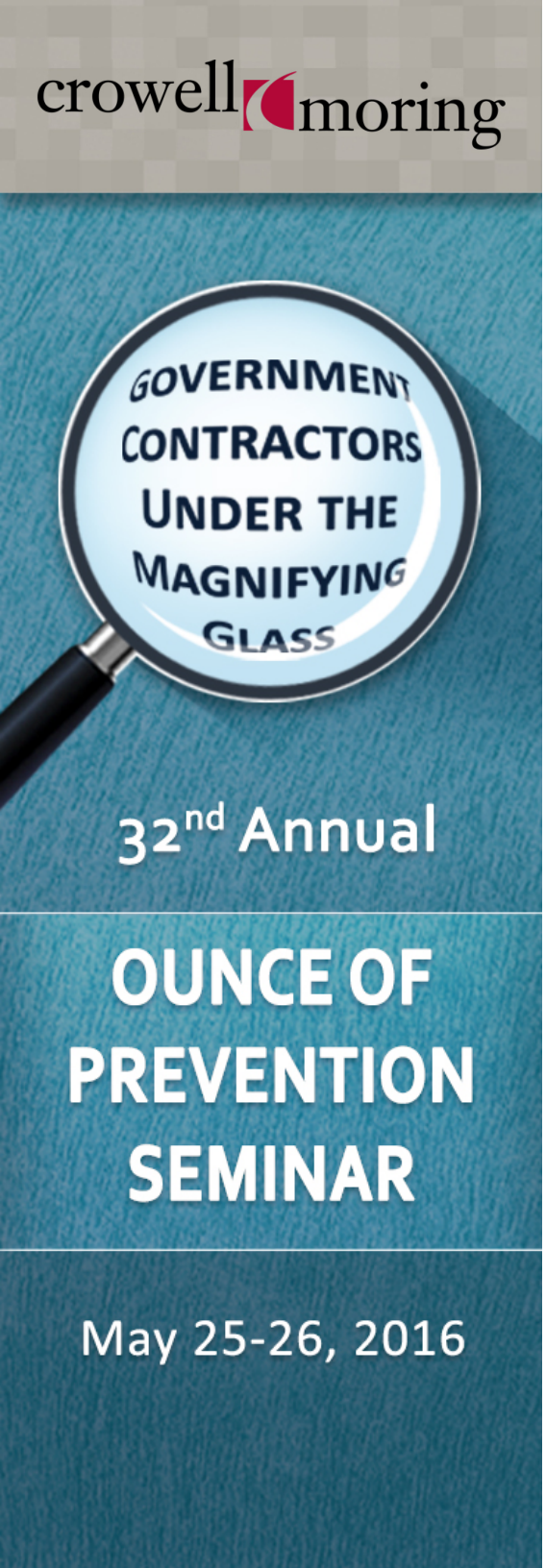

Investigations Part II – Interacting with Regulators

A discussion with:

Maria Swaby, General Services Administration Suspending and Debarring Official*

Brian Persico, Senior Counsel for Investigations, Special Inspector General for Afghanistan Reconstruction*

Kelly Currie, Partner, Crowell & Moring

David Hammond, Partner, Crowell & Moring

Moderated by:

- **David Robbins**, Partner Crowell & Moring

* Important Note

- The views expressed during this session by Ms. Swaby and Mr. Persico are their own. They do not necessarily represent the views of the General Services Administration, the Special Inspector General for Afghanistan Reconstruction, or any other government agency.

Introduction

- The changing enforcement climate:
  - Regulator communication in series (criminal, then civil, then administrative) is no longer the norm;
  - Proactive engagement is advisable, and in many cases, required
    - Mandatory Disclosure Rule
    - Combatting Trafficking in Persons
    - Counterfeit Parts
    - Supply Chain Risk Assessments,
    - And more.

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Benefits of Communication with Regulators

- Disclosure required in certain instances
- Sentencing Guideline and FAR 9.406-1(a) credit may be earned
- Suspension/debarment risk may be mitigated:
  - Large companies notably absent from suspension/debarment list in System for Award Management
  - Individuals predominate (stats Oct 1, 2015 to Apr 19, 2016):
    - Army: 359 actions, 20% companies, 80% individuals
    - Air Force: 55 actions, 22% companies, 78% individuals
    - Navy: 373 actions, 9% companies, 91% individuals
    - EPA: 85 actions, 40% companies, 60% individuals
  - Air Force 2015 Procurement Fraud Remedies Report states at p. 6 that it "did not initiate suspension or debarment actions against a domestic large business concern in FY15," crediting the decline in exclusions to an increase in Mandatory Disclosures disclosures and collaboration with contractors in these situations.

Benefits of Communication with Regulators (continued)

- Given the benefits of, importance of, and requirements to communicate with regulators, we will discuss best practices for communication:
  - When the government is unaware of the misconduct;
  - When the government is aware of some, but not all, of the misconduct;
  - After the inception of a formal enforcement action; and,
  - About ethics and compliance programs relevant to mitigation of future misconduct, and sentencing credit.

When the Government is Unaware of the Misconduct

- Setting the scene: hotline complaint causes internal investigation. Investigation reveals misconduct, and possible whistleblower risk. Company chooses to make a disclosure.

- Which regulator do you go see?
  - DoJ, what agents might be expected?
  - SDO, which agency?
  - IG, when are they interested?

- What do you say?
  - What are you required to say?
  - What is beneficial to say?
  - What is expected?

When the Government is Unaware of Some of the Misconduct

- Setting the scene: whistleblower calls with a partial picture of misconduct, internal review had disclosed two additional areas of problems. One directly related, one unrelated.

- What do you disclose?
  - Legal analysis of requirements to disclose.
  - Risks of less-than-full disclosure.

- Who do you speak with, and in what order?
  - How to manage siloed communities/lack of government wide communication.

- Impact of media or Hill inquiries on this process?
  - What is beneficial to say?
  - What is expected?

When a Formal Enforcement Proceeding is Ongoing

- Setting the scene: whistleblower reprisal matter, and an apparent *qui tam* matter are ongoing, criminal investigation is also possibly underway.
- Managing criminal defense with ongoing disclosure/candor to other branches of the government.
  - Will an SDO agree to limit communication and avoid discussions that could implicate criminal defense?
  - Role of ethics and compliance program in those discussions?
- Managing discussions with firewall between DoJ criminal and other enforcement bodies/agencies

Ethics and Compliance Program

- What is the importance of ethics and compliance programs to regulators?
  - SDO view?
  - IG view?
- Importance of policies and procedures to prevent misconduct, and mitigate chance of recurrence?
- What do regulators look for when evaluating these programs?

