



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

32nd Annual

WEST COAST
OUNCE OF
PREVENTION
SEMINAR

May 18, 2016

WELCOME
ATTENDEES



32nd Annual

**WEST COAST
OUNCE OF
PREVENTION
SEMINAR**

May 18, 2016

“Oh, and Do This, Too”

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

Daniel Forman
Mana Elihu Lombardo
Agustin Orozco



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Fair Pay and Safe Workplaces



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Overview

- Proposed FAR provision and DOL guidance implementing the “Fair Pay and Safe Workplaces” Executive Order
 - published on May 28, 2015
- Proposed Rule and Guidance offer insight into the sweeping compliance and reporting obligations to be imposed on federal contractors
- Final FAR Rule and Guidance are expected to be issued in coming months



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Basic Requirement

- Contractors bidding on contracts valued over \$500,000 must disclose whether they have received any “administrative merits determinations,” “arbitral awards or decisions,” or “civil judgments” within the preceding three-year period for violation of enumerated federal labor laws and equivalent state laws



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Enumerated Federal Labor Laws

- Fair Labor Standards Act
- Occupational Safety and Health Act
- National Labor Relations Act
- Americans with Disabilities Act
- Family and Medical Leave Act
- Title VII of the Civil Rights Act
- Age Discrimination in Employment Act
- Davis-Bacon Act
- Service Contract Act
- Section 503 of the Rehabilitation Act
- Vietnam Era Veterans' Readjustment Assistance Act
- Migrant and Seasonal Agricultural Worker Protection Act
- Executive Order 11246 (Equal Employment Opportunity)
- Executive Order 13658 (Contractor Minimum Wage)



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Responsibility Determination

- Contracting Officer must consider the violations as well as “mitigating circumstances” and remedial measures in responsibility analysis of bidder
- Upon award, contractors must update disclosures and Contracting Officers must repeat the responsibility analysis every 6 months
 - Violations and updates entered into SAM
 - Basic information available in FAPIIS



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Agency Labor Compliance Advisors

- “Agency Labor Compliance Advisors” (ALCA) will help the Contracting Officer determine the appropriate response to address violations



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Unanswered Question: What is an Equivalent State Law?

- Other than OSHA-approved state plans, the “equivalent state law requirement” will not be implemented through this rulemaking
- FAR Council acknowledged that “there will be challenges associated with the implementation” of the state law requirement



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Unanswered Question: What About Subcontractors?

- Proposed rule requires contractors to obtain from subs the same labor compliance history disclosures
- However, FAR Council may apply the subcontracting requirements in phases to give contractors “time to acclimate themselves to their new responsibilities”



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

What Can Companies Do To Prepare?

- Perform a 3-year look-back to identify reportable violations
- Develop information collection and reporting processes to identify potential violations and timely take remedial measures
- Consider messaging and outreach efforts in proposals and to SDOs



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Paid Sick Leave for Federal Contractors



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Procedural Overview

- Executive Order 13706 - September 2015
- DoL's NPRM - February 2016
 - April 12, 2016 – End of Comment Period
 - Follows brief extension granted by DoL
- September 30, 2016 – Deadline for Secretary of Labor to issue regulations
- January 1, 2017 – Final rule effective for “new contracts”



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Coverage – Types of 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)



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Coverage - 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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Implementation - Accruals

- Accrue one hour for every 30 hours worked or 56 hours per year granted up front
- Accrued sick leave carries over year-to-year
- Accrual can be limited to 56 hours in accrual year and 56 hours available at one time
 - Paid sick leave bank can exceed 56 hours if front loaded
 - If not front-loaded, have recurring “refill” issue
- “Reinstatement” of paid sick leave upon re-hire by same contractor or successor
 - Even if sick leave paid on employee’s separation
 - Can implicate pricing on bid for successor contract



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Enforcement & Remedies

- Enforcement
 - Contracting agency
 - Dept of Labor, Wage and Hour Division (WHD)
- Pay and/or benefits denied or lost because of the violation
- Other monetary losses as a direct result of the violation
- Appropriate equitable or other relief
 - liquidated damages equal to monetary relief
 - withholding payment on the contract
- Debarment for up to three years



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

What Can Companies Do To Prepare?

