Federal Government Contracts 2023 Year in Review

What Happened & What it Means for 2024 – and Beyond

Wednesday, Jan. 31, 2024

Holland & Knight

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Chris Nagel is a government contracts attorney based in Holland & Knight's Tysons, Virginia office. Mr. Nagel advises businesses on a broad range of legal issues involving their relationship with the government.

Mr. Nagel represents clients in bid protests, contract claims, suspension/debarment, False Claims Act (FCA) matters and disputes between contractors. He regularly guides corporations through compliance issues, including internal investigations and employee training.

In addition, Mr. Nagel served for 12 years on active duty and as a reservist in the U.S. Marine Corps (USMC). While on active duty, he was deployed to Afghanistan, where he adjudicated claims against the North Atlantic Treaty Organization (NATO) and the U.S. government. His previous tours include stints as a special assistant U.S. attorney for the U.S. District Court for the Eastern District of Virginia, officer-in-charge of the Quantico Legal Assistance Office and as a military prosecutor.

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Today's Speakers

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Agenda

- False Claims & Enforcement
- Regulatory Updates & Trends
- Bid Protest Updates
- Contract Disputes
- Cybersecurity
- Intellectual Property
- Small Business
- Labor Updates
- Trade Restrictions, Domestic Preference & Import/Export

False Claims & Enforcement

False Claims & Enforcement: Brief Overview

- The False Claims Act (FCA) – the basics
- Fiscal Year 2022 statistics on FCA settlements & judgements (a record year)
- A brief digression: the DOJ's Civil-Cyber Fraud Initiative and recent settlements
- Two decisions from the Supreme Court involving the FCA

What is the False Claims Act (FCA)?

- The False Claims Act (31 U.S.C. § 3729) is one of the Government's most important anti-fraud weapons
- Enacted in 1863 by Congress to fight fraud on the Union Army during the Civil War
- An entity violates the FCA by:
  - **False Claim** − "knowingly" causing the submission of a "false claim" to be paid with federal funds or withholding funds owed to the Government
  - "**Implied Certification**" − requesting payment while failing to disclose noncompliance with "material" statutory, regulatory, or contractual requirements

FCA Basics: "Knowingly"

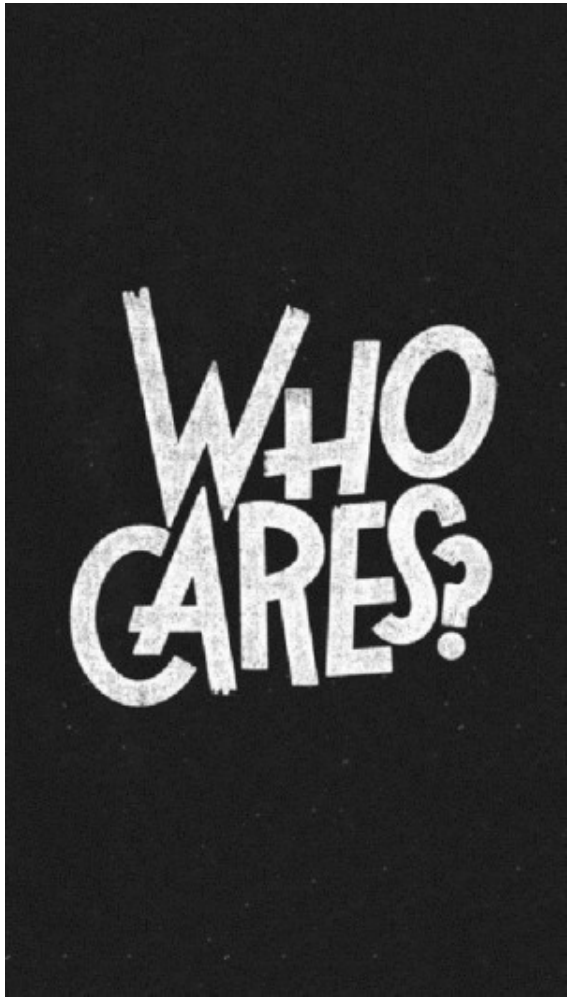
- "Knowingly" means the contractors –
  - Had **actual knowledge** of the false information
  - Acted in **deliberate ignorance** of the truth or falsity of the information
  - Acted in **reckless disregard** of the truth or falsity of the information
- Employees' knowledge is imputed to the contractor (the entity)
- Failure to maintain an effective compliance program constitutes "reckless disregard" under the FCA

FCA Basics: "Claim" and *Qui Tam* Actions

- "Claim" is extremely broad – includes any demand for money or property which is made to:
  - a Federal officer, employee; or agent; OR
  - "a contractor, grantee, or other recipient," if the money is to be spent on the Government's behalf and if the Government provides any of the money demanded or will reimburse the contractor or grantee
- A contractor's own employees have a financial incentive to bring FCA actions against their employer
  - *Qui tam* provision of the FCA allows a private person to bring an FCA action (on behalf of the Government) & recover 15–30% of the amount recovered in the action, PLUS reasonable attorneys' fees and costs
  - What does this mean? A disgruntled or recently fired employee can pose a "whistleblower" risk

FCA Basics: Damages & Penalties

- Under the FCA, the contactor is liable for ***three times the damages*** ("treble damages") sustained by the Government
  - Reduced to "double" damages if the violation is reported to the Government within 30 days after first obtaining information
- Plus, a civil penalty of not less than $11,000 and $22,563 per claim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False Claims: FY 2022 Recoveries Exceed $2 Billion

- In Feb. 2023, DOJ announced that settlements & judgments under the False Claims Act exceeded $2.2 billion in fiscal year 2022
- This amount included DOJ's first settlement under its **Civil Cyber-Fraud Initiative**, which DOJ announced in Oct. 2021 with the purpose of using the FCA to combat cyber threats (***Comprehensive Health Services, LLC***)
  - More on DOJ's Civil-Cyber Fraud Initiative in a minute
- Also included DOJ's largest FCA recovery ($48.5 million) based on allegations of small business contracting fraud (***TriMark USA, LLC***)
- And a large portion of this amount came from one settlement—a nearly $845 million deal with a pharmaceutical company to resolve allegations that the company offered and paid illegal kickbacks (***Biogen, Inc.***)

FCA: DOJ's Civil-Cyber Fraud Initiative

False Claims: DOJ's Civil-Cyber Fraud Initiative

- As noted, DOJ's Civil-Cyber Fraud Initiative is an effort designed to harness the Department's expertise in civil fraud, enforcement, government procurement, and cybersecurity to combat emerging (and escalating) cyber threats
  - Initiative comes on the heels of DOJ's comprehensive 120-day review into its cybersecurity strategy for defending and deterring cyber threats
  - Aims to "hold accountable" those entities and individuals that put sensitive U.S. information at risk by failing to comply with federal cybersecurity requirements
- As applied to cybersecurity, the Initiative uses the FCA to prosecute those who:
  - knowingly provide deficient cybersecurity products or services;
  - knowingly misrepresent their cybersecurity practices or protocols;
  - or knowingly violate obligations to monitor and report cybersecurity incidents and breaches

False Claims: DOJ's Civil-Cyber Fraud Initiative

- So what? Take a close look at your federal prime and subcontracts—any of the following could potentially serve as a basis for an FCA enforcement action:
  - **FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems**: Requires contractors to employ certain "basic" security controls, such as limiting access, authenticating users, and identifying system flaws in a "timely manner.
  - **DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting**: Requires contractor information systems to comply with the cybersecurity requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171. The clause also requires reporting of "cyber incidents" within 72 hours.
  - **DFARS 252.204-7020, NIST SP 800-171 DoD Assessment Requirements**: Applies to covered contractor information systems that are required to comply with NIST SP 800-171, in accordance with the -7012 clause. This clause requires contractors to provide access to their facilities, systems, and personnel necessary for the Government to conduct a NIST SP 800-171 DoD Assessment, as described in NIST SP 800–171 DoD Assessment Methodology (latest version, version 1.2.1 (Jun. 24, 2020)).
  - **DFARS 252.204-7019, Notice of NIST SP 800-171 DoD Assessment Requirements**: Requires offerors, as a prerequisite for award, to perform and hold a current (i.e., not more than 3 years old) NIST SP 800-171 DoD Assessment for each covered contractor information system that is relevant to the offer, contract, task or delivery order.
  - **DFARS 252.204-7021 Contractor Compliance with the Cybersecurity Maturity Model Certification ("CMMC") Level Requirement**: Requires contractors to have a current CMMC certificate at the CMMC level required by the contract, and to maintain that certificate for the duration of the contract. CMMC only builds upon DFARS 252.204-7012 and having the security measures required by DFARS -7012 (i.e., NIST SP 800-171 requirements) in place is the first step toward CMMC certification.

