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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.

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Mandatory Disclosure Rules

In recent years, the federal government has promulgated several procurement rules under the Federal Acquisition Regulation ("FAR") (FAR §§ 3.1003(a), 9.406, 9.407) imposing on contractors the duty to report credible evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery or gratuity, or violation of the Civil False Claims Act. These same rules require disclosure of credible evidence of a significant overpayment (other than overpayments resulting from contract financing payments) (collectively, the "Mandatory Disclosure Rules").

These rules provide procurement agencies with a most potent weapon – the ability to suspend or debar contractors for failure to timely disclose credible evidence of such violations. Although the penalty for not reporting credible evidence of a violation is onerous, the Mandatory Disclosure Rules are widely misunderstood by contractor and agency personnel alike.

A first point of confusion stems from the fact that the rules contemplate submission of an administrative disclosure to the agency Office of Inspector General ("OIG"), with a copy to the cognizant contracting officer; yet the disclosure submittal instructions provided by many agencies only mention submitting the form to OIG. Moreover, for agencies that permit the submission of electronic forms, it is ambiguous whether the forms are automatically transmitted to the contracting officer, leaving contractors to wonder whether they have satisfied their full disclosure obligation when submitting the form directly through the agency's website. Second, the contractor is not being called upon to determine whether a violation of federal laws has actually occurred; instead, the contractor is required to disclose the existence of "credible evidence" of such a violation. But the credibility of evidence will naturally depend on many factors and will vary from situation to situation. Not all evidence is credible, and therefore disclosure will not be required in every instance. The contractor is called upon to make a judgment about the credibility of evidence in its possession, and to make such a judgment, the contractor must first expend some independent due diligence to assess whether it actually possesses credible evidence of a violation of a federal law of the sort that triggers a duty to report under the referenced procurement rules and implementing clauses. To conduct even a rudimentary inquiry regarding the credibility of evidence in the possession of its employees, the contractor must have some sort of internal reporting mechanism to make sure that senior decision-makers are aware of the alleged improper conduct so that they can initiate due diligence, contact counsel, conduct interviews, review email traffic, etc. Similarly, contractor financial controls should be rigorous enough to detect significant overpayments received from the government agencies (and government prime contractors), and once detected, such overpayments must be analyzed to determine whether the overpayment was the result of contract financing or some other form of payment.

It is terribly important, therefore, that the contractor establishes and maintains a robust internal reporting mechanism and financial controls, and that it conducts adequate training of its employees so that they know what should be reported up the chain of command. Contractors must also be sensitive to the fact that the administrative enforcement period (for a knowing failure to disclose) lasts for the life of the contract, plus three years after final payment.

A recent example illustrates the value of a robust internal reporting mechanism. In April 2015, the U.S. Department of Justice ("DOJ") announced that seven people had been charged in a scheme to pay financially significant kickbacks to a procurement official who was employed by a subsidiary of the Boeing Company (that subsidiary manufactures and sells satellites, satellite parts, and services). Boeing's established processes for detecting and reporting perceived fraudulent activity enabled the company to fully comply with the FAR's Mandatory Disclosure Rules. As a consequence of that disclosure, Boeing was not itself the subject or target of DOJ's investigation.

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In taking a more granular look at the disclosure rules, we look first at the requirements embodied in FAR § 52.203-13. This clause is required if the value of the contract is expected to exceed $5 million and the performance period is 120 days or more. The requirements of this clause must be flowed down to all subcontracts that meet the same performance thresholds. This same clause provides contractors with a reasonably detailed road map for the steps that contactors are required to take, such as (1) implementation of a business ethics and compliance program which includes (a) dissemination of relevant information to employees and (b) training which takes into account each employee's duties and responsibilities; and (2) institution of an internal control system which includes (a) detection measures for identifying improper conduct and (b) mechanisms for developing corrective action. The control system is to be under the cognizance of a senior company official who will have at his or her disposal adequate resources to ensure the effectiveness of the program and its constituent controls. The program should also include effective procedures for (i) identifying individuals whose prior conduct would warrant their not being designated as a principal of the contractor; (ii) conducting periodic reviews and audits to validate the effectiveness of controls and procedures; (iii) continued reassessment to reduce the risk of criminal conduct; (iv) establishing internal reporting mechanisms, such as a third-party confidential hotline, for employee reporting; (v) assessing meaningful disciplinary action; and (vi) preparing and timely submitting any disclosures required under the Mandatory Disclosure Rules. Going full circle, the provisions at FAR § 9.407-2 and FAR § 9.406-2 establish the circumstances under which the government's suspension and debarment officials ("SDO") may suspend or debar contractors for the many improprieties enumerated thereunder. These provisions grant the SDO express authority to suspend or debar a contractor that knowingly fails to comply with the Mandatory Disclosure Rules.

