MOFORWARD 2018

Need-To-Know Regulatory and Legal Developments

October 26, 2017 | McLean, VA

MORRISON FOERSTER

MOFORWARD 2018

AGENDA

Time	Session
10:00 - 10:15 AM	Opening Remarks *B Wine & J DeVecchio*
10:15 – 10:45 AM	Bid Protests, Latest Developments and Trends *K Mullen & J Tucker*
10:45 – 11:15 AM	The Foreign Corrupt Practice Act: Developments, Trends, and Practical Advice *C Duross & J Koukios*
11:15 – 11:45 AM	The False Claims Act: Escobar and Current Directions *D Chudd & R Plymale*
11:45 AM – 1:00 PM	Lunch with speaker *Robert Litt*, former General Counsel for the Office of the Director of National Intelligence
1:00 - 1:30 PM	Responding to the Global Cyber Threat Landscape *J Carlin*
1:30 - 2:00 PM	Privacy/Cybersecurity, Breach Reporting, and Government Contract Requirements *J Carlin & T Reynolds*
2:00 - 2:30 PM	What Else to Expect from This Congress and Administration *B Wine & C Chapple*
2:30 - 2:45 PM	BREAK
2:45 - 3:15 PM	Procurement Integrity, COIs, and Competitor Information: Staying Competitive and Compliant *A Ward & S Nandivada*
3:15 - 3:45 PM	Export Controls and Such *R Vacura & C Capito*
3:45 - 4:15 PM	Best Practices in Government Contract Transactions and Dealing With Socio-Economic Challenges *D Specht & S Cave*
4:15 - 4:45 PM	And You Thought Data Rights Were Difficult *J DeVecchio & L Bell*
4:45 - 5:00 PM	Closing Remarks *D Churchill*

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SPEAKERS

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BID PROTESTS

Latest Developments and Trends

Kevin Mullen & Jim Tucker

Date

Repeating Themes

- Tighter budgets:
  - Acquisition workforce driven to do more with less.
  - Increased fixation on cost/price, growth of LPTA procurements.
  - Narrower profit margins, especially in large IT services contracts.
  - Growing Government willingness to trade longtime incumbents for lower-priced newcomers.
  - Growing contractor willingness to protest.
  - Government attempts to limit perceived costs and delays from bid protests.
- Splits between GAO and COFC jurisprudence:
  - Greater COFC scrutiny of the scope of agency corrective action.
  - Greater COFC scrutiny of agency discretion not to conduct clarifications/discussions.
  - Possible narrowing of the timeline to protest OCIs at COFC.

Legislative Reforms: NDAA Studies

- Section 809 Panel
  - Created by FY16 NDAA.
  - Tasked with finding ways to streamline and improve defense acquisition process, including bid protests.
  - Soliciting ideas and recommendations from Government, industry, and general public.
  - Report due by September 2018.
- Section 885 Study
  - Mandated by FY17 NDAA.
  - Required DOD to hire an outside research entity to explore "the prevalence and impact of bid protests on Department of Defense acquisitions, including protests filed with contracting agencies, the Government Accountability Office, and the Court of Federal Claims."
  - Replaced more radical section of Senate bill calling for significant changes to bid protest process.
  - Report due by December 2017.

Legislative Reforms: FY18 NDAA Senate Proposals

- Evidences concern about protest costs and delays, as well as incumbents gaming the system.
- Would require unsuccessful protesters with revenues exceeding $100 million to reimburse DOD for costs of fighting the protest.
- For incumbent contractors that file a protest, would withhold payments exceeding costs incurred under any contract extension or bridge contract made necessary by the protest.
  - Withholdings released to the protester only if the Agency subsequently cancels the solicitation or GAO sustains the protest on any ground.
  - Otherwise, the withholdings are given to the protested awardee, or (apparently for pre-award protests) to a new DOD protest defense fund.
- Would shorten GAO protest period to 65 days for DOD procurements, except for "unusually complex" procurements, where GAO may extend the period up to 100 days.

Legislative Reforms: FY18 NDAA Senate Proposals (cont'd)

- Post-Award Debriefings:
  - Disappointed offerors and the protest bar have long complained about watered-down debriefings.
  - Growing practice of issuing a pro forma written "debriefing" as part of unsuccessful offeror letter, without opportunity to ask questions.
  - OFPP's latest Myth-Busting memo recognized that skimpy debriefings often encourage protests that would not otherwise have been filed:
    - "An effective debriefing process can greatly reduce the frequency of protests, as protests are often driven by a desire to obtain additional information – information that should otherwise be available via a proper debriefing."

Legislative Reforms: FY18 NDAA Senate Proposals (cont'd)

- FY18 NDAA would require DOD to amend the DFARS to reform the debriefing process:
  - Agencies would have to provide "detailed and comprehensive statements of the agency's rating for each evaluation criteria and of the agency's overall award decision," including release of the Source Selection Decision Document (redacted as necessary).
  - Requirement for combined written ***and oral*** debriefing for awards of $10 million or higher.
  - Option for disappointed offerors' outside counsel to review full procurement record, presumably under some kind of protective order.
  - Express provision that the debriefing does not close, and the 5-day protest clock does not begin to run, until agency provides responses to debriefing questions.

GAO Protest Statistical Trends (FY16)

- December 2016 GAO Report
  - 6% more protests filed in FY16 than in FY15 (2789 vs. 2639).
  - ***23%*** of protests sustained with a written decision on the merits – highest sustain rate since FY07 (27%) and highest number of sustained protests (139) since GAO started publishing protest statistics.
  - ***Sustain rate*** doubled relative to FY15 (12%).
  - But ***effectiveness rate*** remained steady at 46% (relative to 45% in FY15).
  - This reflects an increased agency willingness to fight meritorious protests in FY16.
- Interplay with legislative reforms
  - With a 46% effectiveness rate, are frivolous protests really the problem?
  - Proposed debriefing reform likely would reduce total number of protests. May also increase effectiveness rate as number of non-meritorious protests drops.
- FY17 statistics expected in December 2017

Developments: More Frequent Classified Protests

- Protests of classified procurements have increased in recent years.
- NSA recently commented: "We are sitting on three [protests] right now. Used to be you could go a decade without one, let alone sitting on three in one year."
- Increased protests reflect budget restraints, agency willingness to seek better deals from non-incumbents, and eroding contractor-customer loyalties as companies fight over fewer opportunities.
- Also reflect greater Government emphasis on intelligence and cyber spending, resulting in more classified programs to protest.
- Classified protests present special procedural considerations and generally require cleared outside counsel.

Developments: Organizational Conflicts of Interest

- 2011 amendments to the FAR's treatment of OCIs remain in regulatory limbo.
- OCIs continue to be vigorously litigated at both GAO and COFC.
- Timing for protesting an OCI:
  - At the GAO, OCIs normally are protested post-award, unless the protester is on notice of (1) the OCI itself and (2) that the agency has determined that the conflicted firm is nevertheless eligible for award.
  - *Dell Servs. Fed. Gov't, Inc.*, B-414461; B-414461.2, June 21, 2017, 2017 CPD ¶ 192: Protester successfully challenged the unsatisfactory investigation of a Procurement Integrity Act allegation and a related OCI in a pre-award protest. GAO treated the conclusion of the PIA investigation as tantamount to a determination that the offeror was eligible for award despite the related OCI.

Developments: Organizational Conflicts of Interest (cont'd)

- Timing for protesting an OCI at COFC:
- *Concourse Grp., LLC v. United States*, 131 Fed. Cl. 26 (2017):
  - COFC invoked *Blue & Gold Fleet* to dismiss a post-award OCI protest ground where protester knew of the potential OCI and of the conflicted firm's "interest" in the procurement before contract award.
  - ***COFC did not address the "agency determination" prong of the GAO test.***
  - Signals a potential split between the GAO and COFC on OCI protest timing.
  - Risk that a protester at COFC will waive any OCI ground if it knew or should have known of the potential OCI and the conflicted firm's "interest" in the procurement, but does not protest until after award.

Developments: Corrective Action Protests

- Agencies enjoy broad discretion in developing corrective action, but their discretion is not unlimited.
- The GAO traditionally has been broadly deferential to agencies' choice of corrective action following a protest.
- Recent cases demonstrate COFC is willing to take a harder look at the scope of agency corrective action and rein it in if necessary.

Developments: Corrective Action Protests (cont'd)

- *Dell Fed. Sys., LP v. United States*, 133 Fed. Cl. 92 (2017):
  - Agency took voluntary corrective action after filing of multiple GAO protests. Agency determined that the solicitation was ambiguous and DFARS 215.306(c) required it to conduct discussions.
  - Agency corrected the solicitation and opened discussions with all offerors.
  - Original awardees protested at COFC, arguing that corrective action was overly broad, especially where awardees' prices had been disclosed.
  - Held: Arbitrary and capricious to open discussions with all offerors, rather than conducting clarifications only with offerors confused by the solicitation ambiguity.

Developments: Corrective Action Protests (cont'd)

- *Professional Serv. Indus., Inc. v. United States*, 129 Fed. Cl. 190 (2016):
  - Plaintiff and the awardee were the only offerors.
  - GAO twice sustained plaintiff's protests that awardee's PM lacked the required technical experience.
  - Agency's final corrective action included amending the RFP to materially reduce the PM's duties and soliciting new proposals.
  - Plaintiff protested to COFC before the date set for receipt of revised proposals.
  - Held: Arbitrary and capricious to amend the solicitation to "water down" the PM duties, when record did not demonstrate that the original solicitation did not accurately reflect the agency's needs.

Developments: Clarifications and Discussions

- Although the GAO recognizes that a decision not to conduct clarifications or open discussions must be reasonable, the GAO appears never to have sustained a protest challenging an agency's decision not to do so.
- COFC, however, has sustained similar protests, including recently:
  - *Dell Fed. Sys., LP v. United States*, 133 Fed. Cl. 92 (2017): COFC held that opening discussions was an improper remedy for not having conducted discussions before revealing awardees' prices. Agency instead could have conducted limited clarifications without the opportunity to revise proposals.
  - *Level 3 Communications, LLC v. United States*, 129 Fed. Cl. 487 (2016): COFC held it was an abuse of discretion not to seek clarifications where the protester's price was much lower than the awardee's and clarifications could have resolved whether protester's proposal was compliant.

Developments: Corporate Transactions and Pending Proposals

- Effect of corporate transactions on pending procurements remains a hot issue.
- GAO case law provides no clear guides for what to disclose, when to disclose, or the likely effect of disclosing a contemplated transaction.
- *Lockheed Martin Integrated Sys., Inc.—Recon.*, B-410189.7, Aug. 10, 2017, 2017 CPD ¶ 258:
  - After an initial award, and during post-protest corrective action, press release announced Lockheed entered a "definitive agreement" to spin off the business unit proposed to perform.
  - The proposal, which had already been submitted, did not reference the pending transaction.
  - Agency read the press release and determined the transaction "potentially introduced a large amount of risk for the procurement," including an "unquantifiable cost risk" and an "unknown and unknowable" impact on performance.
  - Agency excluded Lockheed from consideration for award, and Lockheed protested.
  - GAO denied the protest, holding that the Agency reasonably considered the transaction and documented a reasonable basis for excluding the protester from award.

Cost Realism

- Agencies looking for a bargain must be on guard against illusory savings.
- Proposed costs aren't necessarily most probable costs.
- *Target Media Mid Atlantic, Inc.*, B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358 :
  - Awardee proposed to perform a cost-type contract at low cost.
  - Its technical proposal outlined a plan to capture a significant number of incumbent personnel and new hires.
  - Agency did not reasonably analyze whether the awardee's low proposed compensation levels were realistic in light of its approach to recruiting incumbent employees and new hires. Instead, it compared proposed compensation to payroll data for awardee's existing workforce.
  - GAO sustained the protest for failure to conduct a reasonable cost realism analysis, and a failure to evaluate professional compensation plans in accordance with FAR 52.222-46.

Cost Realism (cont'd)

- *AdvancedMed Corp.*, B-414373, May 25, 2017, 2017 CPD ¶ 160 :
  - Awardee proposed a lower cost than protester for performing various tasks.
  - The cost difference was largely due to the awardee proposing substantially fewer hours to perform one particular task.
  - Protester argued that the awardee's proposed costs were inconsistent with the level of effort required to perform the task.
  - Although the agency had analyzed proposed hours and costs on a SLIN and labor category level, it did not analyze them at the task level, which was the level of detail required by the RFP.
  - GAO sustained the protest, finding that, without the task-level analysis, the agency could not have reasonably "recognized the true nature of [the awardee's] technical approach or concluded that it was realistic."

Bid Protests on the MoFo Blog

- Check out MoFo's Government Contracts Insights blog: http://govcon.mofo.com/
- Ongoing Post-Award Protest Primer series – takes you from soup to nuts through a post-award protest at the GAO.
- Regular protest roundup of each month's most interesting bid protests.
- Timely articles on new developments and protests of note.
- And plenty of non-protest posts, as well.