- Recommend reviewing current Paid Time Off (PTO) policies for compliance
- Train HR personnel, supervisors, and managers on requirements
- Contract terms – add 56 hours paid sick leave to paid vacation required by covered contract to ensure PTO is sufficient



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Equal Pay Report and EEO-1 Reporting Revisions



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

OFCCP Equal Pay Report

- Proposed Equal Pay Report
 - Would require annual reporting of W-2 wages and hours for all employees by EEO-1 category
 - Stated purpose to improve enforcement efforts and to provide “objective industry standards” for contractors
 - Substantial burden and minimal value
 - Data meaningless for enforcement purposes
 - “Standards” of little value to contracting community
 - Confidentiality concerns



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

EEO-1 Revisions

- Process and Proposed Timeline
 - Not a proposed rule
 - Instead, EEOC is requesting OMB three-year approval of revised EEO-1 report under Paperwork Reduction Act
 - Public hearing and comment period



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

EEO-1 Revisions

- Process and Proposed Timeline
 - Published in Federal Register: February 1, 2016
 - Public hearing: March 16, 2016
 - Comment period ended: April 1, 2016
 - Final form expected: September 2016
 - First submission due: September 30, 2017



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

EEO-1 Revisions

- Substance of Proposed Changes
 - Adds 12 pay bands to each of the 10 EEO-1 Categories
 - Within each pay band, must disclose:
 - Hours worked
 - Number of employees
 - Race
 - Gender
 - Total of 3600 cells
- Burden Estimate
 - EEOC predicts 6.6 hours per employer per year
 - Plus one-time impact of 8 hours per employer
 - Claims current form requires just 3.4 hours of employer time



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

EEO-1 Revisions

- Significance of Proposed Changes
 - Underestimates administrative burdens
 - Aggregate W-2 data not probative of actual discrimination
 - EEO-1 categories group dissimilar jobs
 - Undifferentiated elements of pay swept into W-2 earnings
 - Aggregate hours data – limited or no utility
 - FOIA issues – smaller employers



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

What Can Companies Do To Prepare?

- Consider the impact that the additional reporting may have on current business practices
- Identify any “red flags” that could be identified by EEOC or OFCCP
- Address problem areas or compliance issues before reporting begins



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Other Compliance Considerations

- Prohibition on Contracting with Corporations with Felony Conviction or Delinquent Taxes
- Prohibitions Against Pay Secrecy Policies and Actions
- Final Anti-Human Trafficking FAR and DFARS Rules
- Contractor Employee Internal Confidentiality Agreements

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Contacts

Dan Forman
Partner
202-624-2504

dforman@crowell.com



Mana Lombardo
Counsel
213-443-5563

melombardo@crowell.com

Agustin Orozco
Associate
213-443-5562

aorozco@crowell.com





GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

32nd Annual

WEST COAST
OUNCE OF
PREVENTION
SEMINAR

May 18, 2016

How to Interface with the Government When You Get in Trouble

Gail Zirkelbach

Kelly Currie

Janet Levine

David Robbins

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Contacts



Gail Zirkelbach
Partner
213-443-5549
gzirkelbach@crowell.com



David Robbins
Partner
202-624-2627
drobbs@crowell.com



Kelly Currie
Partner
212-895-4257
kcurrie@crowell.com



Janet Levine
Partner
213-443-5583
jlevine@crowell.com



32nd Annual

**WEST COAST
OUNCE OF
PREVENTION
SEMINAR**

May 18, 2016

The Challenges of Commercial Item Contracting

Lorraine Campos

David Ginsberg

Judy Choi



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Challenging Legislative and Regulatory Burdens for Commercial-Item Contracts



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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]



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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]



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Commercial-Item and Price Reasonableness Determinations

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

[DFARS Case 2016-D006]



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Category Management Initiative



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Category Management (cont.)