Owing in part to the mandatory nature of the disclosure rules, and in part to contractors naturally having to compete for most of the contracts the government awards, there is the temptation to use the disclosure process as a means for distracting or even knocking out a competitor by reporting rumor, innuendo, or facially serious allegations not rooted in credible evidence. While there are no formal mechanisms within the Mandatory Disclosure Rules to deter or prevent this behavior, at a minimum, companies should be wary of federal criminal laws punishing false statements before attempting to use mandatory disclosures offensively.

Contract Spotlight

The Duty to Perform During Disputes

Every day, government contractors are faced with the tension of trying to walk the fine line between what the government wants and what a contract actually requires. Contractors shoulder a heavy burden trying to please their government customers, and it can be difficult to know what action to take when faced with a controversy or genuine dispute. When faced with this conundrum, contractors need to look at what the terms of the contract actually require.

The disputes clause of the contract states that "[t]he Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer." This requirement applies either under the normal disputes clause, FAR 52.233-1, or, in the context of commercial items, FAR 52.212(d). Commonly called "the duty to proceed," this requirement essentially mandates that performance of the contract continue until the dispute is fully resolved. This contractor duty to proceed can exist even in the face of a material breach by the government. Therefore, should a contractor refuse to perform, such a refusal could be viewed as a breach of contract, resulting in the government's issuance of a show cause or cure letter, termination for default, suspension and debarment, negative past performance commentary, or any one or more negative consequences.

When faced with the classic conundrum of being requested or directed by a government representative (a COTR, COR, or field inspector, for example) to perform work not covered by a contract, but also being required to perform under the disputes clause, contractors should consult with counsel and carefully weigh their options. In most cases, the more prudent course of action is to perform the work requested by the government and then later submit a request for equitable adjustment for the increased costs of performance. In other cases, the aggrieved contractor may be able to rely on legal theories, such as commercial impracticability or waiver, to excuse the contractor from the duty to proceed with disputed work. Nevertheless, even with rock-solid defenses against extra-contractual requirements, a contractor's refusal to perform can result in a termination for default. In very limited cases, a contractor may be able to avail itself of a court or board's discretion and willingness to grant declaratory relief and allow the contractor to stop performance even before it has completed the work that is at the center of the dispute.

In short, contractors that are caught between an out-of-scope demand by the government and being required to perform under the disputes clause must carefully consider their course of action. Relief certainly is available to the contractor, but the course of action the contractor takes will dictate that availability.

Business Opportunities with BARDA—The Broad Agency Announcement ("BAA") Process Revealed, Part Two

This is the second installment in a two-part series about the Biomedical Advanced Research and Development Authority's ("BARDA's") use of Broad Agency Announcements ("BAAs") to solicit industry proposals. BARDA (which falls under the purview of the U.S. Department of Health and Human Services) is the lead federal agency for supporting advanced development of medical countermeasures ("MCMs"). As discussed in part one of this article (published in our May 2015 Quarterly Update), BAAs provide a unique vehicle for soliciting proposals for advanced research and development – allowing BARDA to seek proposals related to broad areas of interest, rather than a predetermined statement of work. Part 35 of the Federal Acquisition Regulation defines a BAA as "a competitive solicitation procedure used to obtain proposals for basic and applied research and that part of development not related to the development of a specific system or hardware procurement." In part one, we provided an overview of the process of applying for and winning a contract or grant under a BAA. In part two, we continue to focus on BAA-13-100-SOL-00013 (BAA for the "Advanced Research and Development of Chemical, Biological, Radiological, and Nuclear ("CBRN") Countermeasures for BARDA") ("CBRN BAA"). Most recently, BARDA awarded a contract worth up to $10.4 million to OraSure Technologies, Inc., to advance clinical development of its rapid Ebola antigen test under the CBRN BAA.