FCA Meets Cybersecurity: Example 1

- Don't take our word for it – see ***United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.***, an FCA action involving Aerojet (an aerospace contractor primarily serving DoD and NASA) wherein the company's former senior director of Cyber Security, Compliance, and Controls brought an FCA action alleging the company failed to comply with the cybersecurity requirements in DFARS 252.204-7012
  - Alleged the company Aerojet "fraudulently entered into contracts with the federal government despite knowing that [it] did not meet the minimum standards required to be awarded a government contract"
- The company moved to dismiss, arguing the relator could not satisfy the FCA's "materiality" prong
  - The Court denied the motion to dismiss and rejected the company's arguments

FCA Meets Cybersecurity: Example 1

- ***United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.***
- The company moved to dismiss, arguing the relator could not satisfy the FCA's "materiality" prong
  - The Court denied the motion to dismiss and rejected Aerojet's arguments that the materiality prong was not met because it had disclosed its noncompliance with DoD
  - The Court found that Aerojet failed to disclose the full extent of its noncompliance and that "a partial disclosure would not relieve [Aerojet] of liability where [it] failed to 'disclose noncompliance with material statutory, regulatory, or contractual requirements'"
  - The Court also rejected Aerojet's arguments that its noncompliance does not go to the central purpose of any of its contracts (contracts pertaining to missile defense and rocket engine technology, not cybersecurity) – **the Court found that the cybersecurity regulations could have affected its ability to handle technical information pertaining to missile defense and rocket engine technology**

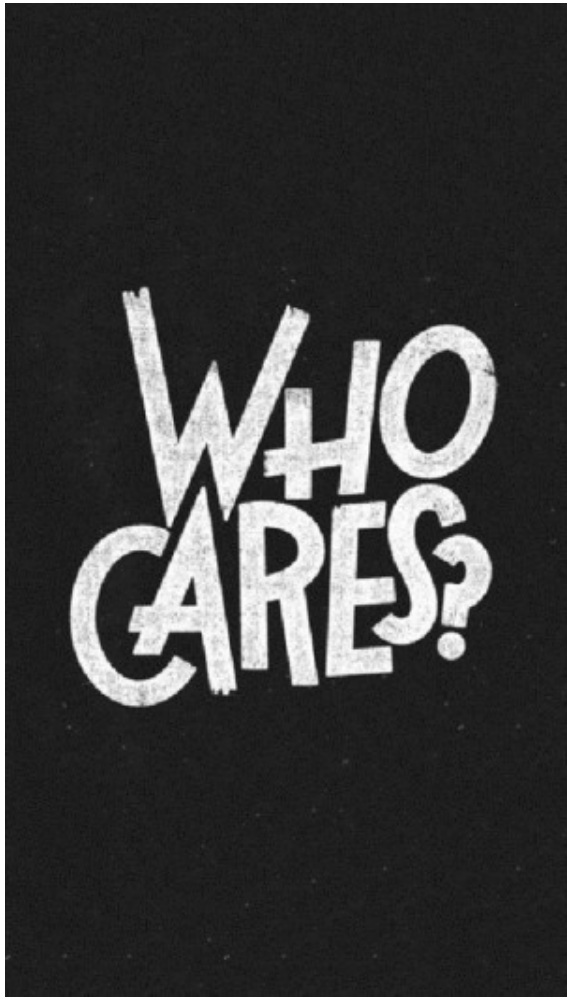
FCA Meets Cybersecurity: Example 1

- ***United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.***
- So, what happened? In July 2022, Aerojet agreed to pay $9 million to resolve matter



FCA Meets Cybersecurity: Example 2

- DOJ's settlement in ***Aerojet Rocketdyne*** was preceded by DOJ's first Civil-Cyber Fraud settlement in March 2023 with ***Comprehensive Health Services*** for $930,000
- ***Comprehensive Health Services***, a provider of global medical services, had contracted to provide medical support services in Iraq and Afghanistan
  - As part of its performance, the company submitted a claim to the State Department for the cost of a secure Electronic Medical Record (EMR) system to store patients' medical records, including the confidential identifying information of U.S. service members, diplomats, officials, and contractors working and receiving medical care in Iraq
  - The Government alleged that during the company's performance, it failed to disclose to the State Department that it had not consistently stored patients' medical records on a secure EMR system
    - E.g., when staff scanned medical records for the EMR system, staff saved & left scanned copies on an internal network drive, accessible by non-clinical staff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FCA: The Supreme Court, 2023

False Claims: The Supreme Court

- This year, the Supreme Court issued two decisions involving the FCA – ***United States ex rel. Schutte v. Supervalu Inc.*** & ***United States ex rel. Polansky v. Executive Health Resources Inc.***
- First, ***United States ex rel. Schutte v. Supervalu Inc.*** – the consolidated cases involved allegations that pharmacies (Safeway & Supervalu), which operate retail drug pharmacies nationwide, violated the FCA by overcharging Medicare & Medicaid for prescription drugs
- By regulation, pharmacies cannot collect more from the Gov't (*i.e.*, cannot charge more to Medicare/Medicaid) than their "usual and customary" drug prices, which is defined as the cash price charged to the general public

False Claims: The Supreme Court

- ***United States ex rel. Schutte v. Supervalu Inc.***
- The relators alleged that the pharmacies violated the FCA by overbilling Medicare & Medicaid when they began offering discounted prices to customers via a price-match program (designed to compete with other pharmacies) & discount program but did not adjust their "usual and customary" prices charged to the Gov't
- The evidence showed that the executives at Supervalu & Safeway believed, at the time, that they were obligated to reduce the "usual and customary" price & made efforts to hide the discounts to avoid doing so
- The Seventh Cir. affirmed judgment for the pharmacies, holding that even if a defendant "might suspect, believe, or intend to file a false claim, [ ] it cannot know that its claim is false if the requirements for that claim are unknown [because the legal requirement is ambiguous]"
  - Found the pharmacies' subjective intent irrelevant

False Claims: The Supreme Court

- ***United States ex rel. Schutte v. Supervalu Inc.***
- The Supreme Court, in a unanimous decision, vacated and remanded the Seventh Cir.'s decision, holding that the FCA's scienter element refers to a defendant's knowledge & subjective beliefs, and not what an objectively reasonably person may have known or believed
- What does this mean? Well, know if a contractor actually knows or believes that its claim is false, is aware of a substantial risk that its claim is false, and "intentionally avoid[s] learning" whether its claim is false, or is aware of such "a substantial and unjustifiable risk" that its claim is false but submits it anyway, it faces FCA liability—"it does not matter whether some other, objectively reasonable interpretation" of the law would indicate otherwise

False Claims: The Supreme Court

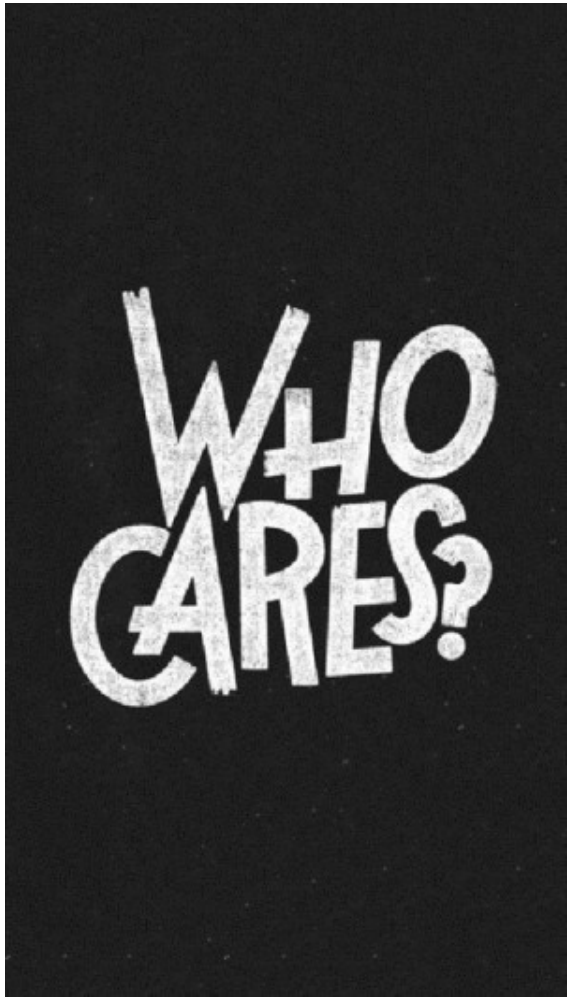
- And in ***United States ex rel. Polansky v. Executive Health Resources Inc.***, the Supreme Court agreed to consider the Government's dismissal authority in FCA *qui tam* cases, even where the Government initially declines to intervene
- The FCA authorizes private persons (called "relators") to bring civil *qui tam* actions on behalf of themselves and the Government
  - FCA complaints are filed under seal for at least 60 days, during which time the Gov't may elect to intervene and proceed with the action (in which the Gov't takes over the action) or decline to take action (in which the relator may conduct the prosecution)
  - The Gov't may also seek dismissal of the action (notwithstanding the relator's objections)

False Claims: The Supreme Court

- ***United States ex rel. Polansky v. Executive Health Resources Inc.*** involved an FCA suit filed by a relator who worked as a consultant for a company that assists doctors & hospitals submit bills to Medicare
  - In 2012, the relator filed action against the company under seal, alleging that it submitted false bills to Medicare by misclassifying medical services resulting in higher bill rates
  - The Gov't investigated the matter for two years and declined to intervene, but reserved the right to seek dismissal later
  - In Aug. 2019 the Gov't moved to dismiss the action
  - District court granted the motion, finding the Gov't entitled to dismissal "under either the rational relationship test or the unfettered discretion test"
- On appeal, the Third Cir. affirmed, first holding that the Gov't must intervene before moving to dismiss, "but it can seek leave to intervene at any point in the litigation upon a showing of good cause"
  - The standard for dismissal depends on the procedural posture of the case under FRCP 41(a)

False Claims: The Supreme Court

- ***United States ex rel. Polansky v. Executive Health Resources Inc.***
- Before the Supreme Court, the relator argued that the Third Cir. erred in affirming because the Gov't lacks any FCA dismissal authority after initially declining to intervene & vesting the relator with the "right to conduct the action"
  - Noted the circuit split over the Gov't's dismissal authority and advocated for a more exacting standard
- On June 16, 2023, the Supreme Court affirmed the Third Circuit's decision & held that the Gov't may move to dismiss whenever it has intervened (whether during the seal period or later)
  - In assessing a motion to dismiss under the FCA over a relator's objection, district courts should apply the rule generally governing voluntary dismissal of suits in ordinary civil litigation (Fed. R. Civ. P. 41(a))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Regulatory Updates & Trends