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International Issues in Government Contracting

Addie Cliffe
Carlton Greene
Yuan Zhou

Agenda

I. Introduction

II. Supply Chain Concerns

III. Foreign Investment & M&A

IV. Developments in Economic Sanctions

V. Questions

Section II:
Supply Chain Concerns

Human Trafficking

- **Supply chain due diligence:**
  - Contractors must comply with the Government's zero-tolerance policy for trafficking in persons
- **FAR Subpart 22.17, Combating Trafficking in Persons, and associated contract clause at FAR 52.222-50 (Mar 2015):**
  - Expanded definition of human trafficking
  - Enhanced monitoring and reporting obligations (e.g., conduct of "agents", reporting of "credible information" to CO and agency IG)
  - Additional compliance and certification requirements (e.g., compliance plan when services/non-COTS supplies outside the U.S. exceed $500,000)

Human Trafficking

- **Contractors face significant risks for inadequate compliance or violations of the new regulations:**
  - Termination for default
  - Suspension or debarment
  - Declining to exercise available options
  - Loss of award fee during performance period in which Government determined contractor non-compliance
- **Responsible Sourcing Tool:**
  - http://www.responsiblesourcingtool.org
  - Model compliance plan
  - No one-size fits all solution

Domestic Preferences

- Tightening up of restrictions and focus on enforcement
  - FTA – Congress imposes stricter Buy America requirements for rolling stock
  - FHWA – court vacates "clarifications" that eased Buy America requirements
  - GSA launches sweeping TAA compliance review effort

Section III: Foreign Investment Considerations

Transactional Considerations

- Review by the Committee on Foreign Investment in the United States (CFIUS)
- Mitigation of Foreign Ownership, Control, or Influence (for contractors with a facility clearance)
- Notification to the Directorate of Defense Trade Controls (DDTC)

Other Considerations

- Data room considerations
  - Classified information
  - Export controlled information
- Export control issues
  - Jurisdiction and classification
  - Authorization
- Sanctions
- Supply chain issues
  - Cybersecurity and data protection
  - Domestic preferences
  - Avoidance of human trafficking
  - Avoidance of counterfeit parts
- Anticorruption compliance

Section IV: Developments in Economic Sanctions

Iran: Background to the Nuclear Deal

- **Overview of the "Joint Comprehensive Plan of Action" ("JCPOA")**
  - Nuclear deal struck with Iran
    - Signatories: Iran and P5+1 (United States, UK, Germany, France, China, Russia)
  - Provides for suspension or lifting of United Nations, EU, and U.S. sanctions in exchange for Iran's agreement to limit or reverse aspects of its nuclear program

- **Key Dates:**
  - July 14, 2015: Agreement Finalized and Approved
  - October 18, 2015: Adoption Day
  - January 16, 2016: Implementation Day (Sanctions officially lifted)
  - October 20, 2023: Transition Day (Lifting of arms and ballistic missile embargoes)

Key Takeaway: Divergence between EU and US Approach to Iran create a compliance challenge and business disadvantage for U.S. entities

Iran (cont.): Summary of U.S. Changes

U.S. Changes applied differently for three types of persons

- **U.S. Persons:**
  - Virtually no change for most U.S. Persons
  - U.S. Persons remain prohibited from virtually all transactions with Iran
  - Two (small) new exceptions
    - (1) Civil commercial passenger aircraft: supportive licensing policy
    - (2) Import of Iranian-origin food stuffs and carpets: new general license

- **Non-U.S. Entities "Owned or Controlled" by U.S. Persons:**
  - Authorized to engage in most activities with Iran
  - Conditions
    - No U.S. touch-point for the transaction: No U.S. person involvement (including parent company), U.S. financing, U.S.-origin goods or services, etc.
    - No transactions with SDNs
    - No transactions with military, paramilitary, or related organization

- **Other Non-U.S. Persons (secondary sanctions):**
  - Suspend enforcement of most existing secondary sanctions
  - Limitations
    - No "significant" transactions with certain Iranian SDNs
    - No transactions with U.S. touchpoint (including U.S.-origin financing)

Iran (cont.): Implications for Contractors

- Limited direct impact on "U.S. Person" contractors
  - Could have effect on (a) non-U.S. subsidiaries of U.S. contractors and (b) non-U.S. person contractors
- **No Change to Existing FAR Certifications**
  - Three current FAR certifications related to Iran (25.703-2):
    - Activity for which sanctions "may be imposed" pursuant to Iran Sanctions Act
    - Transactions with the Islamic Revolutionary Guards Corps
    - Transactions involving the export of "sensitive technology"
  - Issue: Conflict between certification and JCPOA authorization
    - Certification applies to contractor and entities it owns or controls
    - JCPOA authorizes non-U.S. entities to undertake certain activity potentially infringing certification requirement
  - No official position issued yet by U.S. government
- **No Change to Existing State-Level Requirements**
  - Pre-existing state-level requirements:
    - Divestment: Roughly 31 states authorize Iran-related divestment
    - State Contracting: Roughly 16 states have Iran-related state contracting prohibitions
  - Not directly affected by JCPOA
    - State Department has requested states not to enforce provisions

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Cuba: Significant Relaxations

- Announcement of policy reversal in January 2015
  - Additional changes in March & Sept. 2015 and Jan. and March 2016
- Statutory embargo remains in place
  - Virtually all activity by U.S. persons with Cuba remains prohibited UNLESS subject to an exemption, license, or authorization
- Newly authorized activity includes, *inter alia*:
  - Travel: General license for 12 types of travel
    - Includes professional meetings, conferences, and trips to identify potential export markets
    - Permitted to import $400 (including $100 of rum/cigars) for personal use
    - NOTE: tourist travel remains prohibited
  - Exports: New authorizations, subject to conditions, for:
    - (1) Transactions in Support of the Cuban People ("SCP")
    - (2) Consumer Communications Devices ("CCD")
    - (3) Expanded specific licensing policy for a range of items including (a) telecommunications and (b) items related to environmental protection (including renewable energy)
  - Financial Services: Expanded financial interactions including
    - (a) use of credit cards authorized in Cuba, and
    - (b) U.S. correspondent accounts in Cuba
- Removal of State Sponsor of Terrorism designation

TAKEAWAY: The relaxations offer substantial potential opportunity for new transactions in Cuba, but practical challenges (e.g., financing, identifying private sector customers) exist in the Cuban market, and potential risk of policy changes under a new Administration