This article addresses specific requirements found in BARDA BAAs, using the CBRN BAA as an example.

- Unlike the typical solicitation, or grant application, in which the government dictates the intellectual property ("IP") rights it seeks, the CBRN BAA asks offerors to "describe any limitations in intellectual property . . . that will impact the Offeror's performance of the contract." This BAA requirement allows the government to assess any risks related to IP limitations during the proposal phase – including limitations posed by IP rights held by third parties. Contracts awarded under a BAA typically incorporate standard Federal Acquisition Regulation IP clauses.
- The CBRN BAA also states a preference for offerors providing U.S.-based jobs in technical and administrative fields. This preference is also included in the two other open BARDA BAAs.
- Under all BARDA BAAs, offerors must negotiate the terms of any grant or contract, including the type of agreement itself. The negotiation process can be extensive, and even include site visits and audits. An offeror may be removed from award consideration if the offeror and the government cannot negotiate mutually agreeable terms within a reasonable period of time.
- During the contract or grant administration phase, BAAs are further distinguishable from typical contracts. Unlike the typical "Changes" clause, BARDA BAAs require contractors to submit a "Deviation Report" to request a deviation from the contractor's "Integrated Product Development Plan." The Deviation Report must clearly set forth the justification or rationale for the requested change and present specific options to address the change – including a cost-benefit analysis, a timeline for each option, the contractor's recommended course of action, and a full analysis of how the proposed change affects the entire contract.

Contractors interested in submitting a white paper in response to a BARDA BAA (the first step in the process, as discussed in part one) should monitor FedBizOpps (www.fbo.gov). The deadline to submit white papers under all three open BARDA BAAs is July 30, 2015. Based on BARDA's historical record and current needs, it is likely that BARDA will extend or reissue those BAAs.

Timekeeping: Best Practices to Ensure Labor Charges Withstand Audit Scrutiny

Over the past several years, contractors have witnessed the Defense Contract Audit Agency ("DCAA") becoming increasingly vigilant when auditing labor costs, timekeeping records, and associated data. Contractors are reminded that it is their responsibility to comply with all applicable government contract cost principles and to be able to demonstrate with appropriate accounting records that they have adequately documented the costs they have incurred in performing their contracts.

Those contractors required to prepare and submit annual incurred costs submissions ("ICS") for purposes of establishing provisional and final indirect cost rates, cost pools, and allocation bases are especially at risk of having to endure DCAA's seemingly limitless capacity to churn out requests for information ("RFI"). DCAA considers timekeeping to be a high-risk audit area because, unlike other direct (and indirect) operating costs, labor charges are typically and most readily supported by employee timesheets (no invoices, statements of account, bills of lading, or other forms of third-party documentation substantiating the incurrence of costs). In turn, many companies do not do a particularly good job of recording employee time, and that gives rise to missing or incomplete records, mistakes, unapproved changes, and many more timekeeping problems.

Stated differently, if the timekeeping records are not adequate on their face, it is a significant challenge for most companies to identify and provide contemporaneously maintained source documentation to substantiate the incurrence of labor costs and the accumulation and allocation of such costs between and among their government contracts. For this reason, contractors should never take timekeeping procedures for granted, and should err on the side of doing too much rather than too little when it comes to recording employee time, validating the accuracy of employee hours, preserving employee records, and scrutinizing the company's policies, procedures, and controls for accumulating and allocating labor costs between and among direct and indirect cost objectives.

For example, under a typical federal cost reimbursement–type contract, the government will reimburse contractors only for costs that are allowable, reasonable, and allocable

to the contract. Under applicable cost principles, contractors are required to maintain records "adequate to demonstrate that costs claimed have been incurred." FAR 31.201-2(d). For timekeeping purposes, the FAR does not prescribe a particular timekeeping procedure – there is no one-size-fits-all approach to be taken for timekeeping purposes. What works in a small R&D laboratory would not necessarily work in a manufacturing facility with many employees. It is incumbent on each employer/contractor to formulate its own timekeeping system that adequately documents hours worked, projects (cost objectives) worked on, dates, duration, customer, direct and indirect activities, and the like. The contractor can better manage its audit risk in connection with labor costs if its timekeeping system records *all* hours for *each* employee – direct hours, commercial projects, government-funded projects, indirect activities, unscheduled absences, and the like.