Current State of Purchasing:

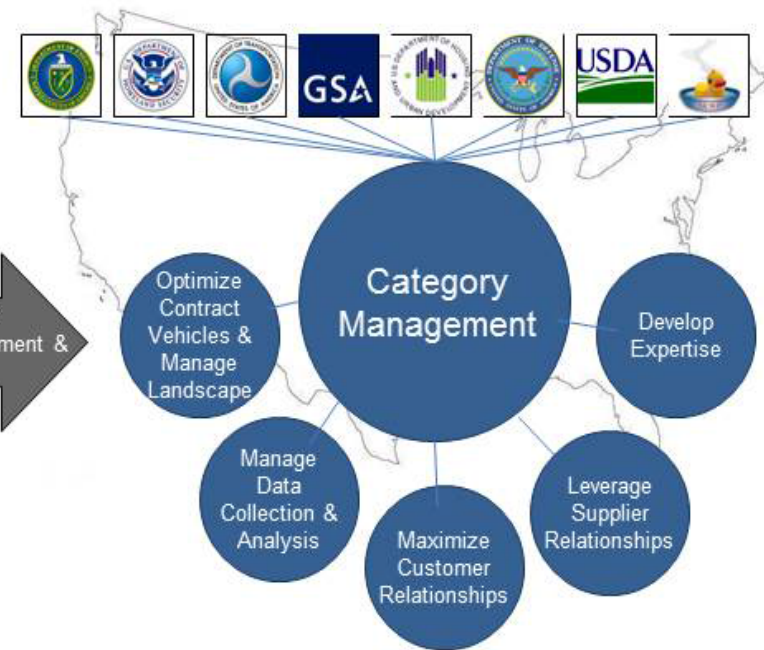
- Lack of coordination across agencies
- Duplicated efforts
- Many agencies; no leveraged buying power



Implementation of
Category Management &
CAP

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





GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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

**GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS**

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	Business Administration	Security Animals & Related	Construction Related	5.1 Machinery & Components
1.2 IT Hardware	2.1 Services	3.1 Services	4.1 Materials	Fire/Rescue/Safety/Environmental Protection
1.3 IT Consulting	2.2 Legal Services	3.2 Security Systems	Construction Related	5.2 Equipment
1.4 IT Security	2.3 Management Advisory Svcs (excl. R&D)	3.3 Security Services	4.2 Services	5.3 Hardware & Tools
1.5 IT Outsourcing	2.4 Marketing and Distribution		4.3 Facility Related Materials	Test & Measurement
1.6 Telecommunications	Public Relations and Professional		4.4 Facility Related Services	5.4 Supplies
	2.5 Communications Services		4.5 Facilities Purchase & Lease	Industrial Products
	2.6 Real Estate Services			Install/Maintenance/Repair/
	2.7 Trade Policy and Services			5.5 Rebuild
	2.8 Technical & Engineering Svcs (non-IT)			5.6 Basic Materials
	2.9 Financial Services			5.7 Oils, Lubricants, and Waxes
	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	Specialized Educational	Drugs and Pharmaceutical
6.2 Office Management Services	7.2 Logistics Support Services	8.2 Lodging	9.1 Services	10.1 Products
6.3 Furniture	7.3 Transportation of Things	8.3 Travel Agent & Misc. Services	9.2 Vocational Training	Medical Equipment &
	7.4 Motor Vehicles (non-combat)		9.3 Human Resources Services	10.2 Accessories & Supplies
	7.5 Transportation Equipment			10.3 Healthcare Services
	7.6 Fuels			

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



What does "Acting as One" mean?



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Sweeping Reforms to the FSS Program



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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 contractors and GSA
 - Proprietary data concerns



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Other Schedule Changes

- GSA's innovative initiatives
 - FAST Lane
 - IT Schedule 70 Springboard
- Implementation of Category Management
 - Consolidated Professional Services Schedule (PSS)
- Schedule 70
 - New GSA and DHA partnership on Health Information Technology (HIT) requirements
 - Upcoming new health IT SIN
 - GSA Class Deviation



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Enforcement Focus and Trends



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Enforcement Trends

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Contacts

Lorraine Campos
Partner

202-624-2786

lcampos@crowell.com



David Ginsberg
Partner

213-443-5545

dginsberg@crowell.com



Judy Choi
Associate

213-443-5564

jchoi@crowell.com





GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

32nd Annual

WEST COAST
OUNCE OF
PREVENTION
SEMINAR

May 18, 2016

Best Practices for Structuring an M&A or Investment Transaction

Karen Hermann
Amy O'Sullivan
Joelle Sires



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Why Are We Here?

