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Government Contracts Quarterly Update

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The *Government Contracts Quarterly Update* is published by BakerHostetler's Government Contracts Practice team to inform our clients and friends of the latest developments in federal government contracting.

DOD Issues Final Rule Expanding Contractor Duties Regarding Personally Identifiable Information

On January 27, 2015, the Department of Defense ("DoD") issued a final rule, 80 Fed. Reg. 4201, updating the DoD's Privacy Program. The purpose of the DoD's Privacy Program is to protect personally identifiable information ("PII") collected, used, maintained, or disseminated by the DoD and its contractors. The final rule contains a broad definition of "DoD contractors," which may apply to offerors, as well as prime DoD contractors. Under the new rule, a "DoD contractor" is:

> Any individual or other legal entity that:
>
> (1.) Directly or indirectly (e.g., through an affiliate) submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a government contract, including a contract for carriage under government or commercial bills of lading, or a subcontract under a government contract; or
>
> (2.) Conducts business, or reasonably may be expected to conduct business, with the federal government as an agent or representative of another contractor.

This broad definition encompasses not only potential contractors—that have never received a government contract—but also affiliates or other corporate relations of DoD contractors handling PII records. Thus, the breadth of the rule seems to expand far beyond contractors directly involved in the "design, development, operation, or maintenance of any system of records."

The new rule also expands the Rules of Conduct governing DoD and contractor personnel (codified at 32 C.F.R. § 310.8). The new provisions to the Rules of Conduct require that DoD and contractor personnel:

- Safeguard the privacy of all individuals and the confidentiality of all PII;
- Prohibit unlawful possession, collection, or disclosure of PII, whether or not it is within a system of records; and
- Where a system contains data of both U.S. citizens and noncitizens, maintain all records in that system in accordance with the Privacy Act.

At least two of these provisions—and perhaps all three—expand contractor duties relating to PII of noncitizens and to records that do not meet the statutory definition of a "system of records" under the Privacy Act. Currently, the Privacy Act defines the term "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence" and defines a "system of records" as a group of records under the control of a DoD component "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." The new Rules of Conduct create affirmative duties for contractors beyond the strictures of these definitions in at least some circumstances.

The new rule also expands the Rules of Conduct to incorporate contractor duties previously codified throughout Chapter 32, Part 310 of the Code of Federal Regulations. Those duties include "minimiz[ing] the collection of PII to that which is relevant and necessary to accomplish a purpose of the DoD" and refraining from "maintaining records describing how any individual exercises rights guaranteed by the First Amendment" except in a few limited circumstances.

Under the new rule, contractors must also report unauthorized disclosures of PII and undergo training to ensure that contractor personnel who handle PII are aware of their responsibilities. Contractor personnel who "willfully mak[e] any unlawful or unauthorized disclosure, knowing that disclosure is prohibited," may be charged with a criminal misdemeanor and fined up to $5,000.

The new rule became effective February 26, 2015. The rule does not contain any language suggesting its application is prospective, thus contractors that are DoD contractors as defined in the rule should review their PII systems for compliance with the new rule. Such contractors may also consider filing a claim for any cost associated with complying with the new rule in connection with existing contracts. Finally, contractors competing for DoD awards should assess their compliance with the new rule in advance and factor compliance costs into their proposals.

New Anti-Human Trafficking Regulations Expand Contractors' Compliance Obligations

On January 29, 2015, the FAR Council issued a final rule, 80 Fed. Reg. 4967 (the "Final Rule"), overhauling federal procurement regulations governing contractors' responsibilities to avoid and combat human trafficking. Under the Final Rule, contractors are now required to adhere to a "Zero Tolerance Policy," which prohibits all contractors' (and subcontractors') employees from engaging in activities associated with human trafficking, including (i) "severe forms of trafficking," including both commercial sex trafficking and coercive labor trafficking; (ii) procuring commercial sex acts; (iii) using forced labor in the performance of contracts; (iv) preventing access to employees' identity or immigration documents; (v) using misleading employee recruitment practices or using recruiters who do not comply with local laws; (vi) charging employees recruitment fees; (vii) failing to provide employees return transportation at the end of employment; (viii) housing employees in conditions that violate local law; and (ix) failing to provide an employment contract in writing. Importantly, these prohibitions extend to all contractors, including contractors that only provide commercial items or services.