Consider adopting some form of the following measures as means for better managing the audit risk associated with labor costs:

- The timekeeping system should apply to all direct and indirect timekeepers.
- Timekeeping records should be maintained contemporaneously, updated daily, capture actual hours worked by each timekeeper on each project (cost objective), and include a description of the activity or activity code that correlates to activities called out in each government contract, commercial order, or other governing agreement or procedure.
- Record on the timesheet actual hours worked for direct and indirect cost objectives, identified by cost codes established in the company's chart of accounts. For example, the timekeeping system should capture time spent directly on other contracts or revenue-generating efforts, administrative time, vacation and sick time, and bid and proposal efforts, as well as time spent on efforts that benefit a contractor's operation as a whole (e.g., research and development and marketing).
- Timesheets should be reviewed and signed by each employee and approved and signed by his or her supervisor before processing for payroll and billing purposes.
- Whether you adopt a paper timesheet or an electronic timekeeping model, there should be a process in place for changing timekeeping entries, one that preserves the original time entry but allows for marginalia, end notes, and recordation of change date, with the approval (of change) by the supervisor.
- Consider implementing a written timekeeping procedure explaining why records are created and needed; how they are to be created, maintained, and preserved; timekeeper and supervisor responsibilities; and the paramount importance of accuracy.
- Develop a training module to educate all timekeepers about the timekeeping process.

Even with these best practices in hand, it is still possible for contractors to encounter an unexpected complication that raises questions regarding allowability, allocability, or reasonableness. Also in this issue, please see the related topic Common Problems in Timekeeping Systems, by the accounting team at BDO USA.

Guest Author Spotlight

Common Problems in Timekeeping Systems

*by Joseph McCaffrey and John Wolfe**

When designing effective timekeeping and labor systems, contractors must be aware of the full spectrum of U.S. regulatory requirements and audit expectations. Contractors may encounter pitfalls in two primary areas: consistency of direct and indirect labor charging, and proper documentation of labor transfers.

FAR 31.202(a), *Direct Costs*, and Cost Accounting Standards ("CAS") 9904.402, *Cost accounting standard – Consistency in allocating costs incurred for the same purpose*, both address contractors' requirements for defining the circumstances under which they treat costs as direct or indirect. More specifically, FAR 31.202(a) states, "No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective." CAS 9904.402-40 indicates that "all costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to final cost objectives." Ignoring these restrictions can expose contractors to significant risk, including disallowance of costs incurred or even allegations of fraud. For example, if a customer is unwilling to pay for program management costs that the contractor ordinarily charges as direct costs, the contractor cannot circumvent the nonpayment by charging the costs indirectly or to overhead.

To mitigate this risk and possible associated audit findings, contractors must implement strong internal controls around labor charging and timekeeping. Such steps may include clearly defining direct and indirect activities. For example, creating a time-charging "matrix" or work instruction can provide guidance for employees on how they should classify and charge certain activities. Companies should provide clear guidelines on when employees should charge time to bid and proposal efforts, as well as how to account for "team meetings" or other administrative functions (including supporting billing, estimates-at-completion, etc.). The guidelines will ensure consistent treatment of categories of expenses from quarter to quarter and year to year. Additionally, many companies proactively conduct "floor checks" of employees' timekeeping practices as part of routine monitoring and risk assessments. By reviewing timesheets and interviewing employees to ensure that

they are following established policies and procedures, companies can design effective process improvements and update their annual training to be more effective.

A second area that often receives significant audit scrutiny is labor transfers or adjustments. Contractors without strong controls may require excessive labor transfers or corrections if they have similar work being performed under multiple contracts, or when there is miscommunication between management and employees on work instructions. In particular, adjustments to entries, corrections, and transfers made a considerable time after an original entry may signal fraud to auditors or, at a minimum, indicate significant accounting irregularities of the sort that should be investigated more thoroughly than what is permitted in a routine incurred-cost or year-end audit.