Increased M&A Activity in the Sector

- OCI divestitures
- Consolidation in the industry

Emphasis on Revenue Generation

- Growth by Acquisition of Strategic Targets
- Maturation of the Private Equity Buyer

Shifting Government Purchase Model

- Greater emphasis on security, intelligence and information technology
- Proliferation of commercial technology in the government sector



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Key Components of Deal – Protecting Value



Due Diligence



Representations/Warranties



Indemnification



Consideration



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Shifting Diligence Landscape

Traditional Focus

- Valuation
 - EBITDA
 - Revenue waterfall
- Required approvals and novations
- Potential risks – audits, claims, investigations

New Focus

- OCI restrictions
- Valuation and viability
 - Backlog and program assessment
 - risks of termination or non-renewal of key contracts
 - margin sustainability and adequacy of business infrastructure
- Integration issues
- Deficiencies in business processes and policies
- In-sourcing risks



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Avoiding Data Room Disasters

- Competitively Sensitive Information
 - information that might give the Purchaser an unfair competitive advantage in future government procurements

OCI issues may arise even during diligence.

- Classified Material
 - May require customer consent to review
 - Timing of deal may dictate that completion of diligence on classified contracts be a closing condition.
- Export Controlled Material



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

2015 Trends / 2016 Predictions

- More auction processes
- Indemnity caps are trending lower
- More pressure on deal timelines, means less time for diligence and integration planning
- Increased use of Transactional Risk Insurance
- Greater focus on “business” due diligence – continue to proactively monitor data room access



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Small Business = Big Issue in M&A and Investment Transactions

- Pipeline/valuation questions
 - Impact on current contracts/status
 - Ability to compete for future set-asides
 - Disclosure obligations or broken deal if serious problems identified
- Was status correctly certified pre- and post-transaction?
- For small businesses in need of investors – how can the transaction be structured to avoid defeating small business size status?
- Other issues: limitations on subcontracting/ostensible subcontractor; subcontracting plan compliance and goaling



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

The “Golden Ticket” of Small Business Status

- Protected space to compete for business with “set-aside” procurements
- Federal Government “Goal” of 23% of prime contracts to be awarded to small businesses
- For FY15 – this was \$90.7 BILLION
- Similar goals imposed on large business primes to subcontract to small businesses
- Proposal evaluation advantages for utilization of small businesses
- Accelerated payment provisions



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Defining a “Small Business”

- No “list” of small businesses, companies self-certify, and it’s a moving target
- Dramatic industry variations what it means to be “small”:
 - Number of employees (100 to 1,500); or
 - Average annual receipts (\$750K to \$38.5M)
- Size status must include all “affiliates”
- Complex regulatory requirements and detailed, fact-specific analysis



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

“Affiliation” – The Silent Killer of Small Business Status

- Generally, affiliation exists between entities when:
 - One controls or has power to control another
 - Or, third party controls or has power to control both
- “Totality of the circumstances” analysis:
 - Ownership, management, previous relationships or ties to another entity
 - Contractual relationships
 - Even shared office space, loans, common investments, etc.
- Corporate nuances – control can arise from:
 - Quorum requirements
 - Blocking rights or supermajority voting rights
- **Ownership misconception**: Affiliation can arise even if investor owns less than 50% of company



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Affiliation - Control

“Control” is construed broadly by the SBA and includes both affirmative and negative control

- Quorum requirement may be negative control
- Existence of one or more independent directors, does not preclude negative control by one or the other
- Limitations on unanimous or supermajority voting requirements – look to case law guidance:
 - Can entity conduct business as it chooses?
 - Acceptable: approve the addition of new members, change board size, amend bylaws, issue additional shares of stock
 - Unacceptable: compensation of officers, choice of auditor, corporate budget, incentive plan, choice of accounting methods



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Financing and Other Start-Up Needs