Regulatory Updates & Trends: Brief Overview

- DoD issues final rule requiring the Government's consideration of Supplier Performance Risk System ("SPRS")
- FAR Council poised to finalize rule requiring public disclosure of greenhouse gas emissions for "major" and "significant" federal contractors
- FAR Council issues interim rule banning the social networking services "TikTok" on contractors' devices

Regulatory Updates & Trends: DoD issues final rule requiring consideration of SPRS assessments

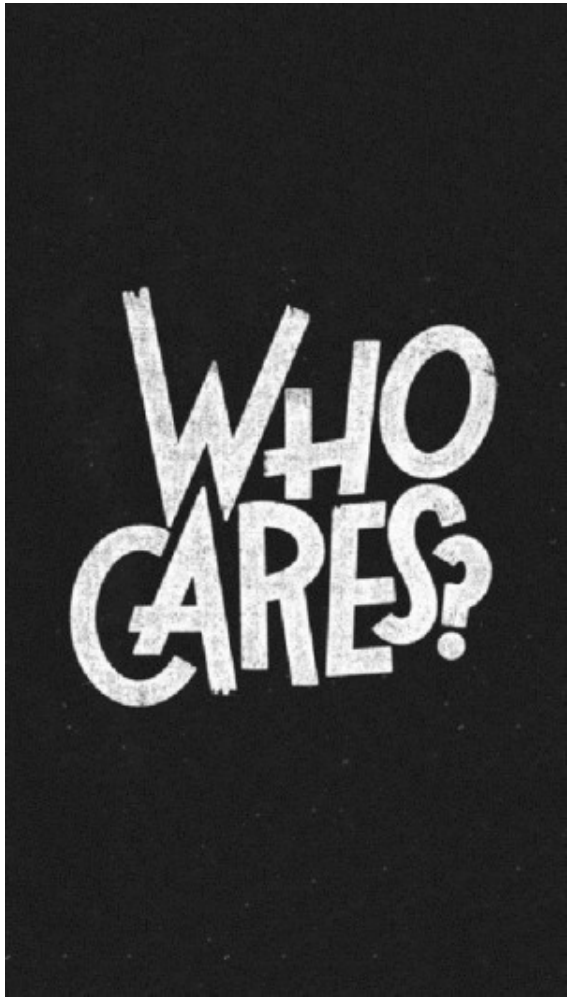
- In Mar. 2023, DoD published a final rule amending the DFARS to require contracting officers to consider Supplier Performance Risk System (SPRS) risk assessments when evaluating quotations or offers & when determining contractor responsibility
- The final rule creates a new DFARS subpart (DFARS subpart 204.76) and a new solicitation provision, DFARS 252.204-7024, Notice on the Use of the Supplier Performance Risk System
  - New solicitation provision informs offerors that the SPRS will be used in evaluation & that the system retrieves item, price, quality, delivery, & contractor information on contracts from Government reporting systems in order to develop risk assessments
- We will discuss another major regulatory update in the Cybersecurity section of the webinar (DoD's proposed CMMC rule) – note that CMMC assessment scores will be reported in SPRS

Regulatory Updates & Trends: FAR Council to finalize rule requiring public disclosure of greenhouse gas emissions

- In late 2022, the FAR Council issued a proposed rule that would require certain federal contractors to complete a greenhouse gas analysis and publicly disclose the results (their greenhouse gas emissions and climate-related financial risks), as well as set science-based targets for reducing emissions
- The proposed rule follows a proposed rule issued by the Securities and Exchange Commission ("SEC") in Mar. 2022, which proposes that SEC registrants disclose in their registration statements and annual reports their climate-related financial risks and related metrics, including greenhouse gas emission metrics
- The proposed FAR rule, like the proposed SEC rule, would leverage existing standards, such as the GHG Protocol Corporate Accounting and Reporting Standard
- While there are similarities between the FAR proposed rule and the SEC proposed rule, the FAR rule goes beyond the SEC proposed rule by –
  - Specifically requiring federal contractors to provide their disclosures using the CDP Climate Change Questionnaire (intended to maximize consistency, comparability, and accessibility of disclosure data)
  - Requiring contractors to set science-based targets to reduce their GHG emissions.
- The FAR Council received over 38,000 public comments by the Feb. 2023 deadline and is set to finalize the rule in 2024

Regulatory Updates & Trends: FAR Council issues interim rule banning TikTok on contractors' devices

- In June 2023, the FAR Council published an interim rule implementing a section of the "No TikTok on Government Devices Act"
- The rule revises the FAR to implement the prohibition on having or using the social networking service TikTok or any successor application or service developed or provided by ByteDance Limited, the Beijing, China based company that owns and operates TikTok
- Under the new FAR 52.204-27, Prohibition on a ByteDance Covered Application, contractors are prohibited from having or using TikTok on any information technology owned or managed by the Government, or on any information technology used or provided by the contractor under the contract, including equipment provided by the contractor's employees
  - (A personally-owned cell phone that is not used in the performance of a Government contract is not subject to the prohibition, however)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Bid Protest Updates

Bid Protest Updates: Brief Overview

- Two notable Fed. Cir. decisions on standing & wavier… and one COFC decision on standing appealed to the Fed. Cir.
- Three bid protest decisions involving an offeror's failure to register in the System for Award Management ("SAM") as required by FAR 52.204-7
- A handful of corrective action decisions
- And a look at GAO's Annual Bid Protest Report to Congress

Bid Protest Updates: Federal Circuit Decisions

- First, a few notable Federal Circuit decisions, in which the Court disagreed with the Court of Federal Claims' **treatment of standing and waiver as jurisdictional** –
  - ***CACI, Inc.-Federal v. United States***, No. 22-1488 (May 10, 2023) (concluding COFC erred in treating standing under 28 U.S.C. § 1491 as jurisdictional in dismissing CACI's bid protest complaint)
  - ***M.R. Pittman Group, LLC v. United States***, No. 2021-2325 (May 22, 2023) (concluding COFC improperly dismissed protest for lack of subject matter jurisdiction pursuant to the *Blue & Gold Fleet* waiver rule)

Bid Protest Updates: Federal Circuit Decisions

- ***CACI, Inc.-Federal* – standing under the Tucker Act is not jurisdictional**
- The Army issued a solicitation for Next Generation Load Device Medium to encrypt and decrypt sensitive information on the battlefield
  - Three offerors, including CACI, were included in the competitive range
  - Ultimately, the Army assigned CACI's proposal three deficiencies and, because of these deficiencies, determined CACI was ineligible for award
  - The Army then awarded contracts to the other two offerors in the competitive range
- CACI protested at COFC, challenging the deficiencies assigned to its proposal
- The Army and one of the awardees moved to dismiss CACI's complaint for lack of standing under a new theory not considered by the contracting officer – that CACI had an OCI that could not be waived or mitigated, which made CACI ineligible for award even if it were to prevail on its claim regarding the assigned deficiencies
  - Reasoning = because CACI had an OCI, it did not have a substantial chance of securing the award; it was not an interested party and thus lacked standing
- COFC conducted its own analysis of the record and concluded CACI had an OCI
  - Because CACI did not provide evidence to rebut this showing, COFC concluded that CACI did not have standing to protest the assigned deficiencies because the OCI would have prevented CACI from being eligible for award
  - In other words, COFC concluded that CACI did not show that it had a "substantial chance it would have received the contract award but for the alleged error" (the deficiencies)
- COFC then dismissed CACI's complaint for lack of standing

Bid Protest Updates: Federal Circuit Decisions

- ***CACI, Inc.-Federal* – standing under the Tucker Act is not jurisdictional**
- 28 U.S.C. § 1491(b)(1) provides that COFC "shall have jurisdiction to render judgment on an action by an **interested party**" in a bid protest
  - Fed. Cir. interprets "interested party" to mean "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract"
  - To prove a "direct economic interest," a party must show that it had a "substantial chance" of winning the contract
- The question before the Fed. Cir. was whether CACI had "statutory standing" under 28 U.S.C. § 1491(b)(1)
  - "Statutory standing" differs from Article III standing – statutory causes of action extend to plaintiffs whose interests fall within the "zone of interests protected by the law invoked"
  - Supreme Court has clarified that "statutory standing" defects do not implicate a court's subject matter jurisdiction
  - Thus, COFC erred in dismissing CACI's complaint for lack of subject matter jurisdiction – "Interested party" analysis under the Tucker Act is a question of statutory standing, not the court's Article III subject matter jurisdiction

Bid Protest Updates: Federal Circuit Decisions

- ***M.R. Pittman Group, LLC – Blue & Gold Fleet* waiver rule is not jurisdictional**
- USACE issued a solicitation for the repair of pump units & posted the solicitation on SAM.gov
- The webpage noted that the procurement was a small business set-aside under NAICS 811310, but the solicitation itself did not include a reference to NAICS 811310
- After M.R. Pittman was the lowest bidder, USACE requested M.R. Pittman to confirm it was a small business under NAICS 811310
- M.R. Pittman was not small under NAICS 811310 & was thus ineligible for award
- USACE awarded the contract to another offeror
- M.R. Pittman then filed suit in COFC, arguing the omission of the NAICS code from the solicitation meant that the procurement could not bet set-aside for small business concerns
- The Gov't moved to dismiss, arguing that, under *Blue & Gold Fleet*, M.R. Pittman had waived its protest ground by failing to raise the issue prior to the close of bidding
- COFC determined that the *Blue & Gold Fleet* wavier rule foreclosed the protest because the USACE's error was apparent from the onset and M.R. Pittman had the opportunity to object to the terms of the solicitation prior to the close of bidding but failed to do so – this deprived COFC of subject matter jurisdiction