One way to lessen the need for corrections and transfers is to have formal work authorizations identifying for each timekeeper only those projects to which the employee is authorized to charge time for a specific effort. If the employee is not authorized, his or her time entries will not be accepted. Contractors should also have policies and procedures in place for management and individual timekeepers to review and approve labor transfers; after all, a labor transfer is a form of correction to the company's accounting records, and the employee stakeholders directly (or indirectly) impacted by such corrections should be informed of the change before it is finally implemented. Whenever possible, the individual timekeeper should initiate corrections and transfers, as opposed to management adjusting journal entries or taking other corrective actions. Most likely, the majority of labor transfers will be administrative in nature or to correct employee timekeeping errors, which does not require contracting officer approval. However, depending on the nature of the labor transfer, contractors should implement procedures for an appropriate level of contractor management review and approval – or, if necessary, contracting officer approval.

The accounting and audit environment is getting ever more complicated, and the stakes are going up for anyone who is required to comply with government contract cost principles. Accountants, bookkeepers, project managers, and administrators all have good reason to stay abreast of developments by attending regular training sessions.

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The Government's Quest for a Uniform Approach to Safeguarding Controlled Unclassified Information

Almost five years after Executive Order ("EO") 13556 mandated a government-wide, uniform approach to safeguarding certain types of unclassified government information – referred to as "controlled unclassified information" ("CUI") – the National Archives and Records Administration ("NARA") recently proposed a rule that, along with final publication of National Institute of Standards and Technology ("NIST") Special Publication 800-171 (finalized June 2015) and a FAR clause (not yet proposed) (the "CUI Program"), is expected to replace the patchwork of protocols that the government has adopted over many years for protecting unclassified information.

The CUI Program consists of three primary components: (1) the proposed rule prescribing the procedures for how agencies are to designate and require contractors to designate and handle CUI; (2) implementation of security controls for contractor IT systems; and (3) the as yet unpromulgated contracting clause, which is expected to synthesize all CUI Program requirements into a single form of clause.

NARA, the government's cognizant agency for the CUI Program initiative, issued on May 8, 2015, the proposed rule establishing uniform policies for agencies on designating, safeguarding, disseminating, marking, decontrolling, and disposing of CUI. The proposed rule – if adopted in its present form – will apply to all executive agencies and their contractors that designate or handle CUI. Specifically, the proposed rule will:

- Give rise to development of a public CUI Registry identifying 23 discrete categories and 82 subcategories of CUI (such as controlled technical information, critical infrastructure, financial, intelligence, and proprietary business information, among others);

- Include standardized markings for CUI and mandate the use of such markings whenever CUI is disseminated outside of the government;

- Establish a standardized CUI decontrol process; and

- Require agencies to protect CUI using NIST standards.

The proposed rule will require agencies to include the CUI Program requirements in all contracts that involve contractor access to CUI. The proposed rule also contemplates that agencies will enter into formal information-sharing agreements with contractors which will require, among other things, that the contractors abide by the CUI Program requirements and self-disclose to cognizant agency officials any instances of their noncompliance with those same requirements.

On June 19, 2015, NIST published the final version of NIST SP 800-171, which, standing alone, will not impose mandatory requirements on agencies or contractors; the standards in NIST SP 800-171 will operate as a collection of recommended agency requirements, the purpose of which will be to motivate agencies and their contractors to migrate toward a common set of best practices when handling CUI that resides on nonfederal,

contractor owned-and-operated IT systems.

NIST SP 800-171 describes 14 categories of recommended security measures designed to protect the confidentiality of CUI residing on contractor information systems, consisting of (1) access control, (2) awareness and training, (3) audit and accountability, (4) configuration management, (5) identification and authentication, (6) incident response, (7) maintenance, (8) media protection, (9) personnel security, (10) physical protection, (11) risk assessment, (12) security assessment, (13) system and communications protection, and (14) system and information security.

Of course, there are subcategories associated with each of the foregoing broad security categories, the collective focus of which is directed at all components of IT systems that process, store, transmit, or receive CUI, or provide security protection for such components. Although the measures contemplated in NIST SP 800-171 are not applicable to contractors by operation of law or regulation, NIST has made it known that it intends for federal agencies to incorporate the measures into agreements with contractors, thereby making them applicable to contractors as arm's-length contracting requirements.

The final piece of the CUI Program will be a single FAR clause (not yet promulgated) that would require contractors to comply with the CUI Program requirements, including the implementation of the security controls embodied in NIST SP 800-171. NARA plans to sponsor such a rule sometime in 2016. Until the formal process of establishing the FAR rule occurs, NIST encourages agencies to reference SP 800-171 in federal contracts, thereby contractually obligating contractor compliance.