Additional U.S. Developments

- **North Korea**
  - Expansion of existing restrictions into full embargo
  - New FAR certification requirement
    - Contractor does not engage in certain NK-related activities
      - Precise language has not yet been published
    - Remedy for false certification is (a) contract termination, (b) debarment/suspension, and (c) inclusion on Debarred List
- **Russia**
  - No major programmatic changes since May 2015
    - U.S. / EU regularly issue new designations under existing authorities
  - Remains enforcement focus for agencies
- **Other Significant Changes in Last 12 Months**
  - Belarus: Authorize trade with Belarusneft and other entities
  - Burma/Myanmar: Authorize trade through Asia World-owned ports
  - Burundi: New sanctions program added (Nov. 23, 2015)
  - Liberia: Sanctions program removed (Nov. 12, 2015)
  - Summary: Changes to 24 of 29 OFAC sanctions programs since May 2015

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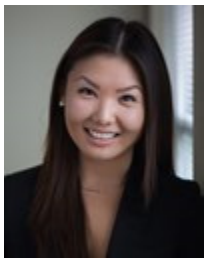

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Perspectives from In-House Counsel

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The Changing Landscape of Government Intellectual Property

John McCarthy
Jon Baker
Joelle Sires

Recent OMB Policies

Software Licensing

Draft OMB Category Management Policy 16-1: Improving the Acquisition & Management of Common Information Technology: Software Licensing

- Seeks to leverage federal government buying power for s/w
- Agency-level strategies:
  - Appoint software manager to manage all agency commercial software contracts & licenses;
  - Maintain a comprehensive annual inventory of software license & subscription spending; and
  - Aggregate agency software requirements and funding
- Government-wide strategies:
  - Identify & promote existing best-in class software agreements; and
  - Develop new government-wide enterprise software agreements

Mobile Devices and Services

Draft OMB Category Management Policy 16-2: Improving the Acquisition & Management of Common Information Technology: Software Licensing Mobile Devices and Services

- Seeks to leverage federal government buying power for mobile devices and services
- Agency-level strategies:
  - Baseline agency usage;
  - Optimize agency requirements

Mobile Devices and Services

- Government-wide strategies:
  - Transition to government-wide acquisition strategies and create accountability
    - Consolidate agency requirements
    - Define government-wide requirements
    - Exception for agency-wide mandatory use vehicles
    - Transition plans
  - Improve demand management practices
  - Create broker model to act as single buyer
  - Create accountability

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Legislative/Regulatory Updates

Exception to the Exception to the Presumption

- Presumption: FASA
  - DoD Commercial Items: Presumption of development at private expense
- Exception: FY 2007 NDAA § 802(b)
  - Reverse presumption of development at private expense for commercial items under contracts or subcontracts for major systems (or subsystems or components thereof)
- Exception to the Exception: FY 2008 NDAA § 815(a)(2)
  - Exempt commercial off-the-shelf (COTS) items from the reverse presumption established under § 802(b) of FY 2007 NDAA

Exception to the Exception to the Presumption

2016 NDAA § 813(a) & Proposed Rule

- Limits applicability of the exception to major weapons system
- Exception to the exception for commercial components or subsystems of major weapons systems where MWS acquired as commercial items
- Exception to the exception for commercial components of subsystems acquired as commercial items
- Expands COTS exception to the exception to include COTS with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet federal government requirements

New DoD Prototype OTA Authority

2016 NDAA § 2371b

- Authorizes DoD to conduct "prototype projects" that are "directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the [DoD], or to improvement of platforms, systems, components, or materials in use by the armed forces."
- Dollar thresholds:
  - $50M - $250M, with approval by the agency's senior procurement executive
  - > $250M, with Under Secretary of Defense for ATL approval and determination that OTA is "essential to meet critical national security objectives"

New DoD Prototype OTA Authority

2016 NDAA § 2371b

- Must meet one of the threshold requirements
  - Nontraditional defense contractor participating to a significant extent;
  - All significant participants are small businesses or nontraditional defense contractors;
  - 1/3 of total cost funded by the parties to the transaction; or
  - Exceptional circumstances:
    - Project involves innovative business arrangements or structures not suitable for a contract;
    - Project provides opportunity to expand supply base
- OTAs, generally, provide greater flexibility in negotiating IP terms

Government Industry Advisory Panel

2016 NDAA Section 813(b)

- Purpose of Panel
  - Review data rights statutes and regs to ensure that they are "best structured to serve the interests of the taxpayers and the national defense."
- Scope of review – factors
  - Ensuring that the DoD does not pay more than once for the same work.
  - Ensuring that DoD contractors are appropriately rewarded for their innovation and invention.
  - Cost-effective reprocurement, sustainment, modification, and upgrades to DoD systems.
  - Encouraging private sector investment in new products, technologies, and processes relevant to DoD
  - Ensuring that the DoD has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use.
- Report due Sept. 30, 2016

2017 NDAA - Modular Open Systems Architecture

- Require use of Modular Open Systems Architecture (MOSA) to the maximum extent practicable
  - MOSA = integrated business and technical strategy that employs a modular design with major system interfaces between a major system platform (such as a ground vehicle, ship, or aircraft) and its major system components (such as sensors or communication equipment) or between major system components
  - Interfaces would be consistent with widely-supported and consensus-based standards, unless such standards are unavailable or unsuitable

2017 NDAA – Changes to Rights in Tech Data

- Rights to Technical Interface Data
  - Government Purpose Rights in TD related to a major system interface developed either at private expense or with a mix of Federal and private funds and used in a modular system approach
  - Government Purpose Rights in the technical data of a general interface developed with a mix of Federal and private funds, unless the Secretary of Defense determines that the negotiation of different rights would be in the best interest of the United States.
  - Unlimited Rights to technical data pertaining to an interface between an item or process and other items or processes.
- Limited Rights to the detailed manufacturing and process data of major system components used in MOSA and developed exclusively at private expense.

2017 NDAA – Changes to Rights in Tech Data

- Requires the U.S. Government and DoD contractors to negotiate for data rights when items or processes are developed with a mix of Federal and private funds.
- Limits deferred ordering of technical data to 6 years after delivery of the last item on a contract and to technical data generated, not utilized, in the performance of the contract.
- The committee expects DoD to develop its sustainment strategies and plans for technical data earlier in the acquisition process so it depends upon deferred ordering less frequently.