- Smartly balance short term needs with long term goals
- Lending practices should also comply with ownership restrictions
- Huge contract awards may require influx of capital, internal controls, and infrastructure
- Be wary of strings attached and impact of “present effect” rule



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Affiliation - Stock Ownership

- Common mistake is not realizing there are several stock ownership tests
 - Misperception that this is only about majority ownership
 - Tests are not just on percentage ownership, but relative percentage ownership
- Tests not limited to individuals, but also whether there are blocks (i.e., friends and family)
- Majority/Largest Minority Ownership: Person or entity that owns or has power to control
 - $\geq 50\%$ of SB's voting stock, or
 - A block of voting stock which is large compared to other blocks, controls or has power to control the SB
 - Case law: block 1.36 times larger than next block = large
 - Presumption of control CANNOT be rebutted

Affiliation - Stock Ownership

- No Single Block is Large: If 2 or more persons or entities each owns, controls, or has power to control
 - < 50% of SB's voting stock, and
 - Such holdings ≈ and aggregate is large compared to any other holding, presume each person or entity has control or power to control
 - May rebut by showing power to control does not exist
- But, if voting stock is "widely held" and no block is large compared to others, Board AND CEO/President presumed to "control"
 - "[I]f stock in a corporation is freely traded and held by more than a few shareholders, it is reasonable to state that it is widely held." *MPC Computers, Inc.*, SBA No. SIZ-4806 (2006)



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

4.16% Interest = Control? YES.

Government Contracting Resources, Inc., SIZ-5706 (2016)

- 20 companies with equal 4.16% minority interest
- No owner could “create a quorum, prevent a quorum, cause any vote to pass, block any vote nor cast a tie-breaking vote”
- OHA: a concern must be controlled by at least one person or entity, so presumption of control NOT rebutted here
- **RESULT**: all 20 investors controlled through stock ownership



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Investor Tips

- Know which test will apply and if control can be rebutted
- Exercise caution if largest interests are equal/approximately equal minority investments
- Be prepared to rebut control presumption – vest decision-making authority in individual(s) with no affiliation concerns
- Do not ignore voting rights for minority investors

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Contacts

Karen Hermann
Partner
202-624-2722

kherrmann@crowell.com



Amy O'Sullivan
Partner
202-624-2563

aosullivan@crowell.com

Joelle Sires
Associate
213-443-5579

jsires@crowell.com





32nd Annual

**WEST COAST
OUNCE OF
PREVENTION
SEMINAR**

May 18, 2016

False Claims Act Trends and Emerging Issues

Mark Troy

Mana Lombardo

Megan Weisgerber



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Relators Go At It Alone

- Record year for *qui tam* recoveries where DOJ declined to intervene (\$1.15 billion)
- Record year for recoveries by Relators (\$598 million)
- DOJ obtained more than \$3.5 billion in settlements and judgments for forth consecutive year



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Civil Penalties Set To Double

- Bipartisan Budget Act of 2015 enacts civil penalties Inflation Adjustment Improvement Act
- Penalty range to increase up to 150%
- Railroad Retirement Board – first federal agency to adjust FCA penalties for inflation



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

A “Sample” of What’s To Come: Extrapolation

- Historically limited to calculating damages once liability has been established
- *United States ex rel. Martin v. Life Care Centers of America, Inc.* and proving liability through statistical analysis



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Contacts

Mark Troy
Partner
213-443-5576
mtroy@crowell.com



Mana Lombardo
Counsel
213-443-5563
melombardo@crowell.com



Megan Weisgerber
Associate
213-443-5506
mweisgerber@crowell.com





32nd Annual

**WEST COAST
OUNCE OF
PREVENTION
SEMINAR**

May 18, 2016

Protecting Information: Cybersecurity and Risk Management

Peter Miller
Jennifer Romano
Nathaniel Wood



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Overview

- Cybersecurity and Risk, Generally
 - Internet of Things
- New FAR Safeguarding Clause and “Old” DFARS Safeguarding Clause
- Data Incidents and Litigation



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Cybersecurity and Risk, Generally