Cybersecurity is one of the nation's most important economic and national security challenges. Given the increasing prevalence of cyber incidents – a 1,100 percent increase in the number of cyber incidents reported by federal agencies from 2006 to 2014 – contractors should adopt a sense of urgency in assessing and improving the security of their IT systems. In addition to liability resulting from a serious data breach (are there any data breaches that are not serious?), a data breach will almost certainly give rise to increased government scrutiny of a contractor's cybersecurity. Contractor shortfalls in those areas could drastically impact the contractor's ability to compete for future awards and, if substantial enough, could lead to termination and possible suspension or debarment. For those contractors that routinely encounter CUI, compliance with the new government protocols emerging from EO 13356 adds yet another layer of security to an ever-growing list of requirements associated with government-furnished information. Safeguarding CUI is one very important step in addressing vulnerabilities in the security of sensitive government information.

HHS OIG Creates New Task Force to Pursue Civil Monetary Penalties and Exclusions

The U.S. Department of Health and Human Services Office of Inspector General ("HHS OIG") announced a new legal team dedicated to pursuing civil monetary penalties ("CMPs") and exclusions.

The new litigation task force will be used to complement other enforcement efforts of DOJ and to fill in enforcement gaps. The task force will focus on levying CMPs and excluding individuals and organizations from participating in the Medicare and Medicaid programs. Led by Robert Penezic, a current HHS OIG deputy branch chief, the new litigation team will have at least 10 dedicated attorneys once it is fully staffed. Their task will be to ramp up civil enforcement actions against providers and individuals in cases initiated by HHS OIG, including cases related to improper billing under the Medicare and Medicaid programs, kickbacks, and compliance with corporate integrity agreement ("CIA") obligations. The new enforcement team will pursue cases that arise from referrals to HHS OIG, False Claims Act ("FCA") litigation, and the monitoring of CIAs.

From a practical standpoint, the new HHS OIG task force likely means more enforcement of cases that DOJ does not pursue. Over the past few years, HHS OIG has reported an increase in settlements under its CMP law related to affirmative enforcement actions (as opposed to self-disclosures). Correlating to the increase in CMP settlements is an increase in individual liability and exclusions, particularly for managers, executives, and physicians. At the American Health Lawyers Association annual meeting, HHS OIG referenced several enforcement matters to further highlight its activities. One such example was a 15-year exclusion and $1.5 million settlement for a physician who allegedly submitted physical therapy claims for services where he was not present. HHS OIG commented that the physician had, among other allegations, submitted claims for procedures furnished at the same time but in different locations. Another example was a settlement with a drug company for billing for drugs that were not dispersed. And another example involved an FCA lawsuit pursued by DOJ against a diagnostic center related to kickbacks. As a separate enforcement action, HHS OIG affirmatively pursued CMPs against 12 physicians involved in the alleged kickback conduct. The recovery by HHS OIG in the individual settlements under its CMP authority was greater than the recovery in the related FCA case.

We expect that the new enforcement team will continue to substantially increase audit and enforcement activities throughout the healthcare industry. The CMPs allow for various recoveries, including treble damages and up to a $50,000 penalty for *each* occurrence involving certain conduct. In addition, HHS OIG's exclusion authority can prevent entities from participating in the Medicare or Medicaid programs for an extended period or indefinitely. Aside from the more obvious financial implications of losing participation eligibility in government-funded healthcare programs, an exclusion can also impact participation in federal grants, cooperative agreements, and other procurement programs.

With the addition of another government enforcement team in the healthcare industry, healthcare providers as well as healthcare institutions and their directors, owners, executives, and managers should revisit their compliance

policies and procedures with an eye toward strengthening those programs. By testing and improving internal audit functions, developing enhanced policies and procedures, and conducting internal investigations when advisable, providers, executives, and individuals can more effectively identify, mitigate, and manage their compliance risks to better defend their actions and decisions should they become the subject of an affirmative enforcement inquiry by this powerful task force.

FCA Case Developments: Tolling Under War Powers Act and Relators as a Source of Public Disclosure

On May 26, 2015, the United States Supreme Court issued its much-anticipated decision in the long-running saga of *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 2015 WL 2456621 (2015) ("KBR"). In so doing, the Court resolved a split between the Circuit Courts of Appeal regarding the applicability of the Wartime Suspension of Limitations Act ("WSLA") to the FCA.