October 4, 2017 - Protests & Litigation

SEPTEMBER 2017 BID PROTEST ROUNDUP

By: Locke Bell

This roundup of notable bid protest decisions issued in September 2017 highlights three decisions, two at the Government Accountability Office (GAO) and one at the Court of Federal Claims (COFC). The first reminds us of the broadness of the discretion afforded a source selection official making a best-value tradeoff decision. The second explores the line between products and services reasonably included in an offeror's General Services Administration (GSA) Federal Supply Schedule (FSS) contract, and those that must be separately provided. And the last examines standing to continue a protest at COFC when intervening circumstances leave a disappointed offeror otherwise ineligible for award.

SSI Tech., Inc., B-414204.3, Sept. 12, 2017, 2017 WL 4021818

The bounds of a source selection official's discretion, although universally broad, may be set differently based on the reviewing GAO attorney and the facts of the case at hand. In SSI Technology, GAO found it was within the source selection official's rational discretion to award a contract for liquid fuel water separators to a dealer at a unit price of $104 more and a delivery date 170 days later than a manufacturer of effectively equivalent liquid fuel water separators, based on concerns about the manufacturer's past performance. The source selection official concluded reasonably, in GAO's opinion, that the dealer offered the best value to the government.

The protester pointed out that the solicitation at issue did not mention "best value" or provide for a "best-value tradeoff" by the agency. In this regard, the solicitation provided, "If the requirement is evaluated manually" — which it was, according to the contracting officer — "price, delivery, and past performance will be considered in accordance with the terms in the solicitation. Since delivery is an evaluation factor, there may be an evaluation preference for quotes/offers of fewer delivery days than the number of delivery days requested by the Government." GAO held that this language "effectively required a best-value analysis by providing that award would be based on 'price, delivery, and past performance.'"

The protest further challenged the agency's best-value tradeoff decision as unreasonable and without a rational basis in light of the fact the awardee offered a price 34 percent higher than the protester for what the protester considered to be the exact same product, at a substantially later delivery date. GAO found this appeal to price and delivery unpersuasive in the face of the agency's determination that the

protester's "very poor past performance history, which included a [Past Performance Information Retrieval System] score of 0 and indicated in part that, in the past year, it had delivered only 23.8% of its DLA-awarded [Contract Line Item Numbers] by their due dates" resulted in concern that the protester's proposal did not "represent a time frame in which [the protester] can actually perform." The agency was reasonable, then, to determine it was worth paying a $104 premium per unit for a "high degree of timely performance."

GAO's decision in SSI Technology serves as a reminder of the formidable climb facing a disappointed offeror as it sets out to overturn an agency's best-value determination as unreasonable.

Bluewater Mgmt. Grp., LLC , B-414785, Sept. 18, 2017, 2017 WL 4174397

GSA FSS contracts provide major administrative ease to procuring agencies, but they present some pitfalls that should be kept in mind. One is in Bluewater Management , where GAO sustained a protest challenging an award for mixed services, some of which were not included in the awardee's schedule contract.

Specifically at issue were lodging and transportation services for civil service mariners assigned to the Military Sealift Command at Norfolk Naval Base. The Navy required up to 250 extended-stay hotel rooms within 25 miles of the base, along with daily round trip transportation at prescribed times. In its request for quotations (RFQ), the Navy listed the lodging and transportation requirements as separate contract line item numbers (CLINs) to be provided and invoiced under the resulting contract.

The Navy invited vendors holding GSA Schedule 48 contracts including Special Item Number 653-9, Long Term Lodging, to submit quotations, although the RFQ made no reference to the schedule or special item number (SIN). Schedule 48 covers services relating to transportation, delivery, and relocation services. It includes many SINs, such as SIN 653-9 for corporate housing facilities and SIN 411-1 for passenger ground transportation services. These individual SINs may cover complementary services as well; SIN 653-9 anticipates that vendors may offer a wide range of amenities to complement the long-term lodging provided, including transportation services.

The awardee in Bluewater Management held a single FSS schedule 48 contract, with SIN 653-9 as its only SIN, listing prices for three types of lodging and identifying only housekeeping services as an additional service, with applicable pricing. The protester argued that the transportation services required by the RFQ were outside the scope of the awardee's Schedule 48 contract, and therefore the agency was precluded from purchasing those services through it. The Navy rebutted that because the standing statement of work for SIN 653-9 contemplated transportation services, the agency could purchase the services as "other direct costs" (ODCs).

The GSA Ordering Guidelines state that "[t]o the extent possible, all anticipated ODCs associated with performance and within the scope of the GSA Schedule contract should be offered as separately listed items, and have an established contract price." GAO, conspicuously disregarding the qualifier "to the extent possible," held that the transportation services awardee proposed were required to be listed on the awardee's schedule with an established contract price. GAO held that the RFQ required ground transportation as a distinct service to perform the task order, not merely to support the provision of lodging services, and therefore these services were not properly classified as ODCs — defined as "charges in direct support of a service," according to the GSA Ordering Guidelines.

Because the awardee's Schedule 48 contract did not include a SIN for transportation services or otherwise list pricing for transportation services, GAO concluded the Navy's acceptance of the awardee's quotation was improper. GAO's decision in Bluewater Management reminds agencies and offerors alike to ensure proposals based on GSA Schedule contracts cover all items and services called for in a solicitation.

Geiler/Schrudde & Zimmerman v. United States , No. 16-186C, slip op. (Fed. Cl. Aug. 30, 2017)

We round out this month's bid protest roundup with a case that presents an interesting (albeit sad) fact pattern. Both COFC and GAO will review a protester's status as an "interested party" as a jurisdictional threshold for hearing a protest — GAO in accordance with its authorizing statutes at 31 U.S.C. §§ 3551, 3553 and its bid protest regulations at 4 C.F.R. §§ 21.0 and 21.1, and COFC in accordance with the Tucker Act, 28 U.S.C. § 1491(b). At both, with some variations, a party generally is an interested party for the purposes of a post-award protest if it was an actual bidder or offeror and had a direct economic interest in the procurement, meaning it had a substantial chance of receiving award. But does a protester retain its standing as an interested party if it had a substantial chance of receiving award when it submitted its protest, but due to intervening circumstances is precluded from award on remand to the agency?

In Geiler/Schrudde & Zimmerman , the court confirmed yes, the protester maintains its standing to protest. There, challenged procurement was set aside for award only to a service-disabled veteran-owned small business (SDVOSB). When the protester submitted its initial complaint in February 2016 challenging alleged errors in the Department of Veterans Affairs' evaluation of proposals to build a chiller plant at a VA facility in Lexington, Kentucky, the protester qualified as an SDVOSB. But just over a month after the complaint was filed, plaintiff's service-disabled veteran owner died.

The VA subsequently revoked the protester's certification as an SDVOSB, and the Government moved to dismiss the protest, arguing that the protester was no longer an interested party because it no longer had a substantial chance at award or an economic interest in the procurement. The court denied the motion, holding, "Standing is determined at the time of the award. " Slip op. at 6 (emphasis

added). Because the protester was an SDVOSB when the initial award decision was made — on September 23, 2015 — the fact that the owner died after the complaint was filed on February 8, 2016 (following an initial protest at GAO) was irrelevant in the court's analysis. Accordingly, COFC retained its jurisdiction over the protest.

This did little good for the protester — the court then held in favor of the Government on the merits. Nevertheless, this readily analogized fact pattern and clean holding by COFC provide an easy citation for protester counsel in the future. One can foresee, without too much imagination, a scenario where a small-business protester challenges evaluation or procedural errors in a small business set-aside award (requiring certification of size as of the date of award), before being acquired or otherwise outgrowing the applicable size standard while the protest pends in court. Under the holding in Geiler/Schrudde & Zimmerman, that protest could go forward regardless.

July 13, 2017 - Post-Award Protest Primer Series, Protests & Litigation

TIMELINESS AND TIMELINES (POST-AWARD PROTEST PRIMER #3)

By: Daniel Chudd and James Tucker

Now that we've discussed the award letter and debriefings, we'll move on to next steps: timeliness of initial protest filings and the protest timeline. In the context of all post-award debriefings, there are two timeliness considerations. First, meeting the GAO's timeliness requirements and, second, whether the filing will result in an automatic stay. Having discussed debriefings last week, we will first look at what is technically an "exception" to the timeliness rules related to a required debriefing, then turn to protests when a debriefing is not required. We will also discuss what may be one of the biggest traps of protest timeliness: protests in the context of a competitive range determination. Finally, we will walk through the timeline of a post-award protest after filing.

Post-Award Protest Timelines – Required Debriefing

When a debriefing is required, either for a FAR Part 15 procurement, or a sufficiently large task or delivery order under FAR Part 16, the close of the debriefing will start the clock for purposes of GAO timeliness and the automatic stay of contract performance under the Competition in Contracting Act. It is imperative, however, that a contractor submit a request for debriefing in writing within three days of the notice of award for the timeliness rules related to required debriefings to apply. It is also important in this context to have a clear understanding of when a debriefing is closed. For example, if an agency agrees to respond to questions at a time following an oral debriefing and confirms that the debriefing will be held open until such questions are answered, the clock will begin to run only when the agency has responded. If, on the other hand, the agency refuses to answer questions or is unclear as to whether it will hold the debriefing open, the safest interpretation is that the agency closed the debriefing on the date of the oral debriefing.

Once the agency has closed a required debriefing, a contractor wishing to file a protest has 10 days to submit its protest to the GAO. This is considered the GAO's "debriefing exception." 4 C.F.R. § 21.2(a)(2). To ensure a stay of contract performance under the Competition in Contracting Act, however, the Agency must receive notice of a protest by the GAO within five days of the requested and required debriefing. 31 U.S.C. § 3553(d)(4)(B). The most important consideration in this regard is that the agency must be notified by the GAO of the protest – a protester merely copying the Contracting Officer on the protest filing is not sufficient. See 31 U.S.C. § 3553(b)(1); 31 U.S.C. § 3553(d). Thus,

when filing a protest for purposes of the stay, a contractor should file by the end of the fourth day or early on the fifth day after the close of the debriefing to allow the GAO time to notify the agency. It is also good practice to contact the GAO hotline a few hours after filing to ensure that the GAO has notified the agency of the protest.

Although the differing deadlines can be confusing, they can also provide opportunities for contractors as well. For example, an offeror with some straightforward protest grounds and some more complex or technically complicated protest grounds may choose to file the straightforward protest grounds within five days of the debriefing, then supplement their protest with the other protest grounds in the next five days, i.e., still within 10 days of the debriefing. This would ensure that the stay of performance would go into effect, but would still allow the offeror additional time to ensure the accuracy of its more complicated protest grounds in a timely fashion.

Post-Award Protest Timeliness – No Required Debriefing

In a procurement where a debriefing is not required, the time to file a protest does not run from the close of a debriefing (even if one is provided voluntarily by the agency). Instead, for purposes of GAO timeliness, a protest must be filed within 10 days of when the protest ground was known or should have been known. In almost all cases this will be from the date of the offeror's notice of award (or from when the award is otherwise publicly announced).

For purposes of the automatic stay, the Competition in Contracting Act provides that the stay will be effective if the Contracting Officer is notified of the protest by the GAO within 10 days of contract award. 31 U.S.C. § 3553(d)(4)(A). This rule, in fact, can apply to a required debriefing situation as well, although agencies often will ensure that the required debriefing is not provided early enough such that the 10-day rule provides a benefit. Once again, it is important to file early enough (either on the ninth day or early on the tenth day) to ensure that the GAO will have time to notify the agency of the protest filing. In addition, offerors should note that the deadline for filing runs from the date of contract award, not from the date of notice of award. Thus, to the extent award is made a day or two before the offeror receives the notice of award, the offeror must count from the date of the actual contract award.

The Competitive Range Timeliness Trap

One of the timeliness traps for the unwary comes in the context of competitive range debriefings. When an offeror is excluded from the competitive range, the FAR provides that the offeror may request a debriefing (which will be required). The FAR allows the offeror to request a pre-award debriefing or to request that the debriefing be delayed until after award. FAR 15.505(a). At first blush, the second option may seem the more advantageous to the offeror: after all, the agency is

required to provide more information in a post-award debriefing than it is in a pre-award debriefing. Compare FAR 15.506(d) (post-award debriefing requirements including information about the awardee), with FAR 15.505(f) (pre-award debriefing requirements).

However, the FAR warns, rather understatedly, that "[d]ebriefings delayed pursuant to [the contractor's request] could affect the timeliness of any protest filed subsequent to the debriefing." The GAO, in fact, has consistently held that an offeror that learns of their its exclusion from the competitive range but chooses to delay the debriefing until after award gives up its opportunity to protest. See, e.g., VMD Systems Integrators, Inc ., B-412729, Mar. 14, 2016, 2016 CPD ¶ 88 (applying very strict interpretation of timeliness rules as discussed in depth in an earlier post).

Thus, although not technically a post-award protest issue, it is important for offerors to be aware of this trap and to request a pre-award debriefing whenever they think they may want to protest their exclusion from the competitive range. If the agency then determines it would rather delay the debriefing until after award, there will be no effect on the timeliness of the potential protest.