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Managing Cybersecurity Risk

- No “one size fits all” approach
- Not a one-and-done activity: ongoing
- Variety of risk management frameworks and policy initiatives
- Federal government – carrot and stick
 - Statutes, guidance, and high-profile enforcement actions across industry sectors and activities (HHS, FTC, FCC, CFPB, SEC, DHS, DOJ, DOD...)
 - NIST Guidance (voluntary), e.g., Framework for Improving Critical Infrastructure Cybersecurity, Guide to Cyber Threat Information Sharing
- State government – privacy/cybersecurity teams, incident response, and risk reduction practices



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Federal Cybersecurity Policy Initiatives

- NIST, *Framework for Improving Critical Infrastructure Cybersecurity* (www.nist.gov/cyberframework/)
 - Voluntary, customizable, and provides a common vocabulary: “Identify, Protect, Detect, Respond, Recover”
 - “Supply chain risk is an essential part of the risk landscape that should be included in organizational risk management”
- NIST SP 800-150, *Guide to Cyber Threat Information Sharing* (<http://csrc.nist.gov/publications/>)
 - Information Sharing & Analysis Centers/Organizations (ISACs/ISAOs)
 - Cybersecurity Information Sharing Act of 2015 (12/15/15)
 - Any “non-federal entity” can share information with federal government “notwithstanding any other provision of law.”
 - Information-sharing portals



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Internet of Things

- “Cyber-physical systems (CPS) [including IoT] are smart systems that include engineered interacting networks of physical and computational components.”

NIST Cyber Physical Systems Public Working Group, *DRAFT Framework for Cyber-Physical Systems*, Release 0.8 (September 2015)

- \$11 Trillion Global Economy
 - \$2 Trillion Today
 - Est. \$11 Trillion in 2025
- More Devices than Humans
 - 25 Billion Devices → 50 Billion devices in 2020
- 127 New Devices/Second Added to Internet
- Exponential increase in data collection and analysis



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

With Benefits Come Risks...

- Ubiquity
- Complexity
- Inconspicuousness
- Limited user interface
- Low cost, little incentive to secure
- Long life: limited patching, upgrades, or technology refresh
- Communications: who else involved?
- Interactions
- And on and on...
- Homes
- Healthcare and medical devices
- Vehicles and drones
- Business environments
- Physical and logical access
- Critical infrastructure
- Industrial and manufacturing processes
- Supply chains
- And on and on...



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

With Risks Come Regulation... and More Risk

- No common IoT standards or interoperability principles or “reasonable security” safe harbors
- Congress: “more than 30 different congressional committees” *Politico* (June 2015)
- Federal Government: Alphabet Soup
 - FTC – consumer catch-all
 - FDA – medical devices
 - FCC – spectrum
 - DOE(nergy) – smart grid
 - DOT – vehicles, aircraft, pipelines
 - DHS – critical infrastructure
 - DOJ – law enforcement
 - DOD – advanced technology
 - HHS – healthcare

An estimated two dozen agencies with IoT-related interests ...
- State Government: “little FTC Acts,” general privacy and data security statutes, IoT-specific legislation
- Private enforcement actions



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

New FAR Safeguarding Rule and “Old” DFARS Safeguarding Rule



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Background

- OPM Breach (along with other high-profile incidents, including IRS, DOE, TRICARE) result in internal initiatives to improve cybersecurity within agencies and across federal government (OMB, GAO, IGs)
- Increased recognition that federal government is out of step with private sector cybersecurity practices
- Return to basics: robust risk management practices, reasonable data security measures, vendor management, and accountability
- Cybersecurity practices aren't (yet) harmonized across federal agencies or within larger agencies.
- Cybersecurity tensions are reflected in agency administration of government contracts as well.



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

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

- Requires contractors and subcontractors to implement 15 security controls taken from the security control families in NIST SP 800-171, *Protecting CUI in Nonfederal Information Systems and Organizations*
 - 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.”