2017 NDAA – Section 813 Panel

- Government Industry Advisory Panel established by 2016 NDAA
- Extend duration of panel to March 1, 2017
- Develop recommended changes to DoD technical statute and regulation, to include consideration of data rights required to support MOSA
- Bottom line: Fundamental changes to data rights rules are on the horizon

SBIR/STTR

- April 2016 SBA issued a notice of proposed amendments
- Significant changes to the current data rights provided under SBIR/STTR awards
- Changes to preference for program participants for Phase III awards

SBIR/STTR

- Currently program participants can receive multiple Phase I and II awards, data protected for at least 4 years from last deliverable
- Proposal to allow USG to use and allow others to use after a non-extendable 12-year period

SBIR/STTR

- Changes create more certainty in Phase III awards:
  - If pursuing the Phase III work with the Awardee is found to be practicable, the agency must award a non-competitive contract to the firm
  - If a sole-source award is not practicable, an agency must consider a different preference, such as requiring contractors to acquire the prior awardee's deliverables through a brand-name designation or establishing evaluation factors that promote subcontracting with the prior awardee

Recent Case Developments

Objecting to Solicitation Terms

Deloitte Consulting, LLP; Booz Allen Hamilton, Inc.; CALIBRE Systems, Inc., B-411884, et al., Nov. 16, 2015, 2016 CPD ¶ 2

- RFQ included non-standard data rights clause:

> *The Government has unlimited rights to all documents/material produced under this contract*. All documents and materials, to include the source codes of any software, produced under this contract shall be government owned and are the property of the Government with all rights and privileges of ownership/copyright belonging exclusively to the Government. These documents and materials may not be used or sold by the contractor without written permission from the Contracting Officer. All materials supplied to the Government shall be the sole property of the Government and may not be used for any other purpose.

Objecting to Solicitation Terms

- Deloitte protested, arguing that the awardee PwC's quotation took exception to RFQ's data rights clause
- The awardee PwC's quotation stated:

> "[N]either the contract deliverables nor their content may be distributed to, discussed with, or otherwise disclosed to any Third Party without PwC's prior written consent."

- **GAO sustained, finding that the data rights clause was a material term of the RFQ.**
- Query how contractors are supposed to negotiate specifically negotiated rights with the USG, as authorized by DFARS 252.227-7013. During Q&A?

Marking Requirements

DynCorp International, LLC v. United States, 125 Fed. Cl. 446 (2016)

- DynCorp, the incumbent, voluntarily gave the agency a life cycle management report which incorporated indirect rate and award fee data
- Agency published report on FedBizOps as part of follow-on RFP – resided there for 5 months
- DynCorp argued RFP should be cancelled & it should be awarded a sole-source contract

Marking Requirements

DynCorp International, LLC v. United States, 125 Fed. Cl. 446 (2016)

- Incumbent contract granted USG unlimited rights in all deliverables, but allowed DynCorp to mark proprietary data
- DynCorp's contract also included FAR 52.227-14, Rights in Data—General, and DFARS 52.252.227-7013, Rights in technical data—Noncommercial items clauses
- DynCorp did not mark life cycle management reports for years
- DynCorp did not object when agency informed a report would included with the solicitation
- DynCorp silent while its proprietary data resided on FedBizOps for 5 months

***Holding*: DynCorp waived ability to protect the rate and fee data as proprietary. Protest dismissed.**

Patents, the Federal Government, and Infringement

Zoltek Corp. v. US (Fed. Cir. 2016)

- Zoltek's saga to obtain compensation for the alleged infringement began in 1996
- Zoltek sued the U.S. for infringing carbon fiber sheet patents used on the B-2 Bomber and F-22 Fighter
- Following Zoltek V, the CFC found Zoltek's claims were invalid as obvious and/or lacking written description

Zoltek Corp. v. US

- Zoltek appealed, and received another shot at recovery from the Federal Circuit in 2016
- The Court found that:
  - The written description need not include information that is already known and available to the experienced public
  - At time of patent application no other company could supply the relevant material
  - An expert could not accurately duplicate patentee's discovery without information that was not available to persons of skill at time of invention

Coming Events

2012 NDAA Changes

- Regulation implementing the requirement for the delivery, and permitting Government disclosure, of "segregation . . . or . . . reintegration" data

FCA

- Increased emphasis on data rights in FCA context?

IP Strategy

IP Strategy

- Plan ahead
- Software licensing
- Negotiating with US Government
- Negotiating with suppliers

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32nd Annual

OUNCE OF PREVENTION SEMINAR

May 25-26, 2016

The Challenges of Commercial Item Contracting

Lorraine Campos

Chris Haile

Nkechi Kanu

Leslie Monahan

Agenda

- Challenging Legislative and Regulatory Burdens for Commercial-Item Contracts
- Category Management Initiative
- Sweeping Reforms to the Federal Supply Schedule (FSS) Program
- Enforcement Focus and Trends

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Challenging Legislative and Regulatory Burdens for Commercial-Item Contracts

Price Reasonableness Determinations

- DoD trends
  - Limit "commercial-item" determinations
  - Increase use of cost data for price reasonableness determinations
- Congress moving in the opposite direction
  - Looking to remove impediments to commercial market entrants

Price Reasonableness Determinations

- Failed rulemaking as DoD purported to implement FY 2013 NDAA
- FY 2013 NDAA required
  - Standards for the adequacy of prior sales data
  - Standards re extent of cost information to obtain when sales data were insufficient
  - Limitations on data obtained
    - form maintained by contractor
    - no cost information when sales data sufficient

[Pub. L. 112-239]

Price Reasonableness Determinations

- DoD Memorandum provided interim guidance under 2013 NDAA
  - Encourages less time on whether product strictly meets commercial-item definitions and more on "am I paying a fair and reasonable price"
  - Its standard for sufficiency of data: "whether a reasonable businessman or business woman reviewing the data . . . [would] conclude that it is sufficient"
  - DCMA Cost & Pricing Center / DCAA assistance upon request

Price Reasonableness Determinations

- DoD Proposed Rule pushes a different agenda
  - Would have required certified cost or pricing data unless (1) pricing is based on catalog prices; (2) pricing is market-based; or (3) items priced on an active FSS
  - For "market-based" pricing, expectation that 50% of sales of the "particular item" must be to nongovernmental customers
  - "Prudent person" standards for determining scope of data to require

[DFARS Case 2013-D034]

Price Reasonableness Determinations

- Congressional Rebuke
  - "send a clear message to those in the Department who are working to maintain the current status quo that they are not only doing serious damage to our national security, but they also appear to be completely out of step ..."