Protest Timeline

As we have explained in the Protest Timeline Infographic, the initial steps in a protest after the initial filing are fairly straightforward. The protester must file a redacted version of the protest within one day of filing its protest. Within the first few days to a week after filing, the GAO will docket the protest, send an acknowledgment of the protest, and issue a protective order (if one was requested). The awardee will also likely intervene, and parties will submit their applications for access to the protective order within this time. Any requests for full or partial dismissal are normally filed within about two weeks of the protest filing.

Unless the protest is dismissed, the agency must file its agency report and the relevant agency record documents within 30 calendar days after the protest is filed. Five days before the agency report is due, the agency must submit an index of the record documents it proposed to produce, as well as specific responses concerning any documents that have been requested by the protester and are being withheld. Within two days of receipt of the index and responses, the protester must file any objections to the index and the proposed scope of document production.

Following receipt of the Agency Report, the protestor and intervenor have 10 days to file their Comments on the Agency Report. The protester must also file any supplemental protests within 10 days of whenever the supplemental protest ground is known or should have been known. At times the agency may choose to submit the agency record, or core documents of the agency record, in advance of the due date for its Agency Report. If this occurs, the protestor may not wait until the date its Comments are due to file any supplemental protests based on the record document; rather, the

protester must file its supplemental protest grounds within 10 days of receipt of the documents on which the new protest ground is based. At times, this can result in multiple clocks running in parallel, with some supplemental protests due before Comments, others due with Comments, and others due after Comments. Even if the GAO grants the parties time extensions for commenting on agency filings, supplemental protest grounds (if any) must be raised within 10 days of whenever the protester knew or should have known of the new ground.

The timeline of a protest following Comments is not well-structured. If a supplemental protest is filed, or if the GAO wants to learn more about a certain issue, it will request supplemental briefing. This supplemental briefing often takes 3-4 weeks following comments to complete, but may be longer or shorter depending on the complexity of the issues. If the GAO requires a hearing – something that has been getting far more rare recently – it will likely hold the hearing shortly after the supplemental briefing, often around day 60-70 following the initial protest. This timing gives the GAO time to receive post-hearing briefs and draft its decision.

The GAO's decision, in all events, is due no later than 100 calendar days after the initial protest is filed. Although supplemental protests are separately docketed by the GAO, and formally have a new 100-day clock running, the GAO will in almost all cases issue a single decision on the initial protest and supplemental protest within 100 days of the initial protest filing. We will discuss in future portions of this series the meaning of the GAO's decision as well as off-ramps that may be taken by the GAO or parties prior to receiving the ultimate GAO decision.

August 31, 2017 - Post-Award Protest Primer Series

PROCEDURALLY NON-PROTESTABLE ISSUES (POST-AWARD PROTEST PRIMER #7)

By: Daniel Chudd and James Tucker

Before diving into the various protest grounds that may result in a sustained protest at the GAO, let's look at some sure losers. These are issues that are not protestable and would likely result in a quick dismissal. This week, we'll discuss procedurally defective protests. Our next post will look at substantive protest grounds that are expressly excluded from review.

Limited Task Order Jurisdiction

Pursuant to the GAO Civilian Task and Delivery Order Protest Authority Act of 2016 and the FY 2017 National Defense Authorization Act, the GAO was granted exclusive and permanent jurisdiction over task- and delivery-order protests for both civilian and Department of Defense (DOD) task orders. Unlike in past years, however, the dollar threshold for protestable task orders is different for civilian and DOD agencies: For civilian agencies a task order continues to be protestable only if the task order value exceeds $10 million; for DOD agencies the value must exceed $25 million for the task order to be protestable. Thus, any task order valued at below $10 million for civilian agencies, or below $25 million for DOD agencies, is not protestable. Notably, the $25 million threshold does not apply to task orders issued by DOD agencies under civilian-agency umbrella contracts. See Analytic Strategies LLC, B-413758.2, Nov. 28, 2016, 2016 CPD ¶ 340; HP Enterprise Services, LLC , B-413382.2, Nov. 30, 2016, 2016 CPD ¶ 343. NASA and the Coast Guard are considered defense agencies for purposes of the $25 million task order threshold. See 10 U.S.C. § 2303 (listing NASA among the agencies to which the chapter applies); 10 U.S.C. § 2304c (discussing task order protests); NCS Technologies, Inc., B-413500.2, Feb. 14, 2017, 2017 CPD ¶ 123 at 2 n.3 (referencing the $25 million threshold applicable to task orders issued under NASA umbrella contracts after the FY 2017 NDAA).

The GAO measures the contract value for purposes of the threshold at the value of the awarded contract. See Goldbelt Glacier Health Servs ., LLC, 2014 CPD ¶ 281 at 2 (stating that "where an order has in fact been issued by the government, we view the jurisdictional limit to turn on the value of the disputed order, which is reflected in the terms of the order itself"). Thus, if a task order is awarded at an amount below the threshold amount, the GAO will not hear a protest even if the protester's offer is above the threshold and technically superior. In the context of a pre-award protest, the GAO will

either look to the values of the remaining offers (if the challenge is to an exclusion from the competitive range) or to the government estimate to determine jurisdiction.

These thresholds (as well as the exclusive nature of the GAO's jurisdiction) do not apply where the protest alleges that the task order is out of scope of the contract or challenges a Federal Supply Schedule order. See Analytic Strategies LLC ; Gemini Indus., Inc., B-413758.2; B-413758.3, Nov. 28, 2016, 2015 CPD ¶ 334.

Lack of Standing

In all protests, the GAO will also consider whether the protester has standing to challenge the contract award. The GAO rules dictate that only an "interested party" may file a protest, and defines "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. 21.0(a)(1). For practical purposes in post-award protests, therefore, the protest must be filed by an actual bidder or offeror that did not receive a contract award. This means subcontractors (even substantial subcontractors) or other team members, individual joint venture partners, and mere investors may not file a protest, even if their direct economic interests may be affected by the award of the contract. Dash Engineering, Inc. ;Engineered Fabrics Corporation , B-246304, B-246304.8, B-246304.9, May 4, 1993, 93-1 CPD ¶ 363 ("A prospective subcontractor does not have the requisite interest to be an interested party because it is not a prospective or actual offeror."); Comark Bldg. Sys., Inc. , B-259515, Apr. 10, 1995, 95-1 CPD ¶ 188 at 2 n.1 (stating that a joint venture, not an individual venture partner, is the appropriate "interested party" to protest).

In addition, the GAO has held that a contract awardee does not have standing to challenge additional awards of Indefinite Delivery/Indefinite Quantity (IDIQ) contracts. See Nat'l Air Cargo Grp., Inc. , B-411830.2, Mar. 9, 2016, 2016 CPD ¶ 85 ("where a solicitation contemplates multiple awards, an existing contract awardee is not an interested party to challenge the agency's decision to award another contract."). As we discussed in an earlier post , however, the Court of Federal Claims broke from the GAO in this regard, and found that an awardee may have standing to challenge other firms' awards in a multiple-award IDIQ procurement. See Nat'l Air Cargo Grp., Inc. v. United States, 196 Fed. Cl. 281, 297 (2016).

Timeliness

In addition to the timeliness rules discussed in Part 3 of this series, post-award protests generally may not challenge the terms of a solicitation, patent ambiguities in the solicitation, or other solicitation improprieties. The GAO rules specify that challenges to a solicitation must be filed prior to the date for submission of proposals. 4 C.F.R. 21.2(a)(1) ("Protests based upon alleged improprieties in a

solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.”). Thus, arguments that the specifications are overly restrictive, that the solicitation does not meet the agency’s actual needs, or that the evaluation methodology is improper will be untimely if they are made after award, and protests on these bases will be dismissed if the alleged impropriety was apparent.

Similarly, an ambiguity that is apparent on the face of the solicitation – i.e., a patent ambiguity – must be challenged pre-award. Therefore, an argument that an evaluation was flawed because two parts of the solicitation are in conflict will be untimely if filed post-award and will be dismissed. Instead, post-award protesters may challenge only latent ambiguities, i.e., ambiguities in the Solicitation language (and the parties’ interpretation of that language) that become apparent only after award – for example, as a result of the agency’s disclosure of how it evaluated the protester’s proposal.

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THE FOREIGN CORRUPT PRACTICES ACT

Developments, Trends, and Practical Advice

Charles E. Duross and James M. Koukios

Date

FCPA Under Trump

- **Attorney General Jeff Sessions** (April 24, 2017):
  - "Our department wants to create an even playing field for law-abiding companies. We will continue to strongly enforce the FCPA and other anti-corruption laws. Companies should succeed because they provide superior products and services, not because they have paid off the right people."
- **SEC Chair Jay Clayton** (March 23, 2017):
  - "U.S. authorities, including the SEC, other financial regulators, and law enforcement agencies, both at home and abroad, play an important role in combating government corruption. I believe the FCPA can be a powerful and effective means to effect this objective. I also believe that international anti-corruption efforts are much more effective at combating corruption if non-U.S. authorities are similarly committed and seek to coordinate. Fortunately, international enforcement efforts appear to be more prevalent than they were a decade ago. If confirmed, I look forward to working with my fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws."

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FCPA Corporate Cases 2017: By the Numbers (To Date)

- **Corporate Enforcement Actions**
  - 7 SEC, 7 DOJ
- **Timing**
  - 4 SEC, 4 DOJ before inauguration day
- **Wide variety of industries**
  - Diagnostic equipment, food, gaming, extractive, medical device, telecom, and others
- **Geographic diversity**
  - 2016: Widespread, but heavy emphasis on China
  - 2017: Brazil (3), India (3), and Angola (2) lead the way
    - Also Azerbaijan, Chile, China, Colombia, Georgia, Iraq, Kazakhstan, Macao, Mexico, Thailand, Uzbekistan
- **Accounting Provision cases remain prominent**
  - 100% of SEC's cases in 2016 have included accounting charges
    - Of those, 86% were stand-alone accounting charges (no anti-bribery)
- **DOJ continues to pursue "declinations with disgorgement"**
  - 29% of DOJ's corporate resolutions in 2017

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FCPA PILOT PROGRAM

The Guidance

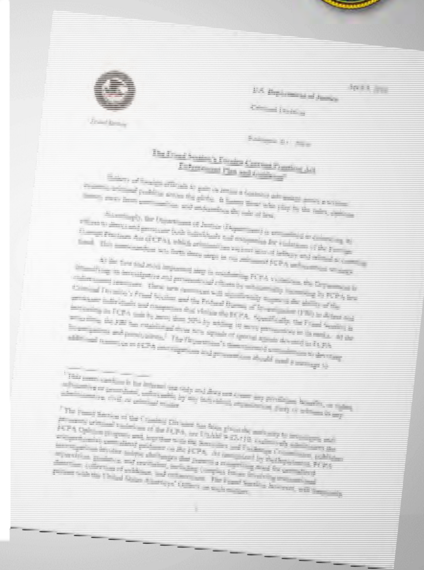
- Companies that meet requirements of program can receive up to a 50% discount off the potential fine range and generally won't have to retain a monitor

Three Requirements

1. Voluntary self-disclosure
2. Full cooperation
3. Timely and appropriate remediation

Disgorgement

- "[T]o be eligible for such credit, even a company that voluntarily self-discloses, fully cooperates, and remediates will be required to disgorge all profits resulting from the FCPA violation."



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Emphasis on Individuals

- DOJ's long-standing emphasis on prosecuting individuals was highlighted by the "Yates Memo" (September 2015)
- DOJ's FCPA Unit has tried—and convicted—three individuals this year for FCPA or money laundering
  - Real estate executive Ng Lap Seng (SDNY July 2017)
  - South Korean official Heon-Cheol Chi (CDCA July 2017)
  - Former Guinean official Mahmoud Thiam (SDNY May 2017)
- Numerous guilty pleas have been entered—and several more are expected by year end
- DOJ used undercover techniques and wiretaps to bring FCPA charges against Joseph Baptiste (August 2017)

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Key Legal Decisions in 2017

- ***Kokesh v. SEC*** (June 6, 2017)
  - Supreme Court held that SEC's ability to disgorge allegedly ill-gotten gains from defendants was subject to the five-year statute of limitation set out in 28 U.S.C. § 2462 for suits brought by the government to enforce "any civil fine, penalty, or forfeiture."
- ***U.S. v. Hoskins*** (argued March 2, 2017)
  - Second Circuit heard oral argument regarding DOJ's ability to charge foreign defendants for conspiring to violate the FCPA or aiding and abetting an FCPA violation.