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

DFARS 252.204-7012: Safeguarding Covered Defense Information and Cyber Incident Reporting

- Final Rule pending (“second interim rule” 12/30/15)
- Mandatory in all defense contracts and solicitations
- Requires “adequate security” to protect information systems handling covered defense information
- Requires written DoD CIO approval of “alternative but equally effective security measures”
- NIST SP 800-53 v. NIST SP 800-171
- Imposes cyber incident reporting requirements
- Exposes contractors to potential for extensive audits
- Growing concern over risk of contractor liability
 - Supply chain compliance
 - False Claims Act
 - Suspension & debarment



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Data Incidents and Litigation



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Responding to an Incident

1. Assemble the Team

- Form your team per the incident response plan
- Investigative team—internal resources v. outside vendor
 - Consider creating separate team for obtaining legal advice
- Involve in-house/outside counsel immediately
 - Privileged communications/work product
 - Assess claims/positions vs. vendor
 - Strategize for long-run – investigation through class actions
- Involve risk management to assess insurance coverage and report incident to commence/preserve claim
- Involve corporate communications to ensure consistency with media statements
- Ensure effective internal reporting



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Responding to an Incident

2. Investigate/mitigate/remediate

- Forensics
 - Can you identify type of infiltration and impact?
 - Can you show forensically that data not accessed?
 - Can you determine if data exfiltrated?
 - In case of missing device, can you determine what data it contained?
- Mitigate/Remediate
 - Can you track and recover lost data?
 - If technical cause, can it be fixed?
 - Are the cyber attackers still in the system?



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Responding to an Incident

3. Notification

- Numerous constituencies: Law enforcement, Regulators, Customers, Public, Media, Business partners
- DFARS 252.204-7012
- OCR/HIPAA – HITECH
- State/Other Breach Notification Laws
 - Standards vary by state
 - AGs have enforcement authority
 - Timing: “in the most expedient time possible,” “without unreasonable delay”
 - If required to notify in some states, notify in all states?
- Don’t sugarcoat notification letter
- What do you do if you cannot determine extent of incident?



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Responding to an Incident

4. Working with Regulators

- Be proactive with regulators
- Establish relationship/bring them in the loop
- Beware of turf wars re regulators with overlapping jurisdiction
- Make sure they know that situation is fluid and you will update them