    [Sen. McCain to Sec'y Carter]
- DoD proposed rule rescinded / rolled into a new rulemaking

Commercial-Item and Price Reasonableness Determinations

FY 2016 NDAA

- Consistency / Predictability in Determinations
  - Amends TINA (10 USC 2306(a)) to create presumption that prior CI determinations apply to later procurements as well
  - Centralized capability to oversee commercial item determinations
  - Public access to determinations

Commercial-Item and Price Reasonableness Determinations

FY 2016 NDAA

- Reducing barriers to entry / Increasing commercial item use
  - Report to Congress on all defense-unique provisions of law applicable to commercial item procurements, with explanations and justifications
  - Requires guidance such that DoD may not purchase non-commercial IT products unless head of agency determines that no commercial items are suitable
  - Hurdles to converting procurements from commercial items

Commercial-Item and Price Reasonableness Determinations

- New rulemaking to incorporate FY 2013 NDAA *and* FY 2016 NDAA requirements

  [DFARS Case 2016-D006]

Category Management Initiative

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Category Management

- Currently federal acquisition system is **fragmented**
  - Thousands of buying offices in hundreds of departments and agencies acquiring more than $400 billion in goods and services each year
  - Acquisition professionals make purchases with little insight into what their counterparts across the government are doing
  - Very little coordination and sharing of information and best practices across the government
  - Agencies are duplicating efforts, conducting thousands of full-and-open competitions, and establishing hundreds of potentially redundant acquisition vehicles and programs
  - The acquisition community GSA serves faces an increasingly challenging buying environment requiring contracting and program professionals to have sophisticated and well rounded business skills

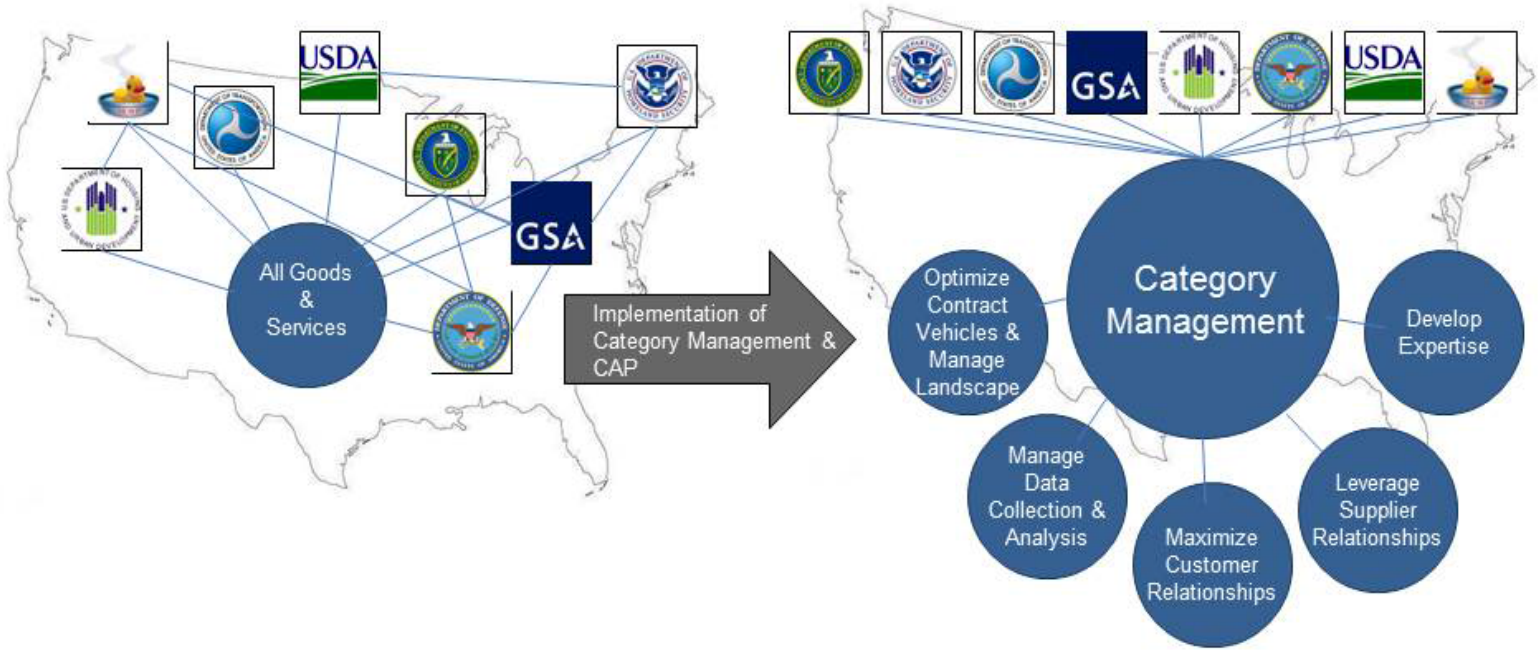
Category Management (cont.)

Current State of Purchasing:

- Lack of coordination across agencies
- Duplicated efforts
- Many agencies; no leveraged buying power

Future State of Purchasing:

- Synchronized procurement across government
- Industry involvement in developing best category strategies
- Core competencies leveraged to match customer needs
- One common management framework



Category Management Purpose

- Category management is a strategic approach that will enable the federal government to buy smarter and more like a single enterprise
- Brings together expertise from across the government, grouped by product or service to provide government buyers holistic view of landscape to enable data driven decisions and better purchasing options

Category Management Goals

- Increase spend under management
- Reduce contract duplication
- Achieve volume savings
- Achieve administrative savings
- Achieve small business goals
- Reduce price variance
- Enhance transparency
- Share best practices
- Create better contract vehicles that lead to smarter purchasing
- Promote consistency

Common Categories of Products

- Each category is ran as a mini-business with its own set of strategies led by a **Category Manager** and supporting senior team
- Category Managers develop a cooperative framework to generate interagency collaboration, promote broad-based stakeholder engagement, and assist in the development of category teams
- Category teams will be responsible for identifying core areas of spend; collectively enhancing levels of analysis and expertise; leveraging shared best practices; and providing acquisition, supply and demand management solutions to meet government-wide requirements

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Ten Common Government Spend Categories

Common Government Spend Categories 1-10 (total FY 2014 spend $275B)