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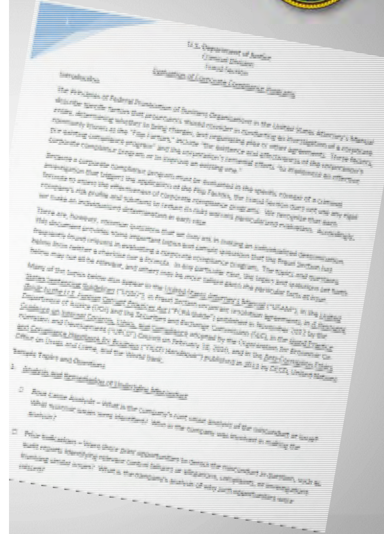
Evaluation of Corporate Compliance Programs

Eleven Categories of Questions:

- Analysis and Remediation of Underlying Misconduct
- Senior and Middle Management
- Autonomy and Resources
- Policies and Procedures
- Operational Integration
- Risk Assessment
- Training and Communications
- Confidential Reporting and Investigation
- Incentives and Disciplinary Measures
- Continuous Improvement, Periodic Testing and Review
- Third Party Management
- Mergers and Acquisitions



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QUESTIONS?

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FALSE CLAIMS ACT: ESCOBAR & CURRENT DIRECTIONS

Daniel Chudd & Rachael Plymale

Escobar & Implied Certification

- On June 16, 2016, the Supreme Court issued a landmark decision recognizing the "implied certification" theory of FCA liability.
- Under *Escobar*, implied certification liability may exist "at least where **two conditions** are satisfied: **first**, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and **second**, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."
- Materiality is the key issue under *Escobar.*
  - The FCA is not an "all-purpose antifraud statute" or a vehicle to punish "garden-variety breaches of contract or regulatory violations."

Escobar Sets the Materiality Bar High

- *Escobar* confirmed that the materiality requirement for all FCA claims is “rigorous” and “demanding.”
- Requires a showing more than that the government had the option to refuse payment had it known of the noncompliance, but that the government actually would have refused payment had it known.
- The Supreme Court held that “statutory, regulatory, and contractual requirements are not automatically material” and that the omission must “have a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”
- *Escobar* held that Government knowledge may disprove materiality, especially where it pays a claim (or regularly pays a type of claim) despite knowledge of contractual violations.
  - Key: What did the Government do after obtaining knowledge of the alleged violations?

Post-*Escobar* Questions

- *Escobar* both affirmed the use of the implied certification theory, but also (seemingly) placed significant limitations on its use through its clarification of the materiality standard.
- *Escobar* left open two major issues:

1. Whether both of *Escobar’s* “two conditions” must be satisfied to establish liability, *i.e.* is a “specific representation” necessary or is liability possible where a claim only implies compliance?
2. What is required to establish materiality?

"Specific Representations"

- A circuit split appears to be developing regarding whether a "specific representation" is required for implied certification liability.
- *United States ex rel. Badr v. Triple Canopy*, 775 F.3d 628 (4th Cir. 2015): *Escobar's* "two conditions" are not required for a certification claims.
  - Case involved a security contractor's claims for payment where it had falsified marksmenship scores for guards and then submitted invoices for the services of those unqualified guards.
  - 4th Circuit rejected defendant's argument that case should be dismissed because the defendant contractor had not (and was not required to) certify that its guards met all contractually required qualifications.
  - The panel held that omissions regarding the guards' qualifications was "squarely within the rule that half-truths .... can be actionable misrepresentations" regardless of the lack of "specific representation" regarding the qualifications.

"Specific Representations" (cont.)

- *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. 2017):
  - Case involved allegations that a contractor had failed to implement an earned value management (EVM) system as required by its subcontract and applicable cost regulations.
  - Although the Circuit did not explicitly hold that both of *Escobar's* "two conditions" must be satisfied, it reviewed both conditions and found that the "specific representation" condition had not been met.
  - The panel analyzed the contractor's claims and found that it had made no representations about its performance but rather simply stated time worked and costs/fees incurred. There was no evidence that the invoices "contained any false or inaccurate statements" and explained that "the FCA attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment" itself.
- *See also United States ex rel. Campie v. Gilead Sciences, Inc.*, (9th Cir. 2017) ("[t]o succeed on such a claim . . . [the defendant] must not merely request payment, but also make specific representations about the goods or services provided).

Proof of Materiality

- *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027 (D.C. Cir. 2017).
  - Case involved allegations that a contractor providing recreation services to servicemembers in Iraq inflated headcounts of personnel it served, making the costs it submitted to the government unreasonable and in violation of the FAR.
  - The DC Circuit affirmed the District Court dismissal of the claim for failing to submit sufficient evidence of materiality.
  - The DC Circuit noted the Supreme Court's emphasis on the fact that materiality must be support by evidence rather than speculation in finding that the relator had failed to prove – the relator had presented no record evidence – that the government would not have paid the claims had it known of the inflated headcounts.
  - The Circuit held that the claim relied on "the far-too-attenuated supposition that the Government *might* have had the 'option to decline to pay'" had it known of the contractor's inflated submission.

Government Knowledge & Materiality

- Several recent cases have noted the importance of the role of Government knowledge in determining the materiality of a claim.
  - *US ex rel. McBride v. Halliburton Co.:* "[C]ourts need not opine in the abstract when the record offers insight into the government's actual payment decisions...."
- Both the 3rd and 5th Circuits have held that where Government agencies are aware of misconduct but take no action, this may be indicative of the lack of materiality of the omission.
  - *Abbott v. BP Exploration & Production, Inc.*, 851 F.3d 384 (5th Cir. 2017): Lack of action against an oil company after both Interior and congressional investigations into its allegedly false certifications of regulatory compliance was "strong evidence" that regulations were "not material" to the decision to pay.

Government Knowledge & Materiality

- *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481 (3d Cir. 2017): Both Medicare's consistent reimbursement of claims when it had knowledge of the types of violations the defendant had allegedly made (failures to make adverse-event reports with the FDA) and FDA and DOJ's failure to take action against the company was evidence that "the expert agencies and government regulators have deemed these violations insubstantial" and thus not material to the decision to pay.

- However, Government knowledge is not dispositive:
  - *US ex rel. Campie v. Gilead.*: In finding that the FDA's approval of a drug despite knowledge of the defendant's alleged misrepresentations related to that drug did not constitute the type of Government knowledge and inaction found in other cases to demonstrate that a requirement was not materials, the Court stated that "to read too much into the FDA's continued approval—and its effect on the government's payment decision—would be a mistake."

Government Knowledge & Materiality

- *Escobar's* emphasis on the importance of Government knowledge has broadened the scope of discovery on issues related to the Government's knowledge and conduct, both in the claims at hand and in claims for similarly-situated entities.
- Both the 3rd Circuit in *US ex rel. Petratos v. Genentech* and the 4th Circuit in *US ex rel. Badr v. Triple Canopy* have relied on the Government's intervention decision in their materiality determinations.
  - Calls into question the notion that intervention decisions are not evidence of the Government's views of the merits of the case.
- Open Questions:
  - What level of knowledge is required to determine a claim is not material, *i.e.* allegations versus actual noncompliance?
  - Who in the government needs to know of the noncompliance for the defense to materiality to apply?
  - What is the relevancy of Government knowledge at the time of the claim for payment versus knowledge learned down the road?

Escobar & Motion Practice

- The *Escobar* Court importantly noted:
  - "We reject Universal Health's assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment. The standard for materiality that we have outlined is a familiar and rigorous one. And False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, for instance, pleading facts to support allegations of materiality."
- Based on this holding, a common theme to post-*Escobar* case law is the resolution of cases at the pleading stage, which greatly reduces litigation costs for contractors.
  - *US ex rel. Kelly v. Serco*: "[C]ourts can properly dismiss an FCA claim on summary judgment based on a claimant's failure to meet the rigorous standard for materiality under the FCA."

Beyond Escobar – What Else is Going On?

- Trends in FCA enforcement and settlements.
  - Government "veto" power over qui tam settlements remains
- Adjustments to statutory penalties
- Use of Statistical Sampling
- Public Disclosure Bar and Original Source exception jurisprudence
- Scienter and a "Knowing" submission in the context of ambiguity

FCA Enforcement and Penalties

- Government recovered more than $4.7 billion in settlements and judgments from fraud and FCA cases in FY 2016.
  - *Qui tam* cases accounted for $2.9B and number of cases continues to increase
  - Rigorous enforcement is likely to continue
- DOJ appears to have "absolute veto power" over relator-defendant settlements through litigation, even where Government has not intervened.
  - Fourth, Fifth, and Sixth Circuits have found FCA to be unambiguous
  - Ninth Circuit is an outlier
- Statutory penalties increased again
  - Large increase in penalties went into effect August 1, 2016
  - Smaller increase to account for inflation effective Feb. 3, 2017
  - Current per-claim penalties: $10,957 – $21,916
  - Assessed on violations occuring on or after Nov. 2, 2015

Statistical Sampling

- False Claims Act is silent as to whether and how statistical sampling may be used.
- Courts appear to be willing to allow the use of statistical sampling as a method to prove damages.
- Government and relators are now attempting to expand use for purposes of proving liability.
  - Use of statistical sampling to prove liability raises burden of proof issues as well as issues of meeting threshold requirements such as falsity.
  - *U.S. v. Vista Hospice Care, Inc.*, No. 3:07-CV-00604-M, 2016 WL 3449833 (N.D. Tex., June 20, 2016), held that use of extrapolation was "unreliable" for purposes of proving liability.
  - *United States v. Robinson*, 2015 WL 1479396, at *10 (E.D. Ky. Mar. 31, 2015), finding that "statistical sampling methods and extrapolation have been accepted in the Sixth Circuit and in other jurisdictions as reliable and acceptable evidence in determining facts related to FCA claims as well as other adjudicative facts.
- Fight over the use of statistical sampling is likely to continue.

Public Disclosure Bar

- "The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed … unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.." 31 U.S.C. § 3730(e)(4).
- Scope of public disclosure bar is often litigated (How disclosed? To whom? How similar?
- Defining who is an original source also a key topic
  - Pre-2010 definition requiring "direct and independent knowledge" still used in a few remaining cases.
  - Current definition of original source is a relator who either
    - voluntarily disclosed information to the Government prior to public disclosure <u>or</u>
    - has "knowledge that is independent of and materially adds to the publicly disclosed allegations" and disclosed prior to filing action.

"Knowing Submission"

- Relying on the ambiguity may provide some defense of knowing submission, but cannot be based on a *post hoc* analysis.
  - *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015), *cert denied*, 137 S. Ct. 625 (2017), held that a defendant did not submit a false claim "knowingly" as a result of a false certification to a material, but ambiguous regulation.
    - D.C. Circuit reviewed "objective reasonableness" of defendant's interpretation as well as whether the agency warned the defendant away from the interpretation.
  - *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. 2017), held that a finding of knowing submission cannot be precluded merely "by a defendant's identification of a reasonable interpretation of an ambiguous regulation."
    - Instead the question is whether the defendant "actually knew or should have known that its conduct violated a regulation in light of any ambiguity tat the time of the alleged violation."
    - Defendants should not be allowed to manufacture, *post hoc*, a reasonable interpretation if it knew of a different authoritative interpretation at the time.

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RESPONDING TO THE GLOBAL CYBER THREAT LANDSCAPE

John P. Carlin
Chair, Global Risk + Crisis Management

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INTRODUCTION

John P. Carlin

- Chair, Global Risk + Crisis Management, Morrison & Foerster LLP
- Former Assistant Attorney General for National Security, U.S. Department of Justice
  - Launched a nationwide outreach effort to raise awareness of national security, cyber, and espionage threats, and encourage greater C-suite involvement in corporate cybersecurity matters
  - Oversaw investigation into the attack on Sony Entertainment's computer systems
  - Brought an indictment against five members of the Chinese military for economic espionage
  - Created a threat analysis team to study potential national security challenges posed by the "Internet of Things"

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THE CURRENT THREAT LANDSCAPE

Incidents Increasing in Size and Scope

- Noticeable trend in past year alone
- More regulatory attention on cybersecurity breaches
- More countries are adopting data breach laws
- More countries adopting laws requiring specific security obligations
- Top-of-mind issue for C-suite in companies across the United States and increasing priority in other countries

What Would You Do?

- You're a mainstream retail company with a trusted brand. You get an email from your IT department that says, "We had a relatively unsophisticated hack, they took a small amount of personally identifiable information and names and addresses. We got it, nothing we haven't seen before. It's contained."
- IT comes back a couple of weeks later and says, "We just received, through Gmail, a demand for $500 in Bitcoin. If we don't pay it, they say they'll embarrass us by making public that our system was breached and that we lost these names and addresses."