The WSLA, first enacted in response to contractor malfeasance during World War I, tolls the statute of limitations for any "offense" involving fraud against the United States or that is otherwise connected to acquisition or procurement, for as long as the United States is at war. In 2008, Congress amended the Act to include instances of congressionally authorized uses of force, such as the Authorization for the Use of Military Force authorizing American operations in Afghanistan. In recent years, a number of courts, including the United States Court of Appeals for the Fourth Circuit, have relied on the WSLA to permit *qui tam* relators to file FCA suits after the otherwise-applicable statute of limitations had expired. If uniformly applied, the WSLA would expose contractors to significant risk of liability for controversies that arose many years after contract closeout.

In a unanimous decision, the Court rejected a broad application of the WSLA to any and all actions. Instead, the Court relied on the plain text and statutory history in concluding that the law only tolls the statute of limitations for criminal offenses; the statute does not toll actions for civil or administrative claims. The implication of the KBR decision is substantial, especially as it relates to *qui tam* actions filed long after the original statute of limitations expired (stale claims). For civil and administrative claims arising out of contract performance in support of operations in Iraq and Afghanistan, claims against those contractors must be timely filed within the statutory limitations period – relators will not have the latitude to file stale claims.

In its decision, the Court also addressed the "first to file" bar under the FCA, adopting the government's position in concluding that there is no support in the text of the FCA to interpret "pending" to include cases that have been dismissed. Instead, the Court held that the "first to file" bar only prevents a relator from filing suit while another suit arising from the same conduct is pending; once a suit is resolved, another relator is free to file his or her own suit.

The upshot of the Court's "first to file" construction is that although contractors may not be subject to two concurrent FCA claims arising out of the same alleged conduct, they may nonetheless be subject to multiple *qui tam* cases if filed sequentially. Thus, contractors should be aware that *qui tam* filings are not necessarily precluded simply because another *qui tam* case is pending on the same issue. Contractors should also note that the filing of a *qui tam* action may toll the statute of limitations for an additional three years for subsequently filed lawsuits if the pending action serves as the government's first notice of the facts giving rise to the claim.

The decision provides a bit of certainty on the one hand relative to tolling under the WSLA, while introducing on the other hand a bit of uncertainty associated with the risk of multiple FCA lawsuits stemming from the same operative conduct. Contractors can rest assured that they will no longer have to defend against civil and administrative claims brought after the expiration of the statute of limitations; however, they may face duplicative suits over a protracted period of time as long as those suits are not pending at the same time.

Less-welcomed decisions were recently issued *en banc* by the Ninth Circuit in *US ex rel. Hartpence v. Kinetic Concepts, Inc*., No. 12-55396 (9th Cir. July 7, 2015) and *US ex rel. Godecke v. Kinetic Concepts, Inc*., No. 12-56117 (9th Cir. July 7, 2015), which allow an individual to be both a relator and a source for public disclosure. For the past 23 years, the Ninth Circuit has followed the "hand in the disclosure" requirement, whereby an FCA suit is barred if the underlying wrongdoing was previously disclosed publicly, unless the relator played a part in publicly disclosing the allegations and information on which their suits were based. The lower court had dismissed the whistleblowers' claims, ruling that they were based on publicly disclosed information and therefore the relators were not the original sources. Following recent precedent from the Supreme Court's decision in *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007), whereby the Supreme Court held that the "direct and independent knowledge" that a relator must have to qualify as an original source is the information upon which his or her complaint is based rather than the information underlying the public disclosure, the Ninth Circuit held that it does not matter whether the relator also played a role in the public disclosure of the allegations that are part of his suit. The unanimous *en banc* ruling effectively makes it easier for whistleblowers to establish original source status in the Ninth Circuit.

Proposed Contract Bundling Changes Aim to Increase Small Business Contracting

As required by the Small Business Jobs Act of 2010, on June 3, 2015, the FAR Council introduced a proposed change to the FAR contract bundling requirements. 80 Fed. Reg. 31,561-01. The proposed rule aims to improve small business participation in federal contracting by clarifying existing FAR regulations that discourage agency

utilization of contracting bundling. The proposed rule would require increased reporting, parses the definitions of "bundling" and "consolidating" of contracts, and requires agencies to publicly justify their decisions to bundle requirements or consolidate contract vehicles. This definitional distinction between bundling of requirements and consolidation of contracts is intended to discourage agencies from combining unrelated requirements or contracts into a single award.