Bid Protest Updates: Federal Circuit Decisions

- ***M.R. Pittman Group, LLC – Blue & Gold Fleet* waiver rule is not jurisdictional**
- The *Blue & Gold Fleet* waiver rule = a party who has the opportunity to object to the terms of a solicitation containing patent errors and fails to do so prior to the close of bidding waives its ability to raise the same objection subsequently in a COFC bid protest
- The Fed. Cir. agreed with the protestor that the *Blue & Gold Fleet* wavier rule is nonjurisdictional
  - The rule "seeks to reduce inefficiencies by requiring an objection to a solicitation be made prior to the close of bidding" which is more akin to "a nonjurisdictional claims processing rule"
  - Did not affect COFC's jurisdiction over the protest under 28 U.S.C. § 1491
  - Thus, COFC erred in holding that M.R. Pittman's failure to object to the solicitation prior to the close of bidding created a jurisdictional defect

Bid Protest Updates: [A Forthcoming] Federal Circuit Decision…

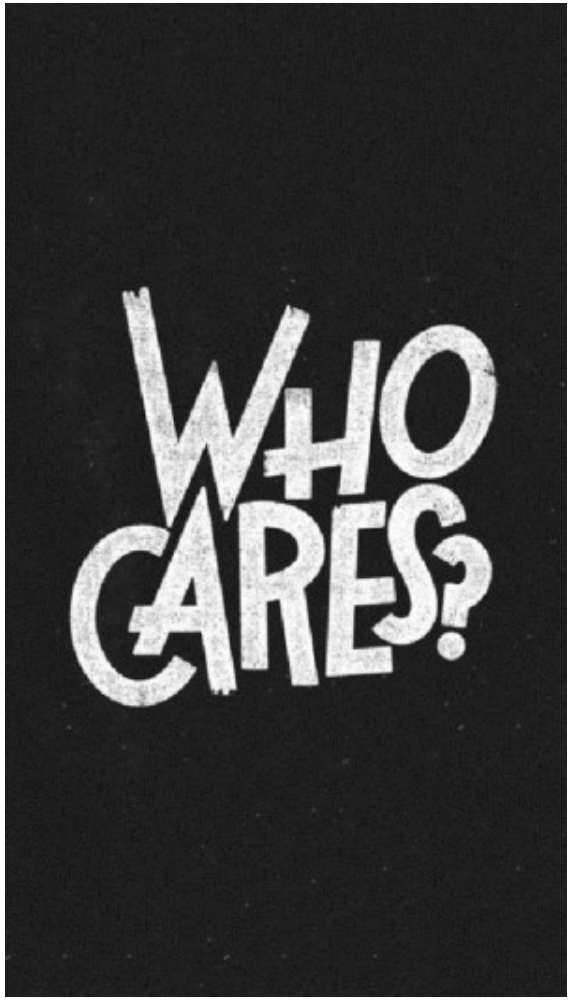
- Lastly, we'd be remiss if we did not mention COFC's decision in ***Precipient.ai, Inc. v. United States***, No. 23-28C (May 17, 2023), which is on appeal to the Fed. Cir.
- *Precipient.ai* involved an NGA solicitation for an IDIQ contract (the SAFFIRE effort) containing two parts – part 1 = a data repository; part 2 = a computer vision system
- The plaintiff, Precipient, is a technology company that developed a computer vision software, "Mirage" – an open architecture tool with features and capabilities critical to geospatial intelligence
  - Met NGA's requirements for part 2 (the computer vision system)
- Despite this, Precipient did not bid on the NGA solicitation – its software could only fulfill the computer vision requirements (and not the data repository requirements)
  - Percipient relied on what it viewed as NGA's statutory obligation to consider incorporating commercial products & hoped to be part of the SAFFIRE efforts

Bid Protest Updates: [A Forthcoming] Federal Circuit Decision…

- ***Precipient.ai, Inc. v. United States***
- But in Jan. 2021, NGA simultaneously awarded the SAFFIRE IDIQ and Task Order 1 to CACI
  - Under Task Order 1, CACI was directed to develop and deliver the computer vision suite of systems
  - NGA told Precipient that, if it wanted to participate in SAFFIRE, it needed to speak with CACI
- Discussions with CACI did not pan out & ultimately Precipient's efforts to be incorporated into the SAFFIRE effort were unfruitful
- So Precipient filed a protest at COFC, alleging that NGA violated its statutory & regulatory obligations by wastefully pursuing a development solution when a possible commercial solution existed…
  - Alleged NGA violated 10 U.S.C. § 3453, a statute requiring agencies to procure commercial or non-developmental products "to the maximum extent practicable"

Bid Protest Updates: [A Forthcoming] Federal Circuit Decision…

- ***Precipient.ai, Inc. v. United States***
- COFC began by assessing whether it had jurisdiction
- 28 U.S.C. § 1491 → COFC has jurisdiction over bid protests that allege a "violation of statute or regulation in connection with a procurement or a proposed procurement"
- But even if the Court has jurisdiction under the Tucker Act, an action may still be barred by the Federal Acquisition Streamlining Act ("FASA")
  - FASA excludes from the Court's jurisdiction any protest "in connection with the issuance or proposed issuance of a task or delivery order"
  - An agency's challenged action = "in connection with the issuance" of a task order if there is a "direct and causal relationship between the two"
- COFC concluded Precipient's protest was "directly and causally" related to NGA's issuance of Task Order 1 and thus barred by FASA
  - In COFC's view, without Task Order 1, the work Precipient was challenging would not be taking place & Precipient could not allege at violation of 10 U.S.C. § 3453
  - Precipient's protest "cannot be abstracted from CACI's performance under a task order"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Bid Protest Updates: Registration in SAM.gov

- This year brought us three bid protest decisions involving an offeror's failure to register in SAM.gov, as required by FAR 52.204-7, System for Award Management
  - ***Thalle/Nicholson Joint Venture v. United States***, No. 22-755 (Jan. 27, 2023)
  - ***Myriddian, LLC v. United States***, No. 23-443 (May 23, 2023)
  - ***STG International v. United States; North East South West Healthcare Solutions v. United States***, Nos. 23-47C; 23-175C, May 24, 2023

Bid Protest Updates: Registration in SAM.gov

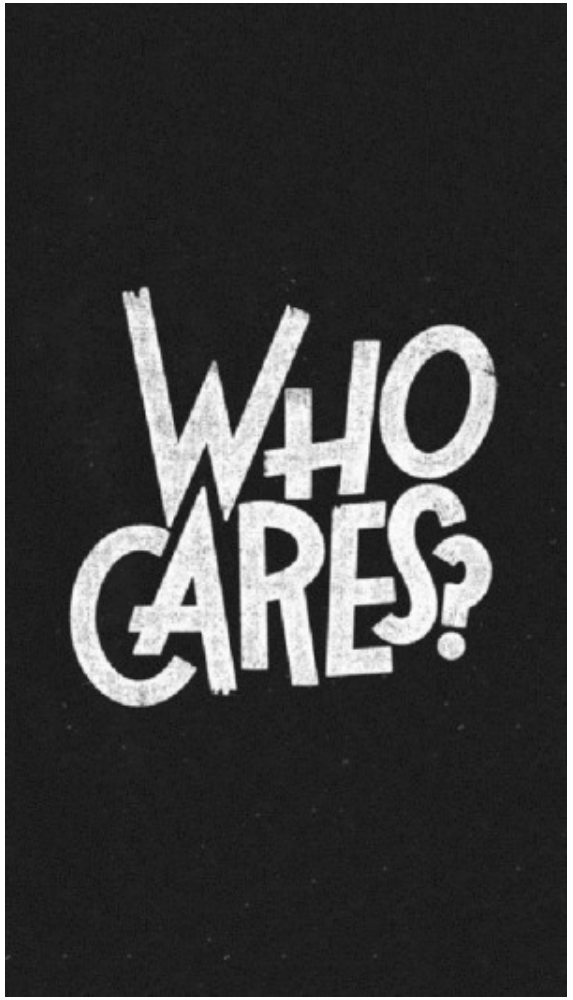
- ***Thalle/Nicholson Joint Venture v. United States***, No. 22-755 (Jan. 27, 2023)
  - Protestor challenged a determination by the U.S. Army Corps of Engineers that its proposal was ineligible for award due to the contractor's failure to register in SAM
  - The Gov't moved to dismiss, arguing that the protestor lacked standing because its proposal was "incurably deficient"
  - COFC held that the protestor had standing to challenge the Corps' determination that its proposal was ineligible for award; however, COFC found that the Corps had a rational basis for its determination that the protestor's proposal was ineligible for award due to the fact that the company was not registered in SAM.gov as required by FAR 52.204-7

Bid Protest Updates: Registration in SAM.gov

- ***Myriddian, LLC v. United States***, No. 23-443 (May 23, 2023)
  - COFC issued a preliminary injunction in a post-award protest, concluding the protestor demonstrated a likelihood of success on the merits of its claim that the awardee was ineligible for award because it did not comply with FAR 52.204-7, System for Award Management, which mandates that offerors be registered in SAM when submitting an offer and continue to be registered until the time of award.
  - The awardee had let its SAM registration lapse from February 12 to March 1—a seventeen-day period between the date the awardee submitted its proposal and the date the agency awarded the contract.
  - The protestor argued that this lapse is fatal because the awardee did not comply with FAR 52.204-7, a mandatory solicitation requirement. COFC agreed.
  - Further, COFC found that the protestor was prejudiced by the agency's error. Comparing the protestor's evaluation ratings against the awardees, the Court concluded, "Such rating similarities are sufficient to show that but for the Agency's error, [the protestor] had a substantial chance of award."