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THE THREATS

Blended Threats:
The Blending of Criminal Activity with National Security

- Terrorists or state actors moonlighting as crooks or state actors using criminal groups as a way to distance themselves from the action
- In 2016, 18% of breaches were conducted by state-affiliated actors*
- Looks like a simple criminal act and too often goes unreported
- Case Studies:
  - Ardit Ferizi
  - Hacktivists / Wikileaks
  - Russia
  - Syrian Electronic Army
- Are your defenses as blended as the threat?
- Cooperation between businesses and law enforcement is vital

Ransomware

- Malware that encrypts or otherwise restricts access to a machine or device
- Polymorphic threat – tens of thousands of malware samples and variants
- More than half of 2016 breaches (51%) involved malware
- Hackers either lock systems so legitimate users cannot gain access, or threaten to take a system down unless a payment is made, often in a digital currency such as Bitcoin.
- To pay or not to pay? Sometimes there is seemingly no choice, but can be deemed to have given material support to terrorists if recipient is on OFAC list
  - FBI Guidance: "There are serious risks to consider before paying the ransom. We do not encourage paying a ransom." (Ransomware: What It Is and What To Do About it)
  - More technical guidance for CISOs (Ransomware Prevention and Response for CISOs)
- Attacks often go unreported to authorities

For more:
"8 Steps to Avoid Being the Victim of the Next Ransomware Attack"

Economic Espionage

- Instead of investing in research and development, actors (usually state actors) invest in the theft of information through cyber-enabled means
- In 2016, 21% of breaches were related to espionage*
- Has cost American companies hundreds of billions of dollars in losses and more than two million jobs
- Highlights that the threat is not limited to consumer data or IP anymore
- There is an urgent need to increase the cost of hacking U.S. businesses

For more:
"The Great Brain Robbery,"
CBS 60 Minutes, January 17, 2016

Weaponized Information

- Information can be used to delegitimize rivals and adversaries, to promote a hostile agenda, and to silence potential critics
- Can succeed by focusing on soft targets (e.g., email communications) that do not require sophisticated techniques to breach
- Examples:
  - Sony Entertainment hack was a warning sign and effort to intimidate film industry
  - Russian attempts to influence elections across Europe and undermine public faith in U.S. electoral system

For more:
"Sony CEO on How the Hack Changed Business," *Vanity Fair New Establishment Summit 2015*

Weaponized Information

- Need to fortify defenses beyond categories of information that are accorded heightened protection under legislation or regulation (e.g. consumer data, health data, etc.)
- What can be done?
  - Monitor social media
  - Have a rapid response communications plan in place
  - Structure your organization to respond to the business risk

Insider Threats

- Might be the most significant threat a company faces, and organizations should not overlook their importance
- Even accidental or negligent threats (e.g., those that result from human error) can create gaps for malicious actors to exploit
- Too often we see companies with great defenses to protect intellectual property and other secrets from external actors, but forget to implement a program to monitor trusted employees or other internal actors
  - Implement monitoring measures that flag anomalous behavior
  - Put access controls in place

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EMERGING THREATS
LESSONS LEARNED, & GOVERNMENT RESPONSE

Emerging Threats

Cyber as an Entry Point	Cyber has become a way for attacks to start, even when a cyber event is not the end result It is an entry point for other activity that isn't always directed towards information or information systems
Hacking for Hire	Trend toward creating easy to use "weaponized malware" that even less sophisticated actors can deploy Companies must be prepared to face an increasing number of sophisticated cyberattacks, and should expect to see attacks that seek to disclose information publicly rather than steal it
Cybersecurity in the IoT Era	Poses the risk of an increase in denial of service attacks, wherein compromised devices can be organized into "botnets" and used to disrupt internet service Important to consider risk when relying on "smart" devices and building them into your systems Practice security by design – focus on how terrorists and other cyber criminals can exploit new technologies

What Has the Government Done?

- We made important changes at DOJ to better share information about cyber threats within the government, breaking down barriers just as we did after 9/11 in the counterterrorism space
- Prosecutions and sanctions to highlight behavior that is unacceptable and a growing threat to the U.S. economy
- Enhanced partnership with the private sector on cybersecurity, including increased information sharing
- More improvement needed:
  - We heard clearly from our intelligence community that Russia used its cyber capabilities to try to interfere in the 2016 U.S. presidential election and will do so again
  - The threat of a North Korean cyber attack outmatches our current defenses

What is Law Enforcement Doing?

- Increased cooperation
- Attribution
- Presidential Policy Directive 41 - United States Cyber Incident Coordination
  - Organizes federal response activities into three lines of effort and establishes a federal lead agency for each:
    - **Threat response** – DOJ, acting through the FBI and the National Cyber Investigative Joint Task Force (NCIJTF);
    - **Asset response** – DHS, acting through the National Cybersecurity and Communications Integration Center (NCCIC); and
    - **Intelligence support and related activities** – The Office of the Director of National Intelligence, through the Cyber Threat Intelligence Integration Center

What are Regulators Doing?

- Looking to make examples
- Encouraging the reporting of cyber incidents
  - FTC – "In our eyes, a company that has reported a breach to the appropriate law enforcers and cooperated with them has taken an important step to reduce the harm from the breach. Therefore, in the course of conducting an investigation, it's likely we'd view that company more favorably than a company that hasn't cooperated." ("If the FTC comes to call," May 20, 2015)
  - SEC – "Although no existing disclosure requirement explicitly refers to cybersecurity risks and cyber incidents, a number of disclosure requirements may impose an obligation on registrants to disclose such risks and incidents." ("CF Disclosure Guidance: Topic No. 2, Cybersecurity," October 13, 2011)
    - SEC rule on material false statements (Rule 10b-5, 17 CFR 240.10b-5)

Stakes of Breach Now Higher?

- The stakes of a breach are potentially higher now in light of a D.C. Circuit Court ruling that the risk of *future* harm can be enough to meet the *Spokeo* standing bar in a data breach case.
- If this trend continues in other courts, it will become easier for individuals and groups to bring lawsuits following a breach, regardless of harm.
  - Read more on this topic: "Data Breach Suits Find Easier Path With DC Circ. Ruling," *Law360*, 8/3/2017

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WHAT CAN YOU DO?

What Can You Do?

- Treat cyber events as an inevitability
  - Understand that there are no walls high enough to prevent every attack. Shift focus to risk management and incident response planning
  - Know what you've got and where it is – don't label the crown jewels
  - Plan now for how you will respond to for future attacks
- Monitor, monitor, monitor!
  - Implement a system that monitors what is going on from a risk standpoint
  - Immediately identify and correct anomalies
- Implement access controls
  - Business decision – who has access and who doesn't
  - Limit access to sensitive information to individuals who really need it
  - Those with access have to know how they can use it and understand the risks
  - Multifactor authentication is becoming standard

What Can You Do?

- Segment your network
- Review supply chains (agreements, participants)
- Train employees
- Draft or update your incident response plan ***now***
  - Test it in realistic simulated tabletop exercises
- Build relationships with law enforcement
  - Know who you will contact depending on the type of incident
  - Establish those relationships now. It will be too late to do so once you are in crisis
  - Agree on whom within your organization will make the call

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CYBERSECURITY CONSIDERATIONS FOR GOVERNMENT CONTRACTORS

John Carlin, Chair, Global Risk + Crisis Management
Tina Reynolds, Partner, Government Contracts

Date

Data Security Incidents

- Increasing in size and scope in past year alone
- More regulatory attention on cybersecurity breaches
- More countries are adopting data breach laws
- More countries adopting laws requiring specific security obligations
- Top-of-mind issue for C-suite in companies across the United States and increasing priority in other countries

Lessons Learned from Breaches

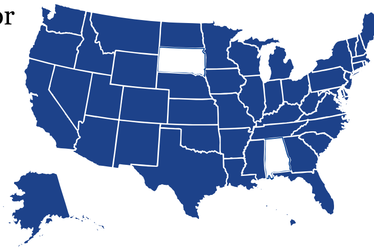
- Too many individuals needed to make every decision
- Team lacked authority to make decisions
- Team lacked the skills and ability to coordinate
- Process was not well thought out and did not fit realities of company
- Lack of practice on incident response plan
- Lack of resiliency planning (i.e. no back up for communication failure)
- Tools available to team not properly calibrated to provide needed information
- Data needed to identify and remedy problem not available

Legal Trends

- Broad Data Security Admonitions
- Breach Notification Laws
- Data Security Laws
- Data Localization
- Rules for Critical Infrastructure

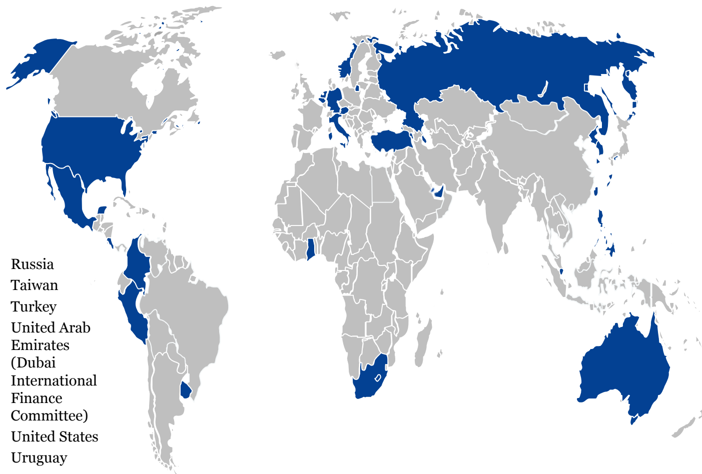
U.S. State Breach Notification Laws

- 48 States plus District of Columbia, Puerto Rico, Guam and U.S. Virgin Islands
- Relevant law is where the individual resides
- Personal Information Covered: Name plus SSN, drivers license numbers, financial account numbers, health information (California) and user names and passwords (California and Florida)
- Trigger – Unauthorized access and/or acquisition of covered personal information (most states computerized data)



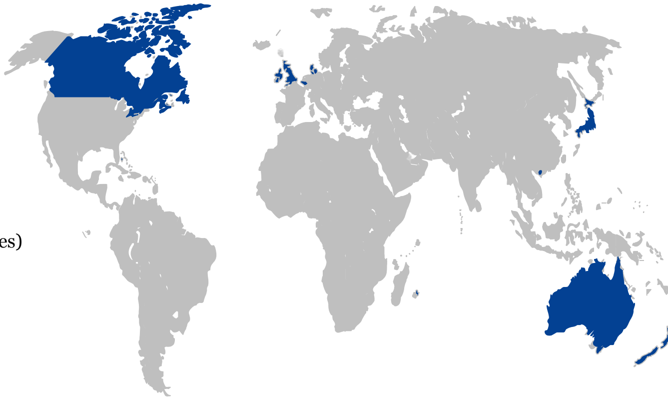
Countries with Mandatory Breach Notification Laws

- Armenia
- Austria
- Australia
- Canada (Alberta, Federal not yet in force)
- Colombia
- Costa Rica
- Germany
- Ghana
- Italy
- Japan (Financial Services Agency)
- Korea
- Lesotho
- Mexico
- Netherlands
- Norway
- Peru
- Philippines
- Qatar
- Russia
- Taiwan
- Turkey
- United Arab Emirates (Dubai International Finance Committee)
- United States
- Uruguay



Countries with Voluntary Guidelines

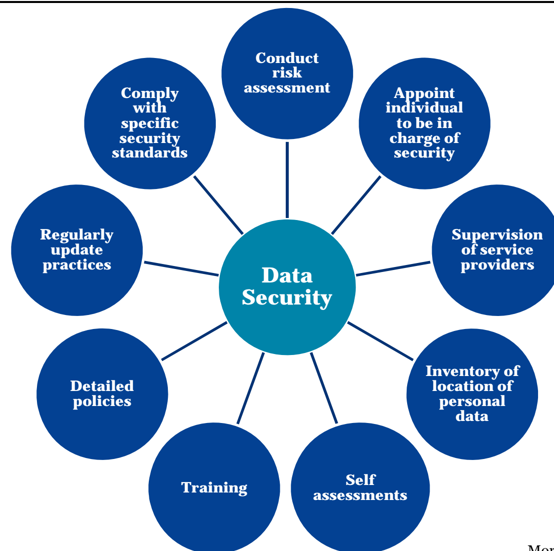
- Australia
- Bahamas
- Belgium
- Bermuda (law not yet in force)
- Canada (Federal; Alberta Mandatory)
- Denmark
- Hong Kong
- Ireland
- Japan (non-financial services)
- Mauritius
- New Zealand
- Singapore
- United Kingdom



Ramifications of a Breach

State/Federal Agencies	Litigation	Other
• State AGs • FTC • SEC	• Consumer Class Actions • Financial Institutions • Shareholder litigation	• Voting members off the Board • Negative PR • Consumer trust • 20 year relationship with regulators • Cyber Insurance • Demands of customers

Data Security Program Elements



Incident Response Planning

- The cornerstone of any company's cyber preparedness and response
- Update regularly based on the current threat environment
- Query whether it would actually be helpful in responding to a high-profile nationwide or global data security breach
- Ensure that it includes a list of key contacts and contact information, and that you have a printed copy in case the breach impacts your company's electronic system
- **Practice it!**
  - Operational leaders should participate in table top exercises to establish clear working relationships and decision-making paths:
    - Who will make the crucial decisions?
    - Who must be consulted?
  - Tabletop serves as a training vehicle and brings together the core members of the response team (IT, HR, compliance, legal, communications) to practice working together
  - Executive Tabletop Exercise and role of the Board

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GOVERNMENT CONTRACTOR SPECIFIC CYBERSECURITY CONSIDERATIONS

Considerations unique to government contractors

Protection is required for:

- Federal contract information ("FCI")
- Controlled unclassified information ("CUI")
- Covered defense information ("CDI")
- Data in the cloud
- Systems run for government agencies
- Classified systems

Breach disclosure required for:

- All DoD contracts
- Others only specified

Federal Contract Information

FAR 52.204-21, "Basic Safeguarding of Covered Contractor Information Systems" (Jun 2016)

- Applies to all contracts except those for COTS
- 15 specific safeguarding requirements for contractor IT systems with any "Federal contract information"

"Federal contract information" means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (such as on public Web sites) or simple transactional information, such as necessary to process payments.