Notably, the precise scope of these prohibitions is unclear, as the FAR Council noted in the Final Rule that violations "may not be associated with a specific contract," suggesting that contractors may be liable for business conduct entirely unrelated to their contracting activities. This ambiguity is compounded by the Final Rule's mandatory disclosure requirement, which obliges a contractor to self-report instances in which the contractor has "credible information" of a violation of the Zero Tolerance Policy outlined above.

In addition to the above prohibitions, the Final Rule also requires contractors and subcontractors with a contract of which any portion is (1) valued at greater than $500,000 and (2) performed outside the United States to implement a compliance plan "appropriate to the size and complexity of the contract and to the nature and scope of the activities to be performed for the Government." Contractors subject to the compliance plan requirement must certify the existence of such plans before award, then annually certify that the plan remains in force and has not been violated. While the language of the Final Rule suggests compliance plans are required only with regard to the specific contract at issue, contractors are nevertheless encouraged to begin immediately developing companywide compliance policies to ensure they do not run afoul of the universal prohibitions, while also better equipping themselves to meet the compliance plan requirements.

Contract Spotlight

Late Payment Interest

Welcome to BakerHostetler's "Contract Spotlight," a space we use to highlight fundamental but often overlooked aspects of government contracting law that can give contractors a leg up in the fiercely competitive government contracts space. This quarter, we are highlighting contractors' ability to recover interest under the Prompt Payment Act ("PPA") and the Contract Disputes Act ("CDA").

The PPA and the CDA work in tandem to compensate contractors for the time value of money not paid in a timely fashion. Under the PPA, an undisputed invoice that is not paid within a certain period of time (typically 30 days) begins to accrue interest that is compounded monthly. However, the clock for PPA interest begins only if the invoice conforms to certain requirements, such as a description of the work performed as well as designated supporting documentation. Because the particular invoicing requirements can vary substantially from contract to contract, contractors must be sure to consult the contract requirements early to ensure that all invoices will be eligible for PPA interest. Although PPA interest accrues automatically and agencies are required to include any accrued interest in their eventual payment, it is nevertheless incumbent upon contractors to closely scrutinize payments to ensure interest has been properly paid. When the Government refuses to pay PPA interest, contractors should consider filing a formal claim for payment under the CDA if and when the request for payment matures into a dispute, either through a contracting officer's explicit refusal to pay the amount or through an unreasonable delay in payment.

In connection with claims, the CDA provides a separate avenue for contractors to recover interest on amounts that the contractor is not timely paid. Once a CDA claim is filed (for more information on the specific claim certification requirements of the CDA, please consult our January 2015 *Government Contracts Quarterly Update*), interest will accrue until the contractor receives payment on that amount, whether as a result of litigation or through settlement.

The interest rate for both the PPA and the CDA is updated every six months by the Secretary of the Treasury, and currently sits at 2.125 percent. While not as significant an amount as some statutory interest rates, this amount can nevertheless accrue substantial sums for contractors facing delayed payments, particularly on large invoices. By familiarizing themselves with the interest provisions of the PPA and the CDA and closely monitoring the government's compliance, contractors can maximize their profitability.

SBA Issues Long-Awaited Proposed Rule on Small Business Subcontracting Limitations

On December 29, 2014, the Small Business Administration ("SBA") issued a proposed rule to comply with directives contained in the 2013 National Defense Authorization Act ("NDAA"). 79 Fed. Reg. 77,955 ("Proposed Rule"). The NDAA introduced drastic changes to the small business subcontracting rules governing federal contracting with small businesses by amending the Small Business Act, 15 U.S.C. § 631 et seq., and charging the SBA with amending its regulations accordingly. In response, the SBA's Proposed Rule introduces several key changes, including a new definition of the subcontracting limitation, exclusion for subcontracts to similarly situated entities from the compliance calculation, and the introduction of significant noncompliance penalties.

The Proposed Rule would redefine the subcontracting limitation, resulting in a simpler calculation for small business prime contractors. Under the current SBA rules, small business prime contractors are required to perform at least (1) "50 percent of the cost of the contract incurred for personnel with its own employees" for service contracts; (2) "50 percent of the cost of manufacturing the supplies or products (not including the costs of materials)" for supply contracts; (3) "15 percent of the cost of the contract with its own employees" for construction contracts; and (4) "25 percent of the cost of the contract with its own employees" for specialty trade construction contracts. 13 C.F.R. § 125.6. The Proposed Rule would utilize the same percentages but change the basis of measurement from "cost of the contract incurred" to a simpler percentage of the "amount paid by the government." Specifically, small business primes would be required to perform 50 percent of the total contract price for service and supply contracts, 15 percent for general construction, and 25 percent for specialty trade construction. Because the limitation is based on the total amount paid by the government, compliance with the limitation would not be calculated until after the performance period—the base period plus any option periods—requiring small business prime contractors to closely track the percentage of work being performed by subcontractors throughout performance.