Bid Protest Updates: Registration in SAM.gov

- ***STG International v. United States; North East South West Healthcare Solutions v. United States***, Nos. 23-47C; 23-175C, May 24, 2023. (May 25, 2023)
  - COFC issued a permanent injunction in a pre-award bid protest, concluding that the protestor was unlawfully excluded under FAR 52.204-7 from the agency's competitive range because the offeror's Phase 1 proposal was not an offer (could not be accepted for form a contract)
  - Thus, requirement to register in SAM.gov did not apply until offer submitted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Bid Protest Updates: Corrective Action Wins

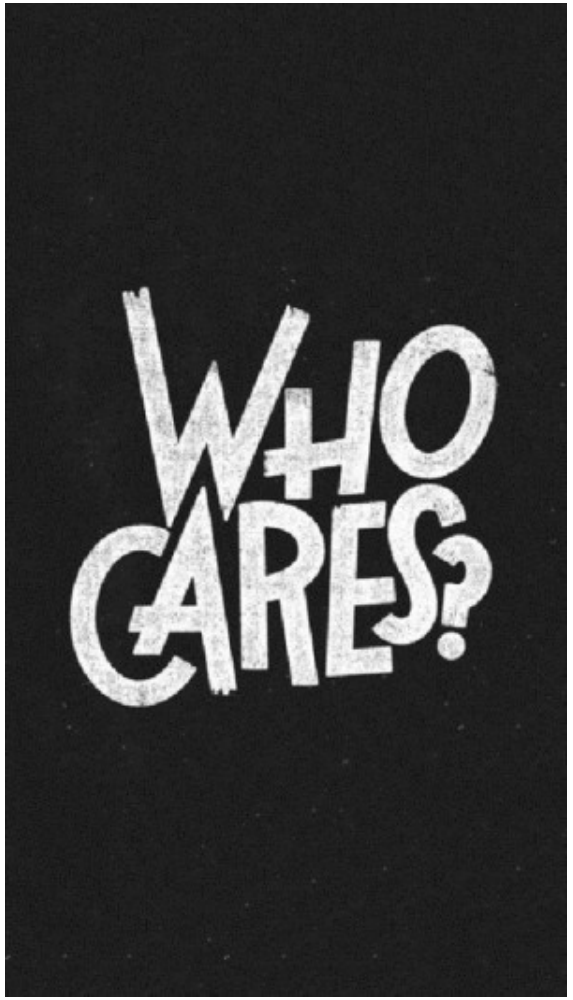
- Corrective action = an agency's voluntary decision to address an issue in response to a bid protest
  - Can occur at any time during a protest
  - May involve, e.g., a re-evaluation of proposals, a new award decision, an amendment to a solicitation, etc.
- A protester can challenge the scope of an agency's corrective action – an agency's decision must be "reasonable under the circumstances and appropriate to remedy the impropriety"
- Two protester wins challenging an agency's corrective action –
  - ***SLS Federal Services v. United States***, 163 Fed. Cl. 596 (2023) (concluding agency's corrective action did not cure improper price reasonableness analysis and granting protestor permanent injunctive relief)
  - ***Kupono Gov't Services; Akima Systems Engineering***, B-421392.9 et al., June 5, 2023, 2023 CPD ¶ 136 (sustaining protest where the agency did not explain or describe the concerns that gave rise to its decision to take corrective action)

Bid Protest Updates: Corrective Action Wins

- See also ***AccelGov, LLC v. United States***, Nos. 23-693C, 23-720C (July 20, 2023) in which COFC declined to dismiss a bid protest after the Gov't represented that it would be taking corrective action
- Gov't's proposed corrective action = cancelling the award, soliciting new proposals, reassessing the protestor's offers, and undertaking "other corrective action in accordance with the Solicitation, the FAR, and all other applicable Federal law"
- The protestors objected to the Gov't's motion in that it lacked detail about what specifically the agency intended to do
- COFC agreed with the protestors, noting that while agencies' corrective actions are reviewed under the "highly deferential" "rational basis" standard, the Gov't "lacks carte blanche to end cases unilaterally—whether via a voluntary remand or dismissal for mootness—simply by calling a mulligan in a case challenging a government procurement decision pursuant to 28 U.S.C. § 1491(b)"
- The Court found that the Gov't's "nonexistent rationale for the proposed agency corrective action fail[ed] to explain how an amended solicitation, receipt and evaluation of new proposals, and unidentified 'other corrective action'" would address the plaintiffs' amended complaints
- As such, "with so little information about the potential corrective action," the Court lacked "any reasonable basis to conclude that the government's proposed steps would resolve any, let alone all of, Plaintiffs' claims" such that the action would be rendered moot
- The Court denied the Government's motion to dismiss

Bid Protests: GAO's Annual Report

- Setting the stage: GAO's annual bid protest report to Congress
  - Why is this a thing? **CICA** requires GAO to report to Congress (1) each instance in which a federal agency **did not fully implement a recommendation made by GAO** in connection with a bid protest; (2) each instance in which a final decision in a protest **was not rendered within 100 days**; and (3) a **summary of the most prevalent grounds for sustaining protests**
- The stats:
  - GAO received **2,025** protests this year (up from 1,658 protests received in FY 2022)*
    - *GAO attributes this 22% increase, in part, to its resolution of "an unusually high number of protests" challenging the CIO-SP4 procurement
  - Overall effectiveness rate = **57%**
    - For comparison, this rate was 51% in FY 2022, 48% in FY 2021
  - Of the protests resolved on the merits (**608 protests**), GAO sustained 31% (**188 protests**)
    - Last year, GAO resolved 455 protests on the merits, sustaining only 13% (59 protests)
- The most prevalent reasons for sustaining protests in FY 2023 were: (1) **unreasonable technical evaluation**; (2) **flawed selection decision**; (3) **unreasonable cost or price evaluation**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Contract Disputes

Contract Disputes: Brief Overview

- A couple of Fed. Cir. decisions
  - Is contract definitization a Government claim under the CDA?
  - Is the “sum certain” requirement jurisdictional?
- Cautionary tales: beware of bilateral modifications & Government affirmative defenses
- And a few termination for default decisions

Fed. Cir.: Contract definitizations – Gov't claims?

- ***Lockheed Martin Aeronautics Co. v. United States***, Fed. Cir. No. 2022-1035 (Apr. 25, 2023): The Federal Circuit affirmed the ASCBA's dismissal of Lockheed's appeal, which asserted that the contracting officers failed to definitize two "letter contracts" (or "Undefinitized Contract Actions") at a reasonable price
- Before the ASBCA, the Gov't moved to dismiss, arguing that the ASBCA lacked jurisdiction over the appeals because Lockheed never submitted a certified claim to the contracting officer
  - Lockheed argued that the contracting officer's unilateral definitizations qualified as government claims under the CDA, which can be directly appealed to the ASBCA without having to submit its own claim to the contracting officers
  - The ASBCA disagreed and dismissed the appeals for lack of jurisdiction
- The Fed. Cir. affirmed, concluding the definitizations were not "government claims" because "they were not demands or assertions by the government seeking relief against Lockheed"

Fed. Cir.: "Sum certain" requirement – jurisdictional?

- ***ECC International Constructors, LLC v. United States*** concerned the ASBCA's dismissal of a contractor's claim—originally submitted to the contracting officer in 2014, the subject of six years of negotiation between the parties, and a nine-day hearing on the merits before the Board—for lack of subject matter jurisdiction for failure to state a "sum certain"
- Did you join us in 2021? If so, you may remember this ASBCA decision…

Fed. Cir.: "Sum certain" requirement – jurisdictional?

- ***ECC International Constructors, LLC*, ASBCA No. 59643**
- USACE contract to design and construct a military compound in Afghanistan
- Contractor submitted a demand for $3,767,856.32 for extra work
  - Broke down into 23 direct cost items totaling $3,212,831.76, before adding general and administrative costs, fee, and bond to arrive at the total claim amount of $3,767,856.32
- Before the Board, the Government challenged nine of the contractor's direct cost items, arguing they failed to specify a sum certain and therefore the Board lacked jurisdiction to entertain them
- Contractor has the burden
  - Each claim must be identified
  - A request involves **separate claims** if they request **different remedies** (e.g., expectation damages vs. consequential damages) or **assert grounds that are materially different from each other** (factually or legally)
  - A contractor's monetary claim "must not only state a bottom-line sum certain for the overall claim, it **must also state a sum certain for any distinct component within the overall claim**"
- Contractor presented more than one set of materially different, unrelated operative facts, and therefore consisted of more than one "sub-claim," for which the contractor did not provide the contracting officer with separate sums certain

Fed. Cir.: CDA's "sum certain" requirement – jurisdictional?

- ***ECC International Constructors, LLC v. United States***
- Well, the contractor appealed—and the Fed. Cir. reversed, holding the requirement that claims submitted under the CDA state a "sum certain" is nonjurisdictional & subject to forfeiture
- The "sum certain" requirement is not in the CDA itself (41 U.S.C. § § 7101–7109) – it comes from the FAR

Contract Disputes: Beware of Bilateral Modifications

- Oftentimes, the Gov't will attempt to include release/waiver language in bilateral modifications – contractors must review all bilateral modifications carefully, before signing, to ensure they are not waiving the right to bring a claim for related issues
- ***Frazier Investments, Inc.***, ASBCA No. 63001, Mar. 13, 2023
  - The Board denies a contractor's claim for alleged constructive changes made by the Air Force during contract performance, finding a bilateral modification for added work operated as an accord and satisfaction (an affirmative defense for the Government)

Contract Disputes: Beware of Bilateral Modifications

- ***Williams Building Co.***, CBCA No. 6650, Apr. 26, 2023: The Board denied a contractor's cardinal change claim, finding prior bilateral modifications & releases barred further recovery
  - Firm fixed price contract with the State Department to retrofit two floors of an office building in Wuhan, China
  - During the project, the contractor alleged that the issued for construction documents were defective, so the parties executed a bilateral modification, wherein the contractor agreed to a substitute set of construction documents in exchange for $1.975 million
    - As part of that bilateral modification, the contractor reserved its right to seek a time extension and extended overhead/delay costs
  - The parties subsequently executed a second modification, which extended the contractor's period of performance and provided compensation for the contractor's overhead/delay costs.
  - Subsequent to that, the contractor sought additional time and money, including a claim for a "cardinal change"