1. IT – $49.9B	2. Professional Services - $61.9B	3. Security and Protection - $5.5B	4. Facilities & Construction - $75.7B	5. Industrial Products & Services - $10.5B
1.1 IT Software	2.1 Business Administration Services	3.1 Security Animals & Related Services	4.1 Construction Related Materials	5.1 Machinery & Components
1.2 IT Hardware	2.2 Legal Services	3.2 Security Systems	4.2 Construction Related Services	5.2 Fire/Rescue/Safety/Environmental Protection Equipment
1.3 IT Consulting	2.3 Management Advisory Svcs (excl. R&D)	3.3 Security Services	4.3 Facility Related Materials	5.3 Hardware & Tools
1.4 IT Security	2.4 Marketing and Distribution		4.4 Facility Related Services	5.4 Test & Measurement Supplies
1.5 IT Outsourcing	2.5 Public Relations and Professional Communications Services		4.5 Facilities Purchase & Lease	5.5 Industrial Products Install/Maintenance/Repair/Rebuild
1.6 Telecommunications	2.6 Real Estate Services			5.6 Basic Materials
	2.7 Trade Policy and Services			5.7 Oils, Lubricants, and Waxes
	2.8 Technical & Engineering Svcs (non-IT)			
	2.9 Financial Services			
	2.10 Social Services			

6. Office Management - $1.9B	7. Transportation and Logistics Services - $26.8B	8. Travel & Lodging – $2.7B	9. Human Capital – $4.1B	10. Medical – $36.0B
6.1 Office Management Products	7.1 Package Delivery & Packaging	8.1 Passenger Travel	9.1 Specialized Educational Services	10.1 Drugs and Pharmaceutical Products
6.2 Office Management Services	7.2 Logistics Support Services	8.2 Lodging	9.2 Vocational Training	10.2 Medical Equipment & Accessories & Supplies
6.3 Furniture	7.3 Transportation of Things	8.3 Travel Agent & Misc. Services	9.3 Human Resources Services	10.3 Healthcare Services
	7.4 Motor Vehicles (non-combat)			
	7.5 Transportation Equipment			
	7.6 Fuels			

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Strategic Sourcing

- Strategic sourcing is an effective strategy that a Category Manager may implement to drive down total costs and improve overall performance for that category
- Ensures that agencies get the same competitive price and quality of performance when they are buying similar commodities under similar circumstances

	Strategic Sourcing	Category Management
Goal	**Achieve savings:** implement specific strategies around spend and vendor consolidation, standardization of requirements and specifications, and price benchmarking and negotiation **Small business:** Meet or exceed small business goals	**Maximize value for spend:** reduce total cost of ownership (TCO), generate supply chain-wide savings, reduce risks, improve supplier and operational performance, and boost innovation **Small business:** Meet or exceed small business goals
Frequency	**Project driven:** initiated once in three to five years based on internal demand or supply market changes	**Continuous:** ongoing series of projects identified and prioritized based on regular analysis and reporting
Methodology	**Standard methodology:** typically based on a seven- to nine-step methodology starting with assessment and ending with vendor selection and implementation	**Broad framework:** ongoing cycle of establishing baseline and goals, developing a strategy for category improvement, project execution, and performance management
Value	**Sourcing savings:** annual savings through planned demand reduction and average purchase price reduction, tracked through finance and sourcing systems	**Value for spend:** achievement of strategic objectives, including spend under management, price savings, TCO savings, improved supplier performance, innovation, and user satisfaction

Acquisition Gateway

- One common portal for acquisition expertise and acquisition services to help buyers navigate the process and universe of purchasing options:
  - Drive down price
  - Reduce price variability
  - Make smarter purchases

- "Category Hallways"
  - Collect and store intelligence, data, and advice about a particular category of products and services in one centralized location for agencies to review, use and refine
  - Deliver relevant and useful category-centric information to various levels of agency stakeholders
  - Offer objective comparisons (based on the category) about specific acquisition/requisition methods and contract vehicles to help purchasing agencies find the best solution

Sweeping Reforms to the FSS Program

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Compliance "Hot Button" Issues in Schedule Contracting

- Consistent problems arise:
  - Commercial Sales Practices (CSP)
  - Price Reduction Clause (PRC)
  - Trade Agreements Act (TAA)
- Time for reform approaching

More Attention on Competition and Pricing

- Increased scrutiny on pricing comparisons and negotiating lowest possible price
- Focus on ensuring CSP submissions are current accurate and complete for both manufacturers and resellers
- Increased use in BPAs and reverse auctions

Proposed Transactional Data Reporting Requirement

- Ultimate Goal: Enhanced price reasonableness determinations
- Proposed Changes:
  - Elimination of PRC and tracking customer
  - Require monthly transactional data reporting
- Problems with Proposed Rule:
  - Significant administrative burdens for both to contractors and GSA
  - Proprietary data concerns

GSA's Information Collection Related to Schedule Pricing Disclosures

- November 18, 2015:
  - GSA requested an extension of a previously approved information collection requirement regarding the PRC
  - Collection effort renamed to include a burden estimate for CSP disclosures
- April 11, 2016:
  - GSA requested a second extension for same information collection
- Use of "80/20 rule" may skew analysis of contractor burden

Trade Agreements Act

- GSA TAA Initiative
  - Renewed focused on TAA compliance
- VA's New TAA policy
  - All "covered drugs" to be offered on FSS contracts, regardless of country of origin

Other Schedule Changes

- Implementation of Category Management
  - Migration to Consolidated Professional Services Schedule (PSS)
- Application of Service Contract Labor Standards
  - Incorporate wage determinations at the task order level
- Schedule 70 Innovations
  - GSA's "Making It Easier" Initiative
  - New GSA and DHA partnership
  - GSA Class Deviation

Implementation of GSA Class Deviation

- Issued July 31, 2015
- Creates a broad new definition of "commercial supplier agreement" (CSA)
- Generates new GSAM clauses for FSS contracts contemplating items with CSAs
- Reconciles federal requirements with the terms of standard CSAs
- Changes the order of precedence for inconsistencies
- Forces contractors to reconsider ability to enter into contracts

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CSA Terms Rendered Unenforceable

1. Definition of Contracting Parties
2. Details of Contract Formation
3. Patent Indemnity
4. Unilateral Contractor Termination for Government Breach
5. Automatic Renewal of Term-Limited Agreements
6. Unilateral Change to License Terms Without Notice
7. Equitable Remedies Against the Government
8. Automatic Incorporation/Deemed Acceptance of 3P Terms
9. State/Foreign Law Governing Contracts
10. Assignment of CSA Without Government Consent
11. Taxes
12. Future Fees and Penalties, Including Attorneys' Fees
13. Payment Terms or Invoicing (Late Payment)
14. Audits
15. Confidentiality of CSA Terms and Conditions

Changes to Order of Precedence

1. The schedule of supplies/services.
2. The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, Unauthorized Obligations, ***and Commercial Supplier Agreements – Unenforceable Clauses*** paragraphs of this clause.
3. The clause at 52.212-5.
4. Solicitation provisions if this is a solicitation.
5. Other paragraphs of this clause.
6. ***Addenda to this solicitation or contract, including any license agreements for computer software*.**
7. The Standard Form 1449.
8. Other documents, exhibits and attachments.
9. The specification