Controlled Unclassified Information

- NARA Final Rule
  - Clarifies and makes uniform the treatment of CUI
  - Establishes CUI Registry as central repository for all guidance, policy, instructions, and information pertaining to CUI
- Directly applies only to federal agencies, but requirements indirectly extend to contractors
  - Anticipated draft and final FAR clause will further implement this directive for federal contractors
  - Controls based on NIST SP 800-171, "Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations"
- Information falls into one of four classifications:
  - Classified Information
  - CUI Basic
  - CUI Specified
  - Uncontrolled Unclassified Information

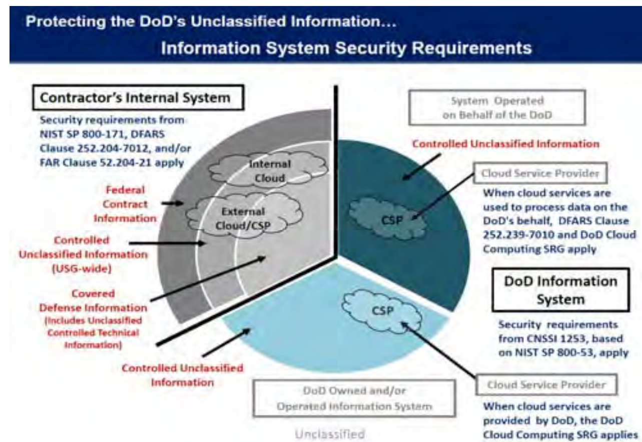
Covered Defense Information

- DFARS 252.204-7012, , "Safeguarding covered defense information and cyber incident reporting" (Oct. 2016)
  - Requires "adequate security" for systems with covered defense information
  - measured through implementation of NIST 800-171 standard
  - full implementation by December 31, 2017
  - notification of non-compliance in the meanwhile (at least within 30 days of award, often with proposal)
- Recent guidance from DoD: "implementation" means have: (1) system security plan (SSP) in place, and (2) plan of action and milestones (POAM) to address any gaps

Special Situations

- Data in the cloud
  - Need to use a FedRAMP certified system
  - DoD Cloud computing Security Requirements Guide (SRG) and DFARS 252.239-7010 apply
- IT Systems run for government agencies
  - NIST 800-53 standards apply
  - More strict controls than NIST 800-171
- Classified environments

Summary of USG cybersecurity systems



Slide courtesy of : Defense Procurement & Acquisition Policy guidance presentation, available at: http://www.acq.osd.mil/dpap/pdi/docs/p2p%20training%20presentations/Cybersecurity%20Initiatives%20&%20Requirements.pdf

Cyber Incident Reporting

- No specific FAR requirement for non-DoD agencies
- DoD "network penetration" rule (DFARS 252.204-7012)
  - Extends to all covered defense information
  - "*Cyber incident* means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein."
  - Rapid reporting (within 72 hours of discovery) required

Best Practice Tips

- Be aware of all your cybersecurity obligations.
- Have a plan in place for detecting and responding to cyber incidents, including any reporting requirements. Practice it.
- If you have DoD contracts (and even if you don't) perform an audit versus NIST 800-171 requirements, or have an audit performed by a third party.
- Create a system security plan and a POAM to address any identified gaps.
- Consider how you will pay for any necessary improvements. Can you include as direct/indirect expense in your contracts?
- Ensure that necessary cybersecurity requirements are communicated to your subcontractors, and that subs are held accountable for compliance.

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RESOURCES & MATERIALS

Resources and materials

- Federal Information Security Management Act of 2002 (FISMA) https://www.gpo.gov/fdsys/pkg/PLAW-107publ347/pdf/PLAW-107publ347.pdf
- Executive Order 13556, "Controlled Unclassified Information," (Nov. 2010) https://obamawhitehouse.archives.gov/the-press-office/2010/11/04/executive-order-13556-controlled-unclassified-information
- Executive Order 13636, Improving Critical Infrastructure Cybersecurity (Feb. 2013) https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity
- Executive Order, "Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure" (May 11, 2017) https://www.whitehouse.gov/the-press-office/2017/05/11/presidential-executive-order-strengthening-cybersecurity-federal
- 2017 FISMA report to Congress https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/fy_2016_fisma_report%20to_congress_official_release_march_10_2017.pdf

Resources and materials (cont.)

- NIST Special Publication 800-171, Rev. 1 http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-171r1.pdf
- NIST Special Publication 800-53, v.5, Security and Privacy Controls for Information Systems and Organizations https://csrc.nist.gov/csrc/media/publications/sp/800-53/rev-5/draft/documents/sp800-53r5-draft.pdf
- DoD's June 23, 2017 Industry Information Day charts http://dodprocurementtoolbox.com/site-pages/cybersecurity-other-resources
- Office of the Under Secretary of Defense, Memorandum: "Implementation of DFARS Clause 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting" (Sept. 21, 2017) http://www.acq.osd.mil/dpap/policy/policyvault/USA002829-17-DPAP.pdf
- Defense Procurement & Acquisition Policy guidance http://www.acq.osd.mil/dpap/pdi/docs/p2p%20training%20presentations/Cybersecurity%20Initiatives%20&%20Requirements.pdf

Resources and materials (cont.)

FAR 52.204-21 Basic Safeguarding of Covered Contractor Information Systems (JUN 2016)

(a)Definitions. As used in this clause -
Covered contractor information system means an information system that is owned or operated by a contractor that processes, stores, or transmits Federal contract information.

Federal contract information means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (such as on public Web sites) or simple transactional information, such as necessary to process payments.

Information means any communication or representation of knowledge such as facts, data, or opinions, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual (Committee on National Security Systems Instruction (CNSSI) 4009).

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502).

Safeguarding means measures or controls that are prescribed to protect information systems.

(b)Safeguarding requirements and procedures.

(1) The Contractor shall apply the following basic safeguarding requirements and procedures to protect covered contractor information systems. Requirements and procedures for basic safeguarding of covered contractor information systems shall include, at a minimum, the following security controls:

Resources and materials (cont.)

(i) Limit information system access to authorized users, processes acting on behalf of authorized users, or devices (including other information systems).

(ii) Limit information system access to the types of transactions and functions that authorized users are permitted to execute.

(iii) Verify and control/limit connections to and use of external information systems.

(iv) Control information posted or processed on publicly accessible information systems.

(v) Identify information system users, processes acting on behalf of users, or devices.

(vi) Authenticate (or verify) the identities of those users, processes, or devices, as a prerequisite to allowing access to organizational information systems.

(vii) Sanitize or destroy information system media containing Federal Contract Information before disposal or release for reuse.

(viii) Limit physical access to organizational information systems, equipment, and the respective operating environments to authorized individuals.

(ix) Escort visitors and monitor visitor activity; maintain audit logs of physical access; and control and manage physical access devices.

(x) Monitor, control, and protect organizational communications (i.e., information transmitted or received by organizational information systems) at the external boundaries and key internal boundaries of the information systems.

(xi) Implement subnetworks for publicly accessible system components that are physically or logically separated from internal networks.

Resources and materials (cont.)

(xii) Identify, report, and correct information and information system flaws in a timely manner.

(xiii) Provide protection from malicious code at appropriate locations within organizational information systems.

(xiv) Update malicious code protection mechanisms when new releases are available.

(xv) Perform periodic scans of the information system and real-time scans of files from external sources as files are downloaded, opened, or executed.

(2)Other requirements. This clause does not relieve the Contractor of any other specific safeguarding requirements specified by Federal agencies and departments relating to covered contractor information systems generally or other Federal safeguarding requirements for controlled unclassified information (CUI) as established by Executive Order 13556.

(c)Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts under this contract (including subcontracts for the acquisition of commercial items, other than commercially available off-the-shelf items), in which the subcontractor may have Federal contract information residing in or transiting through its information system.

Resources and materials (cont.)

DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting (OCT 2016)

(a)Definitions. As used in this clause -

Adequate security means protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information.

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized intentional or unintentional disclosure, modification, destruction, or loss of an object, or the copying of information to unauthorized media may have occurred.

Contractor attributional/proprietary information means information that identifies the contractor(s), whether directly or indirectly, by the grouping of information that can be traced back to the contractor(s) (e.g., program description, facility locations), personally identifiable information, as well as trade secrets, commercial or financial information, or other commercially sensitive information that is not customarily shared outside of the company.

Controlled technical information means technical information with military or space application that is subject to controls on the access, use, reproduction, modification, performance, display, release, disclosure, or dissemination. Controlled technical information would meet the criteria, if disseminated, for distribution statements B through F using the criteria set forth in DoD Instruction 5230.24, Distribution Statements on Technical Documents. The term does not include information that is lawfully publicly available without restrictions.

Covered contractor information system means an unclassified information system that is owned, or operated by or for, a contractor and that processes, stores, or transmits covered defense information.

Resources and materials (cont.)

Covered defense information means unclassified controlled technical information or other information, as described in the Controlled Unclassified Information (CUI) Registry at http://www.archives.gov/cui/registry/category-list.html, that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is -

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the contractor by or on behalf of DoD in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

Forensic analysis means the practice of gathering, retaining, and analyzing computer-related data for investigative purposes in a manner that maintains the integrity of the data.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Malicious software means computer software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of an information system. This definition includes a virus, worm, Trojan horse, or other code-based entity that infects a host, as well as spyware and some forms of adware.

Media means physical devices or writing surfaces including, but is not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which covered defense information is recorded, stored, or printed within a covered contractor information system.

Resources and materials (cont.)

Operationally critical support means supplies or services designated by the Government as critical for airlift, sealift, intermodal transportation services, or logistical support that is essential to the mobilization, deployment, or sustainment of the Armed Forces in a contingency operation.

Rapidly report means within 72 hours of discovery of any cyber incident.

Technical information means technical data or computer software, as those terms are defined in the clause at DFARS 252.227-7013, Rights in Technical Data - Noncommercial Items, regardless of whether or not the clause is incorporated in this solicitation or contract. Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

(b)Adequate security. The Contractor shall provide adequate security on all covered contractor information systems. To provide adequate security, the Contractor shall implement, at a minimum, the following information security protections:

(1) For covered contractor information systems that are part of an information technology (IT) service or system operated on behalf of the Government, the following security requirements apply:

(i) Cloud computing services shall be subject to the security requirements specified in the clause 252.239-7010, Cloud Computing Services, of this contract.

(ii) Any other such IT service or system (i.e., other than cloud computing) shall be subject to the security requirements specified elsewhere in this contract.

(2) For covered contractor information systems that are not part of an IT service or system operated on behalf of the Government and therefore are not subject to the security requirement specified at paragraph (b)(1) of this clause, the following security requirements apply:

Resources and materials (cont.)

(i) Except as provided in paragraph (b)(2)(ii) of this clause, the covered contractor information system shall be subject to the security requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171, "Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations" (available via the internet at http://dx.doi.org/10.6028/NIST.SP.800-171) in effect at the time the solicitation is issued or as authorized by the Contracting Officer.

(ii)(A) The Contractor shall implement NIST SP 800-171, as soon as practical, but not later than December 31, 2017. For all contracts awarded prior to October 1, 2017, the Contractor shall notify the DoD Chief Information Officer (CIO), via email at osd.dibcsia@mail.mil, within 30 days of contract award, of any security requirements specified by NIST SP 800-171 not implemented at the time of contract award.

(B) The Contractor shall submit requests to vary from NIST SP 800-171 in writing to the Contracting Officer, for consideration by the DoD CIO. The Contractor need not implement any security requirement adjudicated by an authorized representative of the DoD CIO to be nonapplicable or to have an alternative, but equally effective, security measure that may be implemented in its place.

(C) If the DoD CIO has previously adjudicated the contractor's requests indicating that a requirement is not applicable or that an alternative security measure is equally effective, a copy of that approval shall be provided to the Contracting Officer when requesting its recognition under this contract.

Resources and materials (cont.)

(3) Apply other information systems security measures when the Contractor reasonably determines that information systems security measures, in addition to those identified in paragraphs (b)(1) and (2) of this clause, may be required to provide adequate security in a dynamic environment or to accommodate special circumstances (e.g., medical devices) and any individual, isolated, or temporary deficiencies based on an assessed risk or vulnerability. These measures may be addressed in a system security plan.

(c) Cyber incident reporting requirement.

(1) When the Contractor discovers a cyber incident that affects a covered contractor information system or the covered defense information residing therein, or that affects the contractor's ability to perform the requirements of the contract that are designated as operationally critical support and identified in the contract, the Contractor shall -

(i) Conduct a review for evidence of compromise of covered defense information, including, but not limited to, identifying compromised computers, servers, specific data, and user accounts. This review shall also include analyzing covered contractor information system(s) that were part of the cyber incident, as well as other information systems on the Contractor's network(s), that may have been accessed as a result of the incident in order to identify compromised covered defense information, or that affect the Contractor's ability to provide operationally critical support; and

(ii) Rapidly report cyber incidents to DoD at http://dibnet.dod.mil.