Contract Disputes: Beware of Bilateral Modifications

- ***Williams Building Co.***
  - The Board found that the contractor had waived its cardinal change claim by entering into the bilateral modifications with the Government
  - Looking to the Federal Circuit, the Board noted that, by agreeing to the bilateral modifications, the "change" became part of the contract, precluding any argument by the contractor that the change is somehow outside the contract's scope
  - Because of this, the Board denied the contractor's appeal

Contract Disputes: Default Terminations

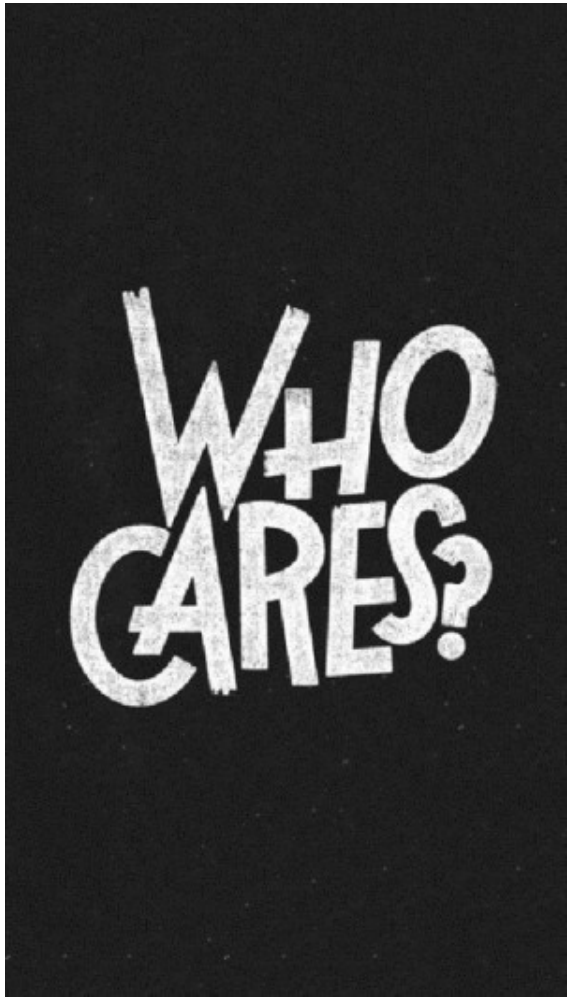
- **Termination for default**: The Government's right to completely or partially terminate a contract because of a contractor's actual or anticipated failure to perform its contractual obligations
  - Procedures set forth in FAR part 49
  - If a contractor can establish that it was not in default or that its failure to perform is excusable, the default clauses provide that a T4D will be considered to have been a termination for convenience (T4C) & the rights and obligations of the parties governed accordingly
  - In the context of commercial item contracts, a T4D is a "termination for cause"

Contract Disputes: Default Terminations

- ***O-Tech Sols., LLC***, ASBCA No. 61898, Mar. 28, 2023: The Board converted a termination for cause (commercial item contract) to a termination for convenience where the contractor demonstrated excusable delay based on the Government's failure to approve corrective work in a timely manner.
- Under a commercial item contract, the Government has the right to terminate for cause "in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance."
- The Board found that the contractor's inability to complete the entire scope of work within the performance period justified the termination, so the burden shifted to the contractor to prove that its default was excusable, or that the Government's termination decision was arbitrary, capricious, or an abuse of discretion.
- The contractor was able to establish excusable delay. The record showed that the contractor was unable to proceed while it waited for the Government to approve its corrective work.
- Although the contracting officer knew the contractor had been waiting weeks for the Government's approval, it issued a cure notice based on contractor delay. Thus, the contractor was able to establish that its default was excusable.

Contract Disputes: Default Terminations

- ***Hughes Group LLC***, CBCA No. 5964, Mar. 6, 2023, 21-1 BCA ¶ 38297: The CBCA converted a default termination to a T4C finding the Government waived its right to terminate for deficient work
- The Government initially issued a cure notice, which the contractor responded to and specifically addressed each discrepancy in writing
- Despite the contractor's response, and the fact that the Government continued to identify and report noncompliant work by the contractor in the subsequent three months, the Government did not terminate the contract
- Instead of terminating the contract, the Government stopped paying the contractor (though the contractor continued to work)
  - This carried on for another couple of months
- Eventually, the Government paid the contractor in full
- After paying the contractor, and without issuing a second cure notice, the Government purported to terminate the contract for default
- The Board converted the T4D into a T4C, finding the Government waived its default termination rights when it paid the contractor in full prior to issuing the termination notice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Cybersecurity

Cybersecurity: Brief Overview

- DoD issues CMMC proposed rule
- DHS & the VA issue agency FAR supplemental regs on cybersecurity

Cybersecurity: DoD issues proposed CMMC rule

- On Dec. 26, 2023, DoD published a proposed rule for implementing its **Cybersecurity Maturity Model Certification** (CMMC) Program
- What is CMMC again? The CMMC Program is DoD's mechanism for verifying that defense contractors & subcontractors have implemented mandatory cybersecurity requirements & are maintaining these requirements during contract performance
  - **Important**: CMMC does not levy additional cybersecurity requirements for L1 and L2 – contractors should already be in compliance with these requirements under FAR 52.204-21 & DFARS 252.204-7012
- CMMC has 3 key features:
  - Tiered model (Level 1, Level 2 & Level 3)
  - Assessment requirement
  - Implementation through contracts

Cybersecurity: DoD issues proposed CMMC rule – How we got here

- Nov. 2010 **E.O. 13556, Controlled Unclassified Information** – intended to establish an open & uniform program for managing unclassified information that requires safeguarding or dissemination controls
  - Establishes the CUI Program
- July 2019 – DoD releases **DODIG-2019-105, Audit of Protection of DoD CUI on Contractor-Owned Networks & Systems**, in which it found that defense contractors were not consistently implementing the security controls specified in NIST SP 800-171, as mandated by DFARS 252.204-7012
- 2019 – DoD announces development of the CMMC Program in order to move away from a "self-attestation" model of security
- Sept. 2020 – DoD publishes its initial vision for the CMMC Program ("**CMMC 1.0**") & outlines the basic features of the Program
  - Interim rule published in the Fed. Reg. created 3 new DFARS provisions/clauses (**DFARS 252.204-7019, -7020 & -7021**)
  - In response to approx. 750 public comments, DoD initiated an internal review of the Program
- Nov. 2021 – DoD publishes "**CMMC 2.0**," an updated program structure (streamlines the model from 5 compliance levels to 3; aligns the model with NIST cybersecurity standards; allows companies at L1 & a subset of companies at L2 to demonstrate compliance through self-assessments, etc.)
- June 2023 – DoD publishes **DODIG-2023-078, Audit of the DoD's Implementation and Oversight of the Controlled Unclassified Information Program,** in which it found that DoD components did not effectively oversee the implementation of established CUI guidance to ensure that CUI documents & emails contained the required markings & that DoD & contractor personnel completed appropriate CUI training

Cybersecurity: DoD issues proposed CMMC rule – CMMC DFARS regs (current versions)

- **DFARS 252.204-7020, NIST SP 800-171 DoD Assessment Requirements**:
  - Applies to covered contractor information systems that are required to comply with NIST SP 800-171, in accordance with the -7012 clause
  - Requires contractors to provide access to their facilities, systems, & personnel necessary for the Gov't to conduct a NIST SP 800-171 DoD Assessment
- **DFARS 252.204-7019, Notice of NIST SP 800-171 DoD Assessment Requirements**:
  - Requires offerors, as a prerequisite for award, to perform & hold a current (*i.e.*, not more than 3 years old) NIST SP 800-171 DoD Assessment for each covered contractor information system that is relevant to the offer, contract, task or delivery order.
  - Summary scores will be posted in the Supplier Performance Risk System (SPRS)
- **DFARS 252.204-7021 Contractor Compliance with the Cybersecurity Maturity Model Certification ("CMMC") Level Requirement**:
  - Requires contractors to have a current CMMC certificate at the CMMC level required by the contract & to maintain that certificate for the duration of the contract
  - CMMC only builds upon DFARS 252.204-7012 – having the security measures required by DFARS -7012 (*i.e.*, NIST SP 800-171 requirements) in place is the first step toward CMMC certification

Cybersecurity: DoD issues proposed CMMC rule

- The comment period for DoD's proposed rule is set to close on Feb. 26, 2024
- A few key takeaways from the proposed rule:
  - **The rollout is quick** – DoD is utilizing a 4 phase implementation approach, with Phase 1 beginning on the effective date of the CMMC revision to DFARS 252.204-7021
  - The program is **broadly applicable** –
    - Applies to all DoD contract & subcontract awardees that will process, store or transmit information that meets the standards for FCI or CUI on contractor information systems
    - Includes acquisitions valued at > the micro-purchase threshold (acquisitions < the SAT), including those for commercial items
    - DoD estimates that approx. 221,286 entities will require CMMC certification (includes small businesses & commercial entities)
  - There is **enormous FCA risk** – under the proposed rule, a "senior official" from the prime & any applicable subs must annually affirm continuing compliance with the specified security requirements

Cybersecurity: Amendments to agency FAR supplements

- In Jan. 2023, the VA issued a final rule amending the VA Acquisition Regulation to require contractors to promptly notify the VA (**within one hour** of discovery or suspicion) of any actual or suspected data breach that occurs with respect to sensitive personal information
  - The rule also requires liquidated damages to be paid by the contractor to the VA in the event of a data breach of any sensitive personal information
- And in June 2023, DHS similarly amended the Homeland Security Acquisition Regulation to require contractors to provide "adequate security" to protect CUI and to report to DHS known or suspected incidents involving personally identifiably information or sensitive personally identifiable information within **one hour** of discovery

CLE Information

- Please see the CLE request form link in the Q&A box below.
- If you practice in NY or are joining by phone, please add the affirmation code in the QA box to your CLE Request form.
- Currently, CLE requests are only available to “live” attendees.