The second and more dramatic change introduced by the Proposed Rule would allow small business prime contractors to subcontract work to "similarly situated" small businesses without counting those subcontracts against the limitations, resulting in a regulation that more closely aligns with the Proposed Rule's stated purpose of ensuring that small businesses receive the majority of the benefit of the small business contracting rules. The current SBA rules do not allow prime contractors to count subcontracts to other small businesses toward the 50 percent limitation, which substantially reduces opportunities for small businesses. While this new wrinkle will increase opportunities for small businesses to receive both prime contracts and subcontracts, prime contractors must be careful when selecting small business subcontractors under this exception. A prospective subcontractor is "similarly situated" only if it is a participant in the same SBA program under which the prime contractor received the award, and if it qualifies for that program under the specific North American Industry Classification System ("NAICS") code under which the award was issued. Moreover, prime contractors may run afoul of the Proposed Rule by subcontracting to a similarly situated entity that, in turn, subcontracts its work to an entity that is not similarly situated. Any work that is further subcontracted to an entity that is not "similarly situated" will count against the subcontracting limit.

The Proposed Rule also introduces steep penalties for noncompliance, including violations of the subcontracting limitations discussed above. While the current SBA rules do not penalize violations of the subcontracting limitations, the Proposed Rule would allow minimum fines of $500,000 for exceeding the limitations on subcontracting; if the prime contractor spends more than $500,000 in excess of the limit, the fine will scale to equal that excess. The Proposed Rule also permits the SBA to pursue debarment of any contractor that violates the spirit and intent of the subcontracting rules.

An Analysis of Fiscal Year 2014 GAO Bid Protest Statistics

Every year, the U.S. Government Accountability Office ("GAO") submits its annual report to Congress summarizing, among other things, overall bid protest filings for the previous fiscal year. The report for Fiscal Year 2014 highlights some interesting trends for disappointed offerors to contemplate when considering whether or not to file a protest.

The GAO received 2,561 bid protests in 2014 and closed out 2,458 cases. The number of protests received in 2014 represents a 5.4 percent increase over the 2,429 protests received in Fiscal Year 2013, after a slight downtick from Fiscal Year 2012.

Of the 2,458 cases closed in 2014, only 556, or 22.6 percent, reached a decision on the merits where GAO either sustained or denied the protest, with denials heavily outweighing sustains (87 percent to 13 percent). The most prevalent grounds for sustaining protests in Fiscal Year 2014 were failure to follow evaluation criteria, flawed selection decision, unreasonable technical evaluation, and unequal treatment of offerors. The low number of merit decisions indicates a high likelihood of early resolution of bid protests, either through dismissal, voluntary agency corrective action, or withdrawal by the protestor.

GAO reported that 43 percent of the cases closed resulted in a protester obtaining some form of relief from the agency, either as a result of voluntary agency corrective action or the GAO sustaining the protest. The relatively small number of sustains (72) indicates that 40 percent of all bid protests were resolved through corrective action.

These statistics demonstrate that, while protestors still face a high hurdle to achieve a favorable written decision from the GAO, protestors still have a strong chance of obtaining a favorable outcome due to agencies' willingness to take corrective action. Thus, the GAO remains an attractive forum for protesting agency action.

Business Opportunities with BARDA—the Broad Agency Announcement (BAA) Process Revealed

Dubbed the nation's "emergency medical cabinet" in the popular news program 60 Minutes, the U.S. Department of Health and Human Services' Biomedical Advanced Research and Development Authority ("BARDA") is the lead federal

agency for supporting advanced development of medical countermeasures ("MCMs") to address chemical, biological, radiological, and nuclear threats for the civilian population. BARDA's core services include four initiatives related to drug development and manufacturing: (1) Fill Finish Manufacturing Network; (2) Centers for Innovation in Advanced Development and Manufacturing; (3) Nonclinical Development Network; and (4) Clinical Studies Network.

The Consolidated and Further Continuing Appropriations Act, 2015, allocated $157 million to BARDA to prevent, prepare for, and respond to Ebola. Overall, the Act allocated $5.4 billion in emergency supplemental spending to prevent, prepare for, and respond to Ebola.