Enforcement Focus and Trends

Enforcement

- Commercial item contractors exempt from some of most onerous government contracting provisions (e.g., certified pricing, CAS)
- Some traditional government-contract provisions apply:
  - Applicable import/export restrictions
  - Requirements related to socio-economic policies (Equal Employment Opportunity, Prohibition on Human Trafficking, etc.)
  - TAA
  - Special Pricing Provisions

Oversight

- Procuring Agency
  - Contracting Office/COTR
  - Suspension and Debarment Official
- Agency Office of Inspector General
  - Special agents
  - Auditors
- Department of Justice
- Local United States Attorney
- Whistleblowers

VMware and Carahsoft

- Carahsoft Technology Corp. had a MAS contract with the GSA to sell software licenses and services; in 2007, modified contract to add VMware Inc.'s products and services
- Both Carahsoft and VMware submitted CSP-1 forms to GSA
- Allegations that from 2007 to 2013, they made false statements on the CSP-1 forms; Carahsoft failed to notify GSA that VMware offered greater discounts than indicated in CSP-1; presented false claims for payment for VMware products
  - Stemming from *qui tam* action filed by former VP of America Sales at VMware

VMware and Carahsoft (cont.)

- In June 2015, VMware and Carahsoft paid **$75.5M** to settle allegations that they violated the FCA by misrepresenting commercial pricing practices
  - Wrongful termination suit by whistleblower still pending
- One of largest FCA recoveries against a technology company

Medtronic

- Medtronic plc and affiliated Medtronic companies ("Medtronic") sell medical devices to VA and DoD through the VA FSS Program
- Medtronic certified that devices were made in the U.S. or other designated country pursuant to the Trade Agreements Act
- Allegations that devices were manufactured in China and Malaysia, prohibited countries under TAA
  - Stemming from *qui tam* action by 3 whistleblowers
- Medtronic paid **$4.41M** to settle allegations that it violated FCA by making false statements regarding the devices' countries of origin

AvKARE v. U.S., No. 15-1015C

- AvKARE Inc. sells variety of pharmaceutical products that are packaged and sold under AvKARE label
- Awarded Schedule 65 B I contract as manufacturer; seeks to renew contract
- OIG investigation concludes AvKARE is distributor, not manufacturer

AvKARE (cont.)

- VA request CSP information for distributor
- AvKARE says it is manufacturer; impossible or impractical to obtain suppliers' commercial sales data
- COFC says AvKARE is distributor; indirect sales to government entities is not commercial sales

Enforcement Trends

- TAA Compliance
  - VA's new TAA Policy
  - GSA's TAA Initiative
- GSA Preaward Audits
- Continued focus on healthcare fraud

VA's New TAA Policy

- Mandates "covered drugs" under Veterans Health Care Act to be offered on FSS contracts - regardless of country of origin
- Reopens sales of covered drugs with API from non-designated countries
- June 6, 2016 deadline to get non-TAA compliant products on 65 I B FSS contract

GSA TAA Initiative

- Renewed focus on TAA compliance
- May 5, 2016 letter require response within 5 business days
  - Copy of the Certificate of Origin; or
  - Certification on manufacturer's official letterhead verifying TAA compliance
- Threaten removal of contractor's entire GSAdvantage file and contract termination for non-compliance

GSA TAA Initiative (cont.)

- GSA letter in response to FOIA and congressional inquiries regarding failed compliance with TAA in which allegations were confirmed
- Underscores importance for contractors to continually re-evaluate their supply chain, especially for products that fall under the "substantial transformations" rules for establishing COO under TAA
- TAA compliance for direct representations to government as well as third-party seller representations

GSA Audits

- Importance of pre-award audit findings
  - Audit findings can drive compliance efforts
- FY 2013, most recent audit report, finds CSP disclosures were not current, accurate, and/or complete
  - Contractors submitted flawed CSP disclosures in 77% of audited contracts
  - GSA estimates accurate CSP information would result in $895M in savings

Other Enforcement Trends

- Continuing focus on healthcare industry
  - Recent enforcement actions in medical device manufacturers for TAA compliance
  - Healthcare industry provides majority of FCA recoveries
    - E.g., Health Care Prevention and Enforcement Action Team

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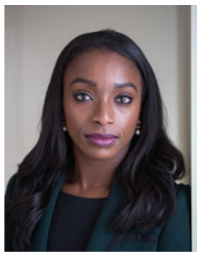

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Contracting in the Dark World:

Special Considerations for Classified Contracting

Michelle Sutphin, BAE Systems

Karen Hermann

Mark Ries

Agenda

- Handling Classified Protests and Claims: Lessons Learned and Practical Tips
- Addressing and Preventing "Insider Threats"
- Engaging a Globalized Defense Base: Foreign Ownership, Control & Influence (FOCI) Issues and Mitigation
- Navigating Diligence of Classified Contracts or Programs

Classified Protests – Pre-Litigation Preparation

- Early preparation is key
- Personnel clearances and access for in-house and outside counsel
- Availability of secure physical space and IT access

Litigation Process Impacts

- Choice of forum
  - GAO vs. COFC
  - BCA vs. COFC
- Potential denial of access to relevant information, even for cleared personnel
- Tight deadlines become tighter due to logistics hurdles

The End Result

- GAO
  - Generally no written decision
  - Similar to outcome prediction ADR
- COFC
  - Redacted written decision
  - Classified material and protected material redacted
- BCA
  - Likely to be a written decision avoiding classified material

Insider Threats

- Executive Order 13587, "Structural Reforms to Improve Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information"
- National Industrial Security Program Operating Manual (NISPOM) Conforming Change 2 (pending), mandates for cleared defense contractors:
  - Establishing insider threat program
  - Designating insider threat senior official, cleared in connection with the FCL
  - Self-assessments of insider threat programs
  - Insider threat training for insider threat program personnel and awareness of employees
  - Monitoring network activity

Insider Threats – Takeaways

- Corporate Proprietary Information And Intellectual Property → Hot Targets
- Reporting Indicates Steady Upward Trend In Targeting
- Threat Is Real, Formidable And Aggressive
- Current Business Environment Exposes Us To More Vulnerabilities
- Strong Partnerships Are Key (Internal And External)
- Automated Analysis Capability Is Essential For Any Large Organization
- Data Loss Prevention Tool ≠ Insider Threat Detection Capability
- Program Transparency → Mitigate Concern And Promote Deterrence