Under the proposed rule, agencies that bundle contracts or requirements in excess of $2 million will face greater notification and reporting requirements. If an agency wants to bundle two existing contracts, it must first notify small businesses at least 30 days beforehand of its intent to bundle its contracts. Agencies will also be required to provide public notice of the agency's bundling policy and a list of and rationale for any bundled requirements for which the agency solicited offers or issued an award. If adopted, the proposal's enhanced notification requirements may afford small business contractors an opportunity to protest an agency's improperly bundled contracts.

The proposed rule creates a separate definition of the term "consolidated," which means a single contract, multiple-award contract, task or delivery order, or multiple-site construction project *which satisfies two or more requirements of the federal agency* for supplies or services that have historically been provided to the agency under two or more contracts. Moreover, when an agency's "consolidated" contract or order is in excess of $2 million, it must be directly authorized by the agency's chief acquisition officer ("CAO").

When an agency utilizes consolidation, the notification requirements are even more stringent than those imposed on bundling. The agency CAO will be required to provide a written justification for each consolidation, demonstrating that the benefits of a consolidated acquisition substantially exceed the benefits of an alternative approach, and to justify how the contract award would impact small business concerns. If the proposed rule is adopted without material revision, the agency will be required to post a notice of each justification to FedBizOpps (www.fbo.gov).

Importantly, the proposed rule will also extend bundling restrictions to cover contracts for commercial items and commercial off-the-shelf items, and will put agencies on notice that small businesses are to play an active role in the acquisition planning process by requiring small business to be a discipline that is represented on the acquisition planning team.

The rule, if implemented, will naturally lead to one or more protests challenging agency actions leading up to bundling and consolidation decisions as those agencies are held accountable for the manner in which they interpret and implement the limitations embodied in the proposed rule, providing contractors new opportunities or the potential to increase their footprint in federal procurements. Whereas the new rule is intended to protect small businesses, protests challenging agency actions in connection with the proposed rule (once finalized) will most likely be initiated before the Government Accountability Office or the Court of Federal Claims and not the Small Business Administration.

As the rule imposes significant agency notification and compliance requirements, small business contractors will hopefully see a noticeable increase in procurement opportunities, assuming the proposed rule is adopted.

Seen and Heard

- Hilary Cairnie recently presented at the 51st Paris Air Show in a forum titled "What Senior Executives and Sales Representatives Need to Know to Avoid Anti-Corruption and Export Control Compliance Violations." Mr. Cairnie presented on the U.S. Suspension and Debarment program, particularly its application to foreign and multinational corporations.

- Kelley Doran has been appointed to the U.S. Geospatial Intelligence Foundation ("USGIF") Geolocation Law Working Group.

- Barron Avery has been appointed to the National Association of Surety Bond Producers ("NASBP") Attorney Advisory Council.

- On June 16, BakerHostetler, LathamBioPharm, and ARC Capital co-sponsored a reception at Barbuzzo restaurant following the 2015 BIO International Convention.

- Barron Avery and Katie John co-authored an article, "Using Declaratory Relief to Get Out of a No-Good, Very Bad Contract," appearing in the Summer 2015 edition of *The Procurement Lawyer* (Vol. 50, No. 4).

- Barron Avery is a featured commentator in "NASBP's Attorney Advisory Council – Participants Opine on Current Risk Management Challenges and Business Opportunities," National Association of Surety Bond Producers, *Surety Bond Quarterly*, Spring 2015 (Vol. 2, Issue 1).

- Hilary Cairnie was a featured speaker and moderator on compliance issues at the April 28, 2015, program titled "Compliance Issues and Business Systems Challenges for Government Contractors," sponsored in part by BDO USA, LLP. The all-day program featured Congresswoman Barbara Comstock and leading industry executives focusing on a variety of issues, including the current DCAA/DCMA environment, compliance matters, the impact of business systems requirements in today's marketplace, and the latest legal updates pertaining to government contractors.

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, the 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

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Hilary S. Cairnie is the leader of our 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.

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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.

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