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

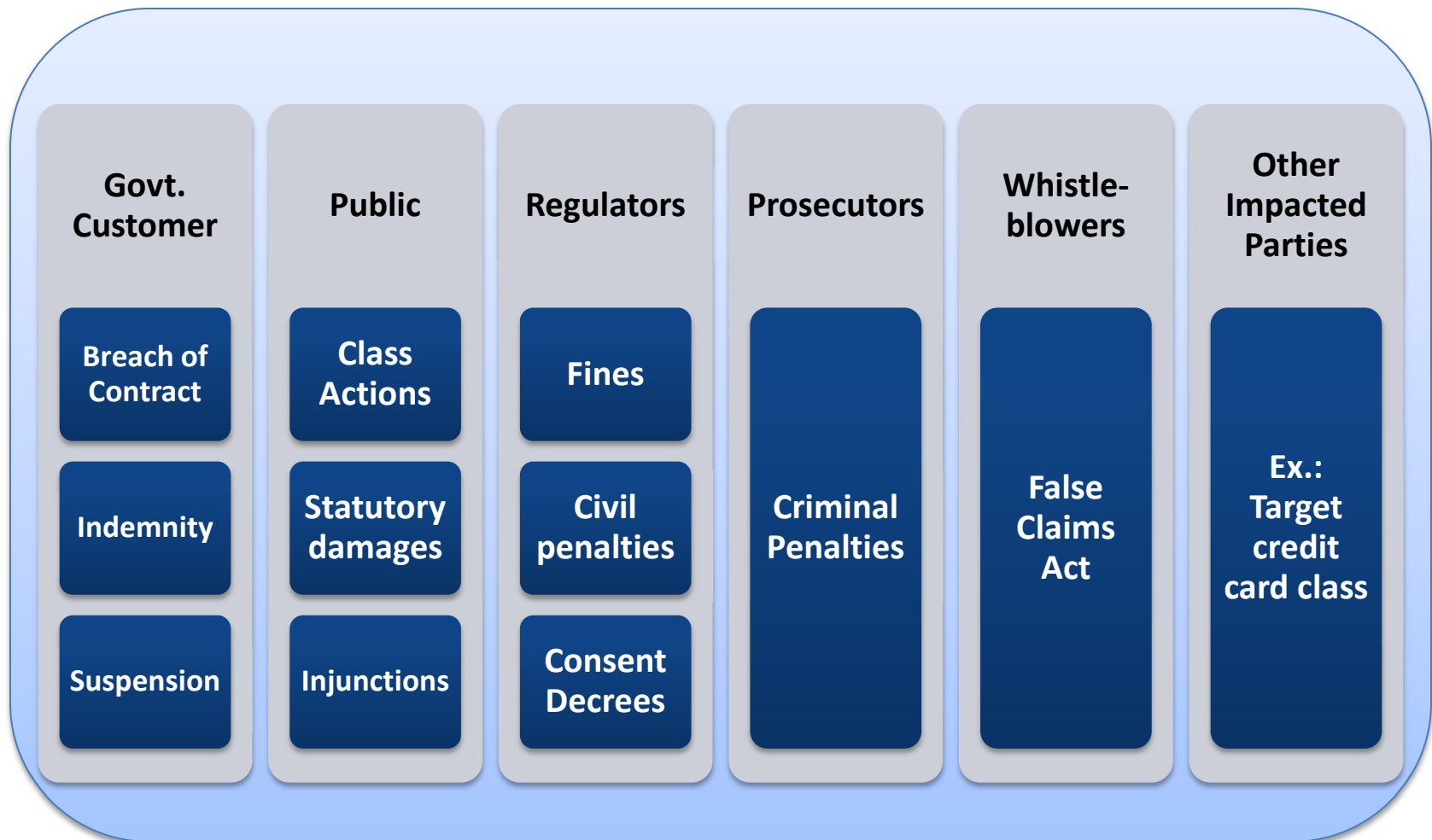
Responding to an Incident

5. Prepare for Litigation

- Include litigation counsel in incident response
- Preserve critical evidence
- Document investigation/remediation efforts

**GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS**

Data Security Incidents Lead to Litigation on Many Fronts





GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Litigation Trends: Creative Pleading

Negligence

Breach of
Contract/Warranty

Unfair Trade
Practices

Misrepresentation

Violation of Privacy

State Statutes (e.g.
CMIA, Customer
Records Act)

Misappropriation

Conversion



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Litigation Trends

- *Spokeo, Inc. v. Robins*
 - Plaintiff alleged a statutory violation of the Fair Credit Reporting Act, even though the violation did not cause an actual injury (as opposed to risk of injury)
 - Trial court dismissed the case, Ninth Circuit reinstated the case
- Issue is standing: does a plaintiff have standing to sue based on a violation of a statute when he has not suffered an actual injury?
- Supreme Court reversed the Ninth Circuit and remanded for further proceedings
 - 6-2 decision, with Justices Ginsburg and Sotomayor dissenting
- Court did not announce a new rule—reiterated earlier rulings that plaintiffs must plead and prove both “particularity” and “concreteness” of harm
 - Ninth Circuit did not analyze “concreteness”
- Concreteness remains a nebulous concept
 - Can’t be a “bare procedural violation, divorced from any concrete harm”
 - But, can be:
 - Procedural violation in some circumstances
 - Risk of real harm



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Litigation Trends

- Cognizable injury or harm
 - Actual identity theft
 - Fear of future harm
- Causation
 - Connecting harm to the data incident



GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Manage Cybersecurity Risk for the Life of the Data

Assess the Risks

- Identify and classify data and systems
- Identify insider threats
- Identify external threats

Reduce the Risks

- Physical and information security controls
- Clear governance, policies and procedures
- Incident response plan
- Industry and government partnerships

Export, Accept, or Avoid the Risks

- M&A
- Insurance
- SAFETY Act
- Managed services
- Refrain from activity

GOVERNMENT
CONTRACTORS
UNDER THE
MAGNIFYING
GLASS

Contacts

Peter Miller
Senior Counsel
202-624-2506

pmiller@crowell.com



Jennifer Romano
Partner
213-443-5552

jromano@crowell.com



Nathaniel Wood
Counsel
213-443-5553

nwood@crowell.com