FOCI Issues and Mitigation

- A U.S. company is under FOCI whenever a foreign interest has the power
  - direct or indirect, whether or not exercised or exercisable
  - to direct or decide matters affecting management or operations
  - which may result in unauthorized access to classified information or adversely affect performance of a classified contract
- Primary consideration is safeguarding classified information
- Company under FOCI is ineligible for a facility clearance ("FCL") until security measures are in place to negate or mitigate the FOCI

Policy -- allow foreign investment consistent with national security

Factors Considered in FOCI Issues and Mitigation

- Record of economic and government espionage against U.S. targets
- Record of enforcement and/or engagement in unauthorized technology transfer
- Type and sensitivity of the information that shall be accessed
- Source, nature and extent of FOCI
  - Majority or substantial minority position
  - Immediate, intermediate, and ultimate parent companies
- Record of compliance with pertinent U.S. laws, regulations and contracts
- Nature of any bilateral and multilateral security and information exchange agreements
- Ownership or control, in whole or in part, by a foreign government

Classified Diligence

Truism:	Contractual and program diligence is essential to any M&A, investment or financing transaction
Problem:	Limited (if any) opportunity to diligence classified contracts and programs

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Mitigation Strategies

Review excerpts of non-classified portions of contracts

*Often OCI or data rights provisions, for example, can be excerpted and provided on a non-classified basis

Engage cleared personnel to conduct review

*requires consent of customer in many cases

*may need to be done at customer's site or in a SCIF

Conduct management interviews

*management can be asked questions about non-classified aspects of contract administration

Special Considerations

Security Clearances

* In an acquisition, confirm that the acquiring entity has appropriate clearances and personnel to manage the acquired company

FOCI Mitigation

* Foreign buyers or investors need to take special care to mitigate any FOCI concerns

Deal Terms

* include broad representations covering risks associated with classified contract performance
* consider including an earn-out if future of classified program is at risk or cannot be confirmed in diligence

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32nd Annual

OUNCE OF PREVENTION SEMINAR

May 25-26, 2016

Cost and Accounting – Items at the Top of the Ledger

Terry Albertson

Rob Burton

Steve McBrady

Skye Mathieson

Agenda

Cost and Accounting – Items at the Top of the Ledger

- Growing Restrictions on Allowability of Independent Research and Development Costs
- Continued Development of the CDA Statute of Limitations
- The *Raytheon* Decision and Offsets Among Multiple Simultaneous Changes in Cost Accounting Practice
- NDAA Provisions Affecting DCAA
  - DCAA Audit of Non-DOD Contracts Restricted
  - Required Identification of Materiality Standards Used by DCAA

Guerilla Attacks on IR&D

- DOD August 26 “white paper” provides that "beginning in FY 2017, DoD will require contractors to record the name of the government party with whom, and date when, a technical interchange took place prior to IR&D project initiation and to provide this information as part of the required IR&D submissions made to [DTIC]," and DCMA and DCAA "will use these DTIC inputs when making allowability determinations for IR&D costs."
- February 8 notice in Federal Register proposing a new DFARS requirements that offerors to identify IR&D projects on which the offeror would rely to perform the resultant contract, so that the cost of the IR&D project can be considered for cost evaluation purposes

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* (Dec. 2014), the Federal Circuit made a significant change in the SOL landscape

Statute of Limitations

- *Appeal of Alion Science & Tech. Corp.*, ASBCA No. 58992 (Nov. 10, 2015)
- *Appeal of Combat Support Associates*, ASBCA No. 58945
- *Kellogg Brown & Root Services, Inc.*, ASBCA No. 58175

Statute of Limitations

- *Appeal of Thorpe See-Op. Corp.*, ASBCA No. 58960
- *Appeal of Systems Management & Research Techs. Corp. v. Dep't of Energy*, CBCA 4068
- *Kellogg Brown & Root Services, Inc. v. Murphy*, Fed. Cir. (May 18, 2016)

National Defense Authorization Act

NDAA Provisions Affecting DCAA

- DCAA Audit of Non-DOD Contracts Restricted
- Required Identification of Materiality Standards Used by DCAA

Accounting Changes

Appeal of Raytheon Co., ASBCA Nos. 57801, 57803, 58068 (May 7, 2015)

- ASBCA held that under FAR 30.606 contractors may not offset cost impacts from simultaneous accounting changes within the same business segment.
- Likely to cause major disruptions when contractors make multiple changes in cost accounting practices made after 2005 (the date of the FAR change).
- Board ignored the language of CAS 9903.306(b)-(c), which states that when there is a change in accounting practice the government should not pay more than the "contract costs, price, or profit" that "would have been agreed to" had the accounting changes been known, which would logically include all simultaneous changes, not just changes that decrease the costs.

Congressional Investigations

- Proposed rule would make costs incurred in connection with Congressional investigations unallowable.
- As written, not clearly limited to the contractor that is actually the subject of the "proceeding or inquiry."

Expressly Unallowable Costs

Appeal of Raytheon Co., ASBCA Nos. 57576 et al.

- Board rejected the Government's overbroad interpretation of "expressly unallowable"
- Decision undercuts the positions asserted in recent DCAA (Mis)guidance titled "Audit Alert on Identifying Expressly Unallowable Costs" (Jan. 7, 2015) and "Audit Alert Distributing a Listing of Cost Principles That Identify Expressly Unallowable Costs" (Dec. 18, 2014)

Rescinded Government Claims

Appeal of L-3 Commc'ns, ASBCA Nos. 60431, 60432 (Apr. 25, 2016)

- ACOs issued, and then rescinded, two final decisions demanding payment for allegedly unallowable costs incurred in FY 2008.
- In the meantime, the contractor had already appealed the Government claims, arguing that the claims were barred by the CDA statute of limitations.
- Board held that the Government's recision mooted the appeals.
- Although the COs had not yet agreed to settle the claims or provide any assurance that the claims would not be reasserted in the future, COs are presumed to act in good faith, and, without evidence of contrary intent, there was no reason not to "trust" that the claims will not be reasserted.

Travel Costs

Appeal of Raytheon Co., ASBCA No. 58212

- Final rule took effect January 10, 2010, changing the FAR 31.25-46(b) phrase "lowest customary standard, coach, or equivalent airfare" to "lowest priced coach class, or equivalent, airfare available to the contractor during normal business hours."
- Parties disputed the appropriate baseline for measuring the amount of unallowable "premium" airfare costs under the pre-2010 version of FAR 31.205-46(b)
- Board denied the parties' cross-motions for partial summary judgment on the retroactive effect, if any, of the January 2010 amendments to the FAR travel cost principle

GOVERNMENT CONTRACTORS UNDER THE MAGNIFYING GLASS

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