Intellectual Property

Intellectual Property: Brief Overview

- FAR Council issues proposed rule on SBIR data rights
- DoD issues final rule regarding acquisitions of noncommercial computer software
- And a couple of COFC copyright infringement cases

IP: FAR Council issues proposed rule on SBIR data rights

- In Apr. 2023, the FAR Council issued a proposed rule to amend the FAR to implement changes related to data rights in SBA's Policy Directive for the Small Business Innovative Research ("SBIR") and Small Business Technology Transfer ("STTR") programs
- Proposed rule would update the FAR/DFARS in line with SBA's Apr. 2019 SBIR/STTR Policy Directive
  - Prior to SBA's Apr. 2019 revision, the FAR, DFARS, and Policy Directive all contained different terminology & data rights allocations for SBIR/STTR data, causing confusion & unnecessary burdens
  - Proposed rule reflects SBA's updated SBIR/STTR Policy Directive terminology, revisions to the data rights afforded to the Gov't, and the extension of the SBIR/STTR data rights protection period from a minimum of 4 years to 20 years
  - Also clarifies direction for contracting officers with regard to document retention & competition requirements

IP: DoD issues final rule regarding acquisitions of noncommercial computer software

- In March 2023, DoD published its final rule, amending the DFARS to implement a Section 871 of the NDAA FY 2018 requiring DoD, as part of any negotiation for noncommercial computer software, to consider all noncommercial computer software and related materials necessary to meet the needs of the agency throughout the lifecycle of the software
- The final rule directs DoD to improve acquisition planning and to identify & negotiate software deliverables & license rights at fair and reasonable prices prior to contract award
  - Revises DFARS 252.227-7014 & DFARS 252.227-7018

IP: COFC copyright infringement decisions

- This year, COFC issued two notable copyright infringement decisions –
  - ***4DD Holdings, LLC v. United States***, No. 15-945C (Aug. 22, 2023) (concluding the Gov't infringed company's copyrighted computer software and awarding $12.7 million as "reasonable and entire compensation")
  - ***HEALTHeSTATE, LLC v. United States***, No. 18-CV-34C (Nov. 20, 2023) (concluding the Defense Health Agency did not infringe copyrights or breach the contracts of a healthcare consulting services company)

Small Business

Small Business: Brief Overview

- U.S. district court enjoins SBA from using race-based rebuttable presumption under the 8(a) program
- A couple notable Office of Hearings and Appeals (“OHA”) remands
- 2023 OHA decisions interpreting 13 C.F.R. § 121.404
- And in focus: more decisions & guidance regarding mentor-protégé joint ventures

Small Business: *Ultima Services Corp. v. Agriculture*

- In the wake of the Supreme Court's decision in ***Students for Fair Admissions, Inc.***, in which the Court struck down race-based affirmative action in the college admissions process, a U.S. district court ruled that the SBA's use of a "**rebuttable presumption**" of social disadvantage for certain minority groups to qualify for inclusion in SBA's 8(a) Business Development Program violates the Fifth Amendment's Due Process Clause
  - ***Ultima Services Corp. v. Dep't of Agriculture***
  - Enjoined the federal Gov't from using the presumption of social disadvantage in administering the 8(a) Program
- Individual-owned 8(a) participants that previously relied on the presumption of social disadvantage to support eligibility are now required to submit social disadvantaged narratives to re-establish eligibility
  - Required for these firms to obtain new 8(a) contracts

Small Business: Notable Area Office remands

- ***OHA remands matter to Area Office for further consideration of the nonmanufacturer rule***: in ***Master Boat Builders, Inc.***, SBA No. SIZ-6198 (Mar. 15, 2023), OHA found that the Area Office erred in fact and law when it determined that the Appellant was a "manufacturer" for the subject procurement under 13 C.F.R. § 121.406(b)(2)
  - OHA began by noting that, when determining whether a business concern is a manufacturer, SBA must determine that the business concern will be "the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired"
  - OHA has interpreted the phrase "its own facilities" in the regulation as meaning that the contractor "need only occupy and control the facilities, if not as owners, then as a lessor or tenant"
  - In remanding to the Area Office, OHA concluded that to determine if a challenged concern's proposal met the "its own facilities" requirement, "a fully executed lease of the proposed premises for manufacturing need not be in place at the time of the proposal" but "there must be some agreement in writing" between the concern and the prospective landlord at the time of the proposal
- ***OHA vacates & remands Area Office decision that relied on SBA's adverse inference rule***: in ***VMJR Companies LLC***, SBA No. SIZ-6199 (Mar. 21, 2023) OHA analyzed **SBA's adverse inference rules**, codified at 13 C.F.R. § 121.1008(d) and 13 C.F.R. § 121.1009(d), & concluded that the Area Office did not act reasonably when "making additional requests in the forms of reminders, after business hours, and overlooking the fact that Appellant had requested the tax returns for multiple entities and was waiting from its accountant"

Small Business: OHA decisions interpreting 13 C.F.R. § 121.404

- 13 C.F.R. § 121.404, When is the size status of a business concern determined?
  - General rule: A concern that represents itself as "small," & qualifies as "small" at the time of its initial offer including price, is generally considered "small" throughout the life of the contract
  - Unrestricted MACs: Small at the time of offer & contract-level recertification, small for goaling purposes for each order issued, unless recertification requested in connection with a specific order or BPA
    - Set-asides for small businesses → requirement to recertify
  - Set-aside MACs: Small at the time of offer & contract-level recertification, small for each order or BPA, unless recertification requested in connection with a specific order or BPA
- Effect of size certification and recertification: Concern grows to be other than small, procuring agency may still exercise options & count award as a SB award
  - Contract novation ((g)(1)): Must recertify or inform the agency that it is other than small; if other than small, agency cannot count the options or orders issued, from that point forward, towards SB goals
  - Merger, sale, or acquisition ((g)(2)(i)): Must recertify or inform the agency that it is other than small; if other than small, agency can no longer count the options or orders issued, from that point forward, towards SB goals
  - Merger, sale, or acquisition after offer, but prior to award: If the merger, sale, or acquisition occurs after submission of initial offer, but prior to award → offeror must recertify size status prior to award
    - If the merger, sale, or acquisition occurs within 180 days of the date of offer & offeror is unable to recertify as small, it will not be eligible as a small business to receive the contract
    - If the merger, sale, or acquisition occurs more than 180 days after the date of offer, award can be made, but it will not count as an award to a small business

Small Business: OHA decisions interpreting 13 C.F.R. § 121.404

- ***22nd Century Technologies, Inc.***, SBA No. SIZ-6122 (Sept. 2021) (affirming determination that set-aside task order under unrestricted MAC, which included section requiring offerors' proposals submitted in response to set-aside task orders to include a representation concerning size, required recertification)
- ***Odyssey Consulting Group, Ltd.***, B-419731 et al. (July 2021) (GAO, deferring to SBA's interpretation of 13 C.F.R. § 121.404, concludes offeror that recertified as "other than small" following acquisition remained eligible for award of set-aside task order)
- ***Avenge Incorporated***, SBA No SIZ-6178 (Nov. 2022) (concluding firm required to recertify at time of task order solicitation because underlying MAC stated individual orders would be limited to small businesses even though individual task order did not specifically state recertification required)
- ***EBA Ernest Bland Assocs.***, SBA No. SIZ-6139 (Feb. 2022) (affirming dismissal of task order size protest under long term contract because the RFQ did not request rectification; references to standard FAR provisions alone = not sufficient to constitute request for recertification)
- ***Computer World Services Corp.***, SBA No. SIZ-6208 (Apr. 2023) (dismissing size protest filed in connection with task order solicitation issued under long-term GWAC as untimely where there was no explicit request for recertification in the TO RFP)
- ***Forward Slope, Inc.***, SBA No. SIZ-6258 (Dec. 2023) (following ***Odyssey Consulting Group*** & concluding that firm, which represented itself as small in connection with underlying MAC, did not have to recertify size for purposes of task order solicitation where the firm had been acquired before task order proposals were due)

Small Business: OHA joint venture decisions

- Joint ventures = by definition, a "partnership" under most state laws
  - Distinct (if properly designed) from a prime/subcontractor relationship
  - Can and often do take the form of an LLC
- SBA's regs provide that parties engaged in a JV are deemed affiliates unless one of two limited exceptions apply –
  - Where both parties to the JV are "small" for purposes of the procurement
  - Where the parties are in an SBA-approved mentor-protégé arrangement & the protégé is small & meets the socioeconomic requirements of the solicitation
- In both cases the JV must adopt an agreement that meets SBA's requirements for set-aside procurements (see **13 C.F.R. § 125.8** & parallel regs for 8(a) JVs, WOSB JVs, SDVOSB JVs, etc.)
  - A JV agreement that fails to meet these requirements will result in SBA deeming the JV partners affiliated, likely rendering the JV ineligible ("other than small")
- Additionally, JVs pursuing set-aside contracts must:
  - Be of limited duration & for limited purposes
  - Must be unpopulated
  - Must be registered in SAM & obtain CAGE code, DUNS, etc.