The primary vehicle BARDA uses to solicit industry proposals and make awards is the Broad Agency Announcement ("BAA"). BAAs provide a unique vehicle for soliciting proposals for advanced research and development. BARDA awards both procurement contracts and nonprocurement instruments including grants, cooperative agreements, interagency agreements, and other transaction agreements using the BAA process. This article is part one of a two-part series addressing BARDA BAAs. This part will describe the process of applying for and winning a BAA agreement. The second part (to appear in the next quarterly edition) will address specific BAA requirements.

The process of responding to a BAA agreement bears some similarities to the Request for Proposal ("RFP") process that contractors may be more familiar with—although the BAA and RFP processes differ in several important ways. Unlike RFPs, which solicit proposals for a specific product or service, BAAs solicit proposals relating to an agency's research interests. BAAs can relate to an individual program or can solicit proposals for broadly defined areas of interest and may incorporate multiple areas of interest. Because BAAs are not based on a common statement of work, BAA offerors draft their own statement of work and technical approach in response to the Government's statement of general interest. Like RFP responses, BAA proposals must be evaluated in accordance with the specified evaluation criteria, but unlike RFP responses, BAA proposals are subjected to peer or scientific review. In addition, BAA proposals need not be evaluated against each other since they are not submitted in accordance with a common work statement. The primary bases for selecting BAA proposals are: (1) technical merits; (2) alignment with agency priorities; and (3) availability of funds.

BARDA has three open BAAs covering: (1) development of MCMs for chemical, biological, radiological, and nuclear ("CBRN") agents; (2) development of MCMs for pandemic influenza; and (3) development of platform technologies that enhance capabilities for development and manufacturing of MCMs.

BAA-13-100-SOL-00013 is titled "Broad Agency Announcement (BAA) for the Advanced Research and Development of Chemical, Biological, Radiological, and Nuclear (CBRN) Medical Countermeasures for BARDA." This BAA includes six areas of interest, three of which are relevant to Ebola prevention and treatment: (1) Area 1.2 seeks "[a]dvanced development projects for vaccines against Ebola and Marburg viral hemorrhagic fevers"; (2) Area 2.3 seeks "[d]evelopment of antibody treatments and other therapeutic agents for viral hemorrhagic fevers viruses"; and (3) Area 6.6 seeks "[i]n vitro diagnostic (IVD) devices that would provide rapid, accurate point-of-care" or "'field-use' testing of the civilian population … and results-reporting after a large scale incident resulting in exposure to bio-threat agents," such as Ebola.

Anticipated funding for the BAA may range from $2 million to $415 million, subject to congressional appropriations. Submissions are accepted on a rolling basis with quarterly deadlines. July 30, 2015 is the final submission deadline for the BAA, although BARDA may renew the BAA, as it has annually since 2009.

Prior to submitting full proposals, offerors are invited to submit "white papers." White papers are short, 14-page submissions that provide an overview of the technical merit of the offeror's proposed concept, as well as its potential contribution to the BARDA mission. Offerors are not required to submit a white paper prior to submitting a proposal but are encouraged to do so due to the time and cost associated with proposal preparation. Offerors who submit white papers on or before a quarterly deadline will receive a response to their white paper within 90 days of the deadline. Offerors who submit a favorably rated white paper will receive an invitation to submit a full proposal. Although offerors who receive an unfavorable rating are not precluded from submitting a full proposal, BARDA encourages those offerors to submit a revised white paper prior to submitting a full proposal.

The full proposal is reviewed by the Technical Evaluation Panel and a Source Selection Authority. The Source Selection Authority reviews the Technical Evaluation Panel's evaluations and, after conducting his or her own review, may select a proposal to proceed into the negotiation and award process. An award will follow a successful negotiation process, which may include audits and site visits. Although the BAA process may seem daunting to contractors navigating it for the first time, the process bears at least some similarities to the RFP process and can result in significant funding for MCM development efforts. Part two of this article will address specific requirements in an open BAA.

Practice Updates

- Hilary Cairnie presented at BDO's 2015 Executive Seminar for Government Contractors on Tuesday, April 28, 2015. The presentation was titled "Spotlight on Legal Issues—Mandatory Disclosure Discussion."

- Barron Avery published an article titled "Contractors and the New Anti-Human Trafficking Requirements" in the March 30, 2015 issue of *Westlaw Journal Government Contract*.