(D) If the Contractor intends to use an external cloud service provider to store, process, or transmit any covered defense information in performance of this contract, the Contractor shall require and ensure that the cloud service provider meets security requirements equivalent to those established by the Government for the Federal Risk and Authorization Management Program (FedRAMP) Moderate baseline (https://www.fedramp.gov/resources/documents/) and that the cloud service provider complies with requirements in paragraphs (c) through (g) of this clause for cyber incident reporting, malicious software, media preservation and protection, access to additional information and equipment necessary for forensic analysis, and cyber incident damage assessment.

Resources and materials (cont.)

(2) Cyber incident report. The cyber incident report shall be treated as information created by or for DoD and shall include, at a minimum, the required elements at http://dibnet.dod.mil.

(3) Medium assurance certificate requirement. In order to report cyber incidents in accordance with this clause, the Contractor or subcontractor shall have or acquire a DoD-approved medium assurance certificate to report cyber incidents. For information on obtaining a DoD-approved medium assurance certificate, see http://iase.disa.mil/pki/eca/Pages/index.aspx.

(d) Malicious software. When the Contractor or subcontractors discover and isolate malicious software in connection with a reported cyber incident, submit the malicious software to DoD Cyber Crime Center (DC3) in accordance with instructions provided by DC3 or the Contracting Officer. Do not send the malicious software to the Contracting Officer.

(e) Media preservation and protection. When a Contractor discovers a cyber incident has occurred, the Contractor shall preserve and protect images of all known affected information systems identified in paragraph (c)(1)(i) of this clause and all relevant monitoring/packet capture data for at least 90 days from the submission of the cyber incident report to allow DoD to request the media or decline interest.

(f) Access to additional information or equipment necessary for forensic analysis. Upon request by DoD, the Contractor shall provide DoD with access to additional information or equipment that is necessary to conduct a forensic analysis.

(g) Cyber incident damage assessment activities. If DoD elects to conduct a damage assessment, the Contracting Officer will request that the Contractor provide all of the damage assessment information gathered in accordance with paragraph (e) of this clause.

(h) DoD safeguarding and use of contractor attributional/proprietary information. The Government shall protect against the unauthorized use or release of information obtained from the contractor (or derived from information

Resources and materials (cont.)

obtained from the contractor) under this clause that includes contractor attributional/proprietary information, including such information submitted in accordance with paragraph (c). To the maximum extent practicable, the Contractor shall identify and mark attributional/proprietary information. In making an authorized release of such information, the Government will implement appropriate procedures to minimize the contractor attributional/proprietary information that is included in such authorized release, seeking to include only that information that is necessary for the authorized purpose(s) for which the information is being released.

(i) Use and release of contractor attributional/proprietary information not created by or for DoD. Information that is obtained from the contractor (or derived from information obtained from the contractor) under this clause that is not created by or for DoD is authorized to be released outside of DoD -

(1) To entities with missions that may be affected by such information;

(2) To entities that may be called upon to assist in the diagnosis, detection, or mitigation of cyber incidents;

(3) To Government entities that conduct counterintelligence or law enforcement investigations;

(4) For national security purposes, including cyber situational awareness and defense purposes (including with Defense Industrial Base (DIB) participants in the program at 32 CFR part 236); or

(5) To a support services contractor ("recipient") that is directly supporting Government activities under a contract that includes the clause at 252.204-7009, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

(j)Use and release of contractor attributional/proprietary information created by or for DoD. Information that is obtained from the contractor (or derived from information obtained from the contractor) under this clause that is created by or for DoD (including the information submitted pursuant to paragraph (c) of this clause) is authorized to be used and released outside of DoD for

Resources and materials (cont.)

purposes and activities authorized by paragraph (i) of this clause, and for any other lawful Government purpose or activity, subject to all applicable statutory, regulatory, and policy based restrictions on the Government's use and release of such information.

(k) The Contractor shall conduct activities under this clause in accordance with applicable laws and regulations on the interception, monitoring, access, use, and disclosure of electronic communications and data.

(l)Other safeguarding or reporting requirements. The safeguarding and cyber incident reporting required by this clause in no way abrogates the Contractor's responsibility for other safeguarding or cyber incident reporting pertaining to its unclassified information systems as required by other applicable clauses of this contract, or as a result of other applicable U.S. Government statutory or regulatory requirements.

(m)Subcontracts. The Contractor shall -

(1) Include this clause, including this paragraph (m), in subcontracts, or similar contractual instruments, for operationally critical support, or for which subcontract performance will involve covered defense information, including subcontracts for commercial items, without alteration, except to identify the parties. The Contractor shall determine if the information required for subcontractor performance retains its identity as covered defense information and will require protection under this clause, and, if necessary, consult with the Contracting Officer; and

(2) Require subcontractors to -

(i) Notify the prime Contractor (or next higher-tier subcontractor) when submitting a request to vary from a NIST SP 800-171 security requirement to the Contracting Officer, in accordance with paragraph (b)(2)(ii)(B) of this clause; and

(ii) Provide the incident report number, automatically assigned by DoD, to the prime Contractor (or next higher-tier subcontractor) as soon as practicable, when reporting a cyber incident to DoD as required in paragraph (c) of this clause.

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WHAT ELSE TO EXPECT FROM THIS CONGRESS AND ADMINISTRATION

Bradley Wine & Catherine Chapple

Date

Regulatory Reform

- Significant **focus** for this administration.
  - “One In, Two Out” E.O.
  - Regulatory Accountability Act
- Pulling or suspending 860 **pending** regulations.
- President Trump has promised to eliminate 80 percent of **all** federal regulations.
  - 80% is not likely to happen but have already had success.

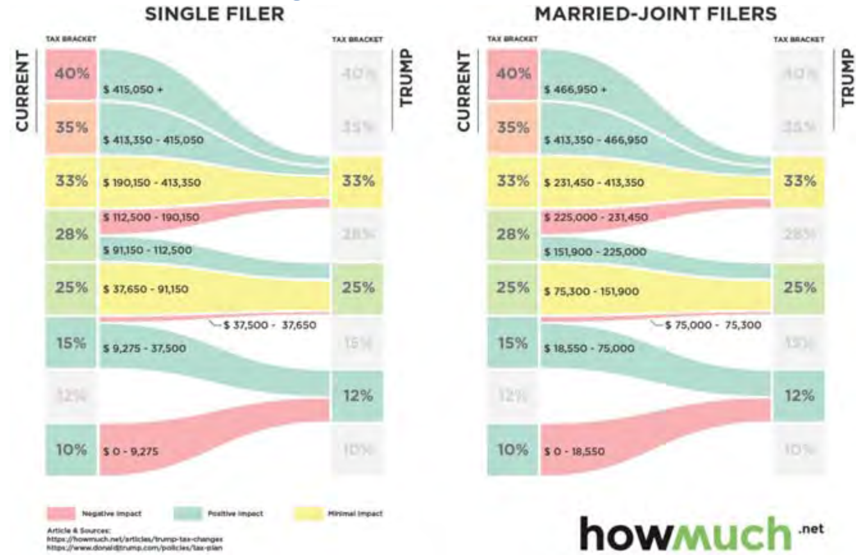
Regulatory Reform

- Early success using the **Congressional Review Act** (CRA).
  - CRA – 1996 law, had only been used successfully **one** time previously.
- This year, Congress used it to **repeal 14 regulations**, including:
  - Fair Pay and Safe Workplaces rule
  - Five-year Record of Workplace Injuries
  - Broadband Data Collection

Tax Reform

- Senate passed a **budget plan** last week. Tax reform is currently in the House.
- GOP goal is to pass Senate budget by the **end of this week** (10/27).
- House may propose **new top income tax rate** for high earners in addition to the 35% rate proposed in the recent tax framework.
  - That framework calls for just **three** tax rates -- **12%, 25% and 35%** but allows for a potential fourth.
  - Fourth rate may be **lower** than today's 39.6%, but no details yet.

Bracket Changes



Tax Reform

GOP Goals:

- Reduce **corporate rate** to 20% from 35%.
- **Double** standard deduction.
- Eliminate tax breaks to **simplify code**.
  - Trump tweet: won’t eliminate 401(k) retirement program tax incentives.
  - Mortgage interest deduction likely safe.
- Add no more than $1.5 trillion to **deficits** over 10 years.

Infrastructure

- Trump no longer favors **private investment** as way to pay for federal infrastructure projects.
- A surprising reversal: for first 9 months of 2017, administration had been advocating for private investment; investors have lined up tens of billions of dollars.
- **$1 trillion** in infrastructure spending needed.
- American Society of Civil Engineers has given current system, including the nation's roads, bridges, tunnels and sewer lines, a grade of a **D+**.

Air Traffic Control Privatization

- Would **remove** air traffic control from FAA and create an **independent nonprofit** to run it.
- Governed by a board including the transportation secretary, people nominated by the airline companies and representatives of the air traffic controllers' and pilots' unions.
- Board would be funded through **user fees**.

Appropriations Acts

- The Senate and the House passed competing National Defense Authorization Acts (NDAA) in September.
- Chambers **conferencing** to resolve differences in bills.
- Some key differences:
  - House has proposed to create a **new Space Corps**; Senate and DOD don't agree.
  - Acquisition reform –
    - Senate bill would make significant changes to **GAO bid protest process**.
    - House seeks to set up "Amazon-like" COTS marketplace.

Acquisition Reform - GAO

- Senate NDAA – Sections 821 & 822:
- Section 821: Make **more information** available to disappointed offerors.
  - Written source selection award determination.
  - Combined written and oral debriefing for awards/T.O. >$10 million.
  - Unredacted copy of award document and agency record to outside counsel or consultant under P.O.
  - Opportunity to ask follow-up questions during debriefing.

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PROCUREMENT INTEGRITY, CONFLICTS OF INTEREST & COMPETITOR INFORMATION:

STAYING COMPETITIVE AND COMPLIANT

Alex Ward & Sandeep Nandivada

Agenda

- Legal Framework:
  - Procurement Integrity
  - Conflicts of Interest
  - Competitor Information
- Practical Guidelines
- Scenarios

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LEGAL FRAMEWORK: PROCUREMENT INTEGRITY ACT

Procurement Integrity Act

Background:

- Passed in 1988 when the Operation Ill Wind investigation revealed "the seedy trade of favors and information" between Pentagon consultants, former employees, and contractors.
- Intended to prevent "trafficking" in procurement information and conflicts of interest involving procurement personnel.
- Codified at 41 U.S.C. § 2101 and FAR 3.104.

Procurement Integrity Act

Three primary restrictions:

- Prohibits knowing disclosure or receipt of contractor bid or proposal information or government source selection information;
- Regulates employment discussions between government procurement employees and contractors; and
- Prohibits compensation by a contractor to certain former government employees for one year.

Procurement Integrity Act

Restriction on access to information:

- Offerors may not knowingly obtain certain types of information about a pending procurement:
  - Another contractor’s bid or proposal information
  - Government source selection information
- A government employee may not knowingly provide this information except under specifically defined circumstances (e.g., a debriefing).

Procurement Integrity Act

What is Contractor Bid or Proposal Information?

- Any information submitted in connection with a bid or proposal that has not previously been made public.
- This includes:
  - Cost or pricing data
  - Indirect costs and direct labor rates
  - Proprietary information, marked appropriately
  - Information properly marked by the contractor as bid or proposal information

Procurement Integrity Act

What is Source Selection Information?

- Government information not available to the public that is prepared for use by an agency in evaluating proposals.
- For example:
  - Evaluation plans
  - Government estimates
  - Rankings, evaluations , or evaluation reports on bids, proposals, or competitors
  - Competitive range determinations
  - Other information marked as “source selection information”

Procurement Integrity Act

Penalties for violation:

- Criminal
  - 5 years in prison.
- Civil
  - $500,000 fine for corporations or $50,000 fine for individuals, plus twice the amount of any compensation received or offered.
- Administrative
  - Cancel procurement and/or disqualify offeror.
  - Rescind or terminate contract, plus re-procurement costs.
  - Suspend & debar for lack of present responsibility.

Procurement Integrity Act

Enforcement:

- Druyun/Boeing affair, 2003-04
  - Air Force procurement official steered a large tanker contract toward Boeing and provided proprietary information about a competitor while in employment discussions with Boeing.
  - She was sentenced to nine months in prison.
  - Boeing's CFO also pled guilty.
- Even without criminal or civil penalties, contracting officers may disqualify an offeror based on the mere appearance of impropriety.

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LEGAL FRAMEWORK: CONFLICTS OF INTEREST

Organizational Conflicts of Interest

Organizational Conflicts of Interest arise where a contractor gains a competitive advantage as a result of:

- Unequal access to information (e.g., obtaining non-public, competitively useful to which other competitors do not have access).
- Establishing the ground rules for a competition (e.g., SOW or systems engineering and technical direction work).
- Impaired objectivity (e.g., grading its own performance, or that of an affiliate or subcontractor, under another contract).