Small Business: OHA joint venture decisions

- ***Focus Revision Partners***, SBA No. SIZ-6188 (Jan. 2023) (reversing Area Office & concluding that mentor-protégé JV not small where the JV agreement did not comply with the requirements in 13 C.F.R. § 125.8(b)(2) and (c); the JV agreement addendum was not signed & was dated after final proposal revisions; & where JV agreement (even with the addendum) did not meet the relaxed requirements for indefinite contracts (to provide at least a "general description"))
- ***Syscom, Inc.***, SBA No. SIZ-6195 (Mar. 2023) (reversing Area Office and concluding that JV between an 8(a) participant and small business did not qualify as an 8(a) JV under 13 C.F.R. § 124.513 because, although the JV agreement properly designated the 8(a) participant as the managing venturer, Michigan law also required the JV's operating agreement to make that designation & the JV did not have an operating agreement or any similar document that made that designation)
- ***GC&V Constr. LLC***, SBA No. SIZ-6236 (Aug. 2023) (concluding Area Office did not err in using JV members' ownership percentages for purposes of determining members' proportionate shares of receipts from the JV, rendering the affiliated entity (and thus the appellant) other than small)
- ***Federal Performance Management Solutions, LLC***, SBA No. SIZ-6246 (Sept. 26, 2023) (upholding Area Office decision treating JV members as affiliates where the JV submitted its offer on the contested procurement more than two years after the JV's first award)

Small Business: SBA & DoD-NISP release notice on security requirements for joint ventures

- In Oct. 2023, the Information Security Oversight Office ("ISOO") released a joint notice **providing clarifying guidance to agencies on facility security clearances for JVs** in the NISP, including those established under SBA's mentor-protégé JV program
- Intended to clarify & resolve any "confusion" created by GAO's decision in ***InfoPoint, LLC***, B-419856 (Aug. 27, 2021), in which GAO ruled that it was improper for an agency to require a JV offeror to possess a facility clearance at the time of proposal submission
  - *InfoPoint*: So long as the parties to the JV each possess the requisite security clearance, the procuring agency must accept the JV's proposal, even if the JV itself does not yet have a facility security clearance

Small Business: SBA & DoD-NISP release notice on security requirements for joint ventures

- NISP requires any legal entity that will access classified information pursuant to a legitimate Gov't requirement (such as a Gov't contract) to possess an FCL
  - JVs formed as separate/distinct legal entities → may be awarded classified contracts & may hold FCLs; FCL may be processed after contract award (*i.e.*, FCL not required at the time of proposal submission)
  - JVs not formed as separate/distinct legal entities → JV may not may not be awarded a classified contract or hold an FCL in its own right (because the JV is not a distinct legal entity); rather, the entities that make up the JV may be awarded classified contracts and may hold the requisite FCL
- Under SBA's regs, mentor-protégé JVs must be "unpopulated" (meaning the JV itself cannot be populated w/ individuals to perform Gov't contracts)
  - SBA's view = mentor-protégé JVs are for a limited purpose/limited duration & as such cannot submit offers for set-aside contracts after two years from the date of the first award… restricts ability for JVs to obtain FCLs
- ISOO Guidance:
  - All work performed by an SBA-permitted JV (*i.e.*, an unpopulated JV) will be performed by one or both of the individual JV partners & not by the JV itself
    - In such cases, NISP will exclude the JV entity from access to classified information
  - For contracts where security work = the primary purpose of the procurement → the small business partner must possess the FCL

Labor Updates

Labor Updates: Brief Overview

- DOL issues final rule revamping regulations implementing Davis-Bacon and “Related Acts”
- DOL sues Dish Network over alleged refusal to comply with an affirmative action review

Labor Updates: DOL issues final rule updating Davis-Bacon and "Related Acts" regulations

- In Aug. 2023, DOL issued a final rule updating its regulations issued under the Davis-Bacon and "Related Acts" ("DBRAs")
  - Effective Oct. 23, 2023
    - Generally applies to new contracts entered into after Oct. 23, 2023
    - Also applies to a narrow subset of existing contracts –
      - Where a contract or order is changed to include substantial work that was not within the scope of work of the original contract
      - Where an option to extend the term of a contract is exercised
      - Ongoing contracts not tied to the completion of any particular project (e.g., multiyear IDIQs) for which new wage determinations must be incorporated on an annual base
- The final rule is DOL's first comprehensive regulatory review in nearly 40 years
- The final rule updates 29 C.F.R. parts 1, 3, and 5 – DOL's regulations implementing the DBA and the DBRAs
- The term **Davis-Bacon labor standards** is defined to mean the requirements of the DBA, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, "***and the prevailing wage provisions of the other statutes*** referenced in [29 C.F.R. parts 1, 3, and 5]"

Labor Updates: DOL issues final rule updating Davis-Bacon and "Related Acts" regulations

- Key take aways from the expansive final rule include:
  - Expanding the definition of "building or work" to include not only construction activity involving an entire building, structure, or improvement, but also construction activity involving a portion of a building, structure, or improvement, or the installation of equipment or components into a building
    - Also includes solar panels, wind turbines, broadband installation, and installation of electric car chargers to the list of encompassed construction activities
  - Revising the methodology for setting & updating prevailing wages
  - Reducing the need for "conformances" where DOL has received insufficient data to publish a prevailing wage for a classification of worker
  - Strengthened enforcement by making the DBRA contract clauses & applicable wage determinations effective by operation of law, notwithstanding mistaken omissions from a contract
  - New anti-retaliation provisions designed to ensure workers who raise concerns about payment practices or assist DOL in investigations are protected from termination or other adverse employment actions
  - Reinforces remedies available to DOL when violations are discovered, including strengthening the cross-withholding procedures for recovering back wages

Labor Updates: DOL files lawsuit to require Dish Network to provide employment data

- On Aug. 21, 2023, the DOL filed a lawsuit against Dish Network seeking an order to compel the company to provide documents & information necessary to complete the agency's review of the contractor's equal employment opportunity practices at its Roseland, New Jersey location
- Every contractor holding a federal contract or subcontract of $50,000 or more & having 50 or more employees must maintain, develop & implement a written Affirmative Action Program for each of its establishments
  - The regs provide that, upon request, government contractors must submit to DOL's Office of Federal Contractor Compliance ("OFCCP") documents required for OFCCP to conduct a compliance review
- Dish Network has entered into federal contracts since 2016, including contracts with the Federal Bureau of Prisons, SBA, VA, and DoD
- According to the complaint, DOL filed suit after "years of efforts" to secure voluntary compliance

Trade Restrictions, Domestic Preference & Import/Export

Trade Restrictions, Domestic Preference, and Import/Export: Brief Overview

- A handful of FCA prosecutions & settlements involving violations of the Buy American Act, Trade Agreements Act, and Berry Amendment
- OMB issues final guidance supporting implementation of the Build America, Buy America provisions of the BIL
- DOJ & Commerce announce creation of the “Disruptive Technology Strike Force”

Trade Restrictions & Domestic Preference: FCA Prosecutions & Settlements



PRESS RELEASE

Virginia tactical gear & equipment company agrees to pay more than $2 million to settle allegations related to Buy American Act

Monday, November 20, 2023

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For Immediate Release

U.S. Attorney's Office, Southern District of Ohio

COLUMBUS, Ohio – U.S. Attorney Kenneth L. Parker today announced that a Virginia-based tactical gear and equipment company has agreed to pay nearly $2.1 million to resolve False Claims Act allegations that it failed to comply with the requirements of the Buy American Act ("BAA"), Trade Agreements Act ("TAA") and Berry Amendment when selling textile-based products to the Department of Defense.

Domestic Preference: OMB issues guidance supporting implementation of Build America, Buy America

- In Aug. 2023, the Office of Management & Budget ("OMB") issued guidance to support the implementation of the "**Build America, Buy America**" provisions of the Infrastructure Investment & Jobs Act / Bipartisan Infrastructure law
- Build America, Buy America → requires the heads of covered federal agencies to ensure that "none of the funds made available for a Federal financial assistance program for infrastructure may be obligated for a project **unless all of the iron, steel, manufactured products, and construction materials used in the project** are produced in the United States"
  - Affirms the Biden Administration's policy (set forth in E.O. 14005, Ensuring the Future Is Made in All of America by All of America's Workers) to "use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States"

Domestic Preference: OMB issues guidance supporting implementation of Build America, Buy America

- Revises OMB's guidance in 2 C.F.R. to add a new part 184 & to review 2 C.F.R. § 200.322 –
  - New part 184 = designed to provide "clear and consistent" guidance to federal agencies on how to apply the domestic content procurement preference to federal awards for infrastructure projects
  - Also includes guidance for determining the cost of components of manufactured products (uses a modified version of the "cost of components" test found in the FAR & used for federal procurements)
  - Includes guidance on proposing and issuing Buy American waivers
  - Specifies that federal agencies providing federal financial assistance for infrastructure projects must implement the Buy American preferences set forth in 2 C.F.R. part 184 as of the effective date of the guidance (Oct. 2023)

Import/Export: DOJ & Commerce announce creation of the "Disruptive Technology Strike Force"

- In Feb. 2023, DOJ's National Security Division and Commerce's Bureau of Industry and Security ("BIS") announced the creation of the "Disruptive Technology Strike Force"
  - Purpose = "to target illicit actors, strengthen supply chains and protect critical technological assets from being acquired or used by nation-state adversaries"
- According to the press release, the Strike Force's work will focus on "investigating and prosecuting criminal violations of export laws; enhancing administrative enforcement of U.S. export controls; fostering partnerships with the private sector; leveraging international partnerships to coordinate law enforcement actions and disruption strategies; utilizing advanced data analytics and all-source intelligence to develop and build investigations; conducting regular trainings for field offices; and strengthening connectivity between the strike force and the Intelligence Community"
- And, in May 2023, the Strike Force announced five federal prosecutions and four arrests, involving "the disruption of alleged procurement networks created to help the Russian military and intelligence services obtain sensitive technology in violation of U.S. laws" and the "stealing of software and hardware source code from U.S. tech companies in order to market [ ] to Chinese competitors"

Questions?