Legislative Updates

Bill Number	Sponsor	Description	Last Action	Status
H.R. 185	Goodlatte	A bill to reform the process by which federal agencies analyze and formulate new regulations and guidance documents	1/13/15	Passed House
H.R. 273	Rush	A bill to amend the Small Business Act to enhance services to disadvantaged small businesses	1/12/15	Referred to Committee
H.R. 490	Lynch	A bill to provide for a strategic plan to reform and improve the federal government's security clearance and background investigation processes	1/22/15	Referred to Committee
H.R. 924	Gosar	A bill to require that the prevailing wage utilized for purposes of the Davis-Bacon Act be determined by the Bureau of Labor Statistics	2/12/15	Referred to Committee
S. 434	Tester	A bill to strengthen the accountability of individuals involved in misconduct affecting the integrity of background investigations, to update guidelines for security clearances, and to prevent conflicts of interest relating to contractors providing background investigation fieldwork services and investigative support services	2/10/15	Referred to Committee
H.R. 1313	McNerney	A bill to amend Title 38, United States Code, to enhance the treatment of certain small business concerns for purposes of Department of Veterans Affairs contracting goals and preferences	3/4/15	Referred to Committee
S. 795	McCaskill	A bill to enhance whistleblower protection for contractor and grantee employees	3/18/15	Referred to Committee
H.R. 1562	Chaffetz	A bill to prohibit the awarding of a contract or grant in excess of the simplified acquisition threshold unless the prospective contractor or grantee certifies in writing to the agency awarding the contract or grant that the contractor or grantee has no seriously delinquent tax debts	3/24/15	Referred to Committee

Regulatory Updates

Code Section	Agency	Description	Latest Action	Effective Date
13 CFR Part 121	SBA	Implements requirements of the 2013 National Defense Authorization Act by limiting liability for fraud penalties for individuals or firms that misrepresent size status for business concerns in good-faith reliance on small business status advisory opinions	Final Rule	8/10/15
48 CFR Part 225	DoD	Amends the DFARS to implement the statutory domestic source restrictions on certain naval vessel components	Final Rule	2/26/15
48 CFR Part 819	VA	Amends the adjudication procedures for verifying ownership and control of veteran-owned small businesses in order for such firms to participate in Department of Veterans Affairs acquisitions set aside for veteran-owned small businesses	Final Rule	3/10/15
48 CFR Part 25	DoD, GSA, NASA	Amends the FAR to update the list of domestically unavailable items for purposes of the Buy American Act	Notice of Proposed Rulemaking	Comments Due 5/26/15

About BakerHostetler

BakerHostetler, one of the nation's largest law firms, represents clients around the globe. With offices coast to coast, our more than 900 lawyers litigate cases and resolve disputes that potentially threaten clients' competitiveness, navigate the laws and regulations that shape the global economy, and help clients develop and close deals that fuel their strategic growth. At BakerHostetler we distinguish ourselves through our commitment to the highest standard of client care. By emphasizing an approach to service delivery as exacting as our legal work, we are determined to surpass our clients' expectations.

BakerHostetler's Government Contracts Practice team consists of more than a dozen attorneys with extensive experience in government contracts, including former government attorneys from the U.S. Justice Department, U.S. Securities and Exchange Commission, and the U.S. Patent and Trademark Office. Working closely with the firm's Intellectual Property, Labor and Employment Practice groups, as well as the International Trade, FDA, and White Collar Defense and Corporate Investigations Practice teams, among others, the Government Contracts Practice team represents clients on a wide variety of government contract matters and cases.

Why BakerHostetler's Government Contracts Practice team?

- Seasoned, experienced team with a deep bench
- Several attorneys with technical and engineering backgrounds
- Former government attorneys
- Outstanding client service and responsiveness
- Competitive value-driven rates and fee arrangements

Hilary S. Cairnie
Partner, Washington, D.C.
202.861.1668
hcairnie@bakerlaw.com

Hilary S. Cairnie is the leader of the firm's Government Contracts Practice team. He focuses on public contract law, encompassing virtually all aspects including contract formation, performance, administration, and enforcement controversies at the federal and state levels. With two engineering degrees and several years of experience working as an engineer for various companies, Mr. Cairnie uses his unique technical background to represent clients involved in aerospace, automotive, shipbuilding, transportation, construction, software, medical and healthcare, engineering, and research and development endeavors, among others.

Kelley P. Doran
Partner, Washington, D.C.
202.861.1661
kdoran@bakerlaw.com

Kelley P. Doran has focused on government contracts counseling, contract negotiation, and litigation for almost 20 years. Mr. Doran's practice includes representing a broad array of commercial item, defense, and homeland security contractors that sell products and services to the federal, state, and local governments. He has worked with product and service companies in numerous industries, including biodefense and life sciences, environmental remediation, homeland security, information technology, and nanotechnology.