Codified at FAR subpart 9.5.

Even if not unlawful under the PIA, unequal access to information may lead to an OCI.

Mitigating OCIs

Unequal Access to Information

- Firewalling employees
- Releasing the non-public, competitively useful information to all competitors

Biased Ground Rules

- Avoidance

Impaired Objectivity

- Firewalling subcontractors or affiliates
- Strategic subcontracting with unbiased supervision

Personal Conflicts of Interest

- Contractor employees who work on government contracts for acquisition support must act impartially and may not use their position for personal gain.
- PCIs can arise as a result of:
  - Family or personal relationships
  - Financial investments or interests
  - Employment negotiations
  - Travel or consulting
- May require reporting, non-disclosure agreements, and/or screens.
- Codified at FAR subpart 3.11.

PIA & OCI Protest Statistics

Protests Filed At GAO & CoFC Since 1/1/2017*			
	OCI	PCI	PIA
GAO	6 Unsuccessful 3 Successful**	1 Unsuccessful	3 Unsuccessful 1 Successful
COFC	2 Unsuccessful	N/A	N/A

*Data compiled 10/3/2017
**Includes denial of agency request for reconsideration

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LEGAL FRAMEWORK: COMPETITOR INFORMATION

Competitor Information

Trade Secrets:

- A trade secret is information (*e.g.*, formula, program, device, process) that:
  - has independent economic value;
  - is not known or readily ascertainable; and
  - is subject to efforts to maintain its secrecy.
- Misappropriation occurs when trade secrets are obtained by improper means.
  - What is proper vs. improper is not always clear.
  - Improper means probably include corporate espionage. They might include obtaining information from a competitor's employees.
- Remedies can include:
  - Injunction
  - Financial damages, including punitives

Competitor Information

Balancing free market with proprietary interests:

- An employee may use the skills and knowledge commonly used in the trade, even if acquired during his/her prior employment.
- However, there are limits on an employee's right to use confidential information that he/she received from a prior employer.
- The line is not always clear.

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PRACTICAL GUIDELINES

Interactions with Government

- Interactions with government customers are permitted and encouraged. According to the Office of Federal Procurement Policy:
  – "[P]roductive interactions between federal agencies and our industry partners should be encouraged to ensure that the government clearly understands the marketplace and can award a contract or order for an effective solution at a reasonable price."
- Three phases:
  - Prior to the issuance of the RFP, government officials can meet with potential offerors as long as all offerors are treated equally.
  - After issuance of the RFP, interactions with the agency should be initiated by and conducted through the contracting officer.
  - After proposal submission, interaction generally is limited to the formal clarifications and discussions process.

Interactions with Government

When dealing with the Government, do not:

- Engage in employment discussions with government officials without first involving HR, legal, and/or your ethics office.
- Ask for or accept source selection information or bid or proposal information, whether or not marked.
- Ask for or accept information about a competitor.
- Seek preferential treatment.

Interactions with Competitor Employees

Many solicitations encourage or even require offerors to maintain the incumbent workforce. It is permissible to ask competitor employees about:

- Their qualifications and experience.
- Their own compensation, in order make an offer.

However, approach with caution:

- Did they sign a non-disclosure or non-compete agreement?
- Do they have proprietary information they should not share?

These communications should be limited and documented.

When Things Go Wrong

- If you receive potentially impermissible information from either government or competitor employees:
  - Do not open, forward, copy, or delete the information.
  - If already opened, stop reviewing immediately.
  - Contact your legal or ethics office immediately.
  - Do not respond to the sender without legal or ethics advice.
  - Document that you have taken these steps.

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SCENARIOS

Steering the SOW

FACTS

The incumbent program manager meets with his Agency counterpart to pitch her on how the solicitation should be structured. The meeting goes great: "I think I really convinced her to write an SOW that will be perfect for us!"

PROBLEM?

Probably not

- But be careful about soliciting inside information or receiving preferential treatment, and about getting into an OCI situation.

The Perils of Auto-fill

FACTS

The contracting officer accidentally sends your capture manager an email containing a draft evaluation chart.

PROBLEM?

Depends on what the capture manager does:

- Doesn't open or forward; calls legal. **OKAY**
- Opens the email before realizing what it is; immediately closes it and calls legal. **PROBABLY OKAY**
- Sends it to his technical team lead: "The contracting officer sent me this by accident. He was freaking out, but I promised I'd cover his back. So keep this close hold – just you and me and anyone else you trust. There's some great stuff in here!" **NOT OKAY AT ALL**

The Friendly Coffee

FACTS

Your VP for Business Development has coffee with a friend in the agency's contract shop after proposal submission but before final proposal revisions. Back in the office, he tells the team: "We're in the running for the Mega-Ray contract, but we're going to have to sharpen our pencils."

PROBLEM?

Maybe:

- The VP-BD's friend just said: "You were there at industry day – you know you have serious competition." **PROBABLY OKAY**
- The VP-BD traded a cup of joe for the price delta to your main competitor. **DEFINITELY NOT OKAY**

Brother Can You Spare a Job?

FACTS

You're having lunch with Admiral Carrier to discuss some cost overruns on your contract. The Admiral tells you he's planning to retire soon but says he still has some fight left in him: "Are you interested in hiring an old salt like me?"

PROBLEM?

Depends on your answer:

- We're always looking for qualified people, but we can't discuss employment opportunities until you've retired or recused yourself from matters involving the company. **OKAY**.
- Let's wait and see how these negotiations turn out and then we can talk about whether we have a VP slot for you. **PROBLEM**.
- We're not allowed to talk about that. Have your daughter email me your resume and job requirements so no one will know. **BIG PROBLEM**.

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EXPORT CONTROLS AND SUCH

Rick Vacura & Charles Capito

Scope and Agenda

Scope: Identifying export control issues for U.S. government contractors, and summarizing practice trends and outlook for 2018 and beyond. Export controls are the subject of multi-day conferences; this presentation is designed to identify issues and trends at a high level.

Agenda:

- Overview of Export Control Regimes
- Export Control Considerations for OCONUS and CONUS Work
- Updates and Trends:
  - Final Stages of ECR
  - Discernible Policies under Trump Administration
  - CFIUS
  - Penalties and Enforcement Trends

Overview of Export Control Regimes

	Arms	Commercial/Dual Use	Sanctions
Regime	International Traffic in Arms Regulations ("ITAR") under the Arms Export Control Act ("AECA")	Export Administration Regulations ("EAR") under the Export Administration Act ("EAA") and others.	Targeted sanctions imposed under the Int'l Emergency Economic Powers Act ("IEEPA") and other statutes.
Agency	State Department's Directorate of Defense Trade Controls ("DDTC")	Commerce Department's Bureau of Industry and Security ("BIS")	Treasury Department's Office of Foreign Assets Control ("OFAC")
Scope	Defense articles on the U.S. Munitions List ("USML"); Defense services; and Technical Data.	"Dual use" items and technology; and "600 series" defense items.	Controls money of and transactions with sanctioned countries, entities, and individuals.

Key Terms and Basics

Key terms and concepts applicable to both the ITAR and EAR, although definitions vary.

- What is an export?
  - Physical shipment of controlled items;
  - Transferring technology or technical data electronically; or
  - Visual disclosure.
- What is a reexport or retransfer?
  - Transfer of a controlled item from one foreign country to another; transfer of an item for an end use, end user, or destination not previously authorized by license.
- Deemed export - Release of technology (including technical information) or software to a foreign national in the United States.
  - Release can be oral or visual. Email is the most common means.

Key Terms and Basics, cont'd

- End user – the person abroad that receives and ultimately uses the controlled item.
- End use – the manner in which the controlled is ultimately incorporated and used by the end user.
- Technical data – data controlled under the ITAR that is information, other than software, required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. Includes blueprints, drawings, photos, plans, instructions.
  - Does not include information in the "public domain."
- Commodity Jurisdiction – DDTC (State) is the arbiter of whether an item is controlled under the ITAR or the EAR by processing a "CJ Request."

Export Control Considerations for OCONUS Work

- U.S. export controls can rear their head in numerous scenarios when performing abroad, but for U.S. government contractors they arise in three circumstances:
  1. U.S. government contracts with OCONUS delivery or performance;
  2. Foreign Military Sales ("FMS") for foreign government customers; or
  3. Direct commercial sales for foreign government or commercial customers.

Export Control Considerations for OCONUS Work

U.S. government contracts with OCONUS delivery or performance.

- DFARS 252.7901-3(b) – "It is the contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items. This responsibility exists independent of, and is not established or limited by, this section."
- DFARS clause 252.225—7048(d) – "Nothing in the terms of this contract adds, changes, supercedes, or waives any of the requirements of applicable Federal laws, Executive orders, and regulations…."
- Just because the U.S. government is your customer, does not mean you are excused from complying with export controls or obtaining the necessary authorizations.
  - Though exceptions may apply.

Export Control Considerations for OCONUS Work

There are numerous export control obligations that will be triggered by OCONUS **USG contracts**, including:

1. Export Licenses: Licenses are required for exports of ITAR-controlled defense articles, defense services, or controlled-technical data.
   - ITAR 126.4 – license not required for the temporary export of defense articles, including technical data, and defense services "by or for any agency of the U.S. Government for official use by such an agency…." This is a fairly narrow exception:
     - Only applies when "all aspects" of the transaction are affected by USG
     - DDTC approval needed for permanent export.
   - Different licenses for different contracting scenarios:
     - DSP-5 – permanent exports for Government-Owned Government-Operated ("GOGO") or Government-Owned Contractor-Operated ("GOCO") activities;
     - DSP-73 – temporary exports for Contractor-Owned Contractor-Operated ("COCO") activities. These are popular for FOBs in Iraq and Afghanistan.
     - Technical Assistance Agreements – for performance of defense services abroad.

Export Control Considerations for OCONUS Work

Cont'd - Export control obligations triggered by OCONUS **USG contracts**:

2. Foreign Nationals:
   - ITAR controlled data and services cannot be disclosed to foreign nationals, whether they are:
     - Non-U.S. employees of the contractor (whether in U.S., in theater, or elsewhere);
     - Foreign persons employed by your subcontractors, vendors, or affiliates; or
     - Foreign persons employed by other USG contractors or vendors.
   - Under the ITAR and EAR, U.S. persons include citizens and lawful permanent residents (*i.e.*, green card holders).
   - For classified activities, only U.S. citizens may be processed for personnel clearances. LPRs are not citizens.

Export Control Considerations for OCONUS Work

Cont'd - Export control obligations triggered by OCONUS **USG contracts**:

3. Joint Operations:
   - When performing in theaters under joint or multilateral operations (*e.g.*, NATO, U.N., coalition forces, non-U.S. embassy staff), contractors must be sensitive with whom it is working, or to whom it is briefing.
     - May require additional or amended authorizations to perform defense services or disclose technical data in briefings.

4. Data Access:
   - Most U.S. contractors store ITAR- and EAR-controlled data on their systems. These companies must have systems in places to:
     - Prevent access by non-U.S. person employees;
     - Prevent access to controlled-data from unsecure locations abroad; and
     - Ensure storage is maintained on U.S.-based servers/systems.

Export Control Considerations for OCONUS Work

Export control considerations for **Foreign Military Sales**:

- Foreign Military Sales ("FMS") is a USG program that facilitates sales of U.S. defense articles, defense services, and technical data to foreign governments. FMS sales are unique:
  - USG and foreign government enter into a government-to-government agreement. State determines which governments and programs, and DoD (Defense Security Cooperation Agency) executes the transactions.
  - Funded with appropriations or indirectly by foreign governments (*i.e.*, Foreign Military Financing ("FMF").
  - Contractor is not a party to the sale.
- Special ITAR license – DSP-94 for authorization of export of defense articles solder the FMS program.
  - ITAR 126.6(c) – License not required if the export is per FMS, subject to conditions.
- Be sensitive to exchange of information prior to sale – i.e., proposals, presentations, briefings, etc. Such activities may entail disclosure of controlled information and may require license prior to sale.

Export Control Considerations for OCONUS Work

Export control considerations for **Direct Commercial Sales**:

- Direct Commercial Sales ("DCS") – sale of a U.S. defense articles, service or technical data without the direct/contractual involvement of the USG.
  - Contractor negotiates terms of contract – advantages (flexibility to negotiate terms such as contract type, schedule, payment, etc.) and disadvantages (lose leverage of USG to enforce payment terms).
- May trigger all three export control regimes:
  - ITAR and EAR licensing and brokering requirements;
    - ITAR covers equipment and systems, while BIS may cover military parts and components (*i.e.*, "600 Series" items).
  - OFAC – screening for sanctioned entities (*i.e.*, Specially Designated Nationals).
  - …and others, including the Anti-Boycott laws and regulations and the Foreign Corrupt Practices Act ("FCPA").

Export Control Considerations for OCONUS Work

Export control considerations for **Direct Commercial Sales**, cont'd:

- Note U.S. Arms embargoes – exports to embargoed countries are proscribed, including exports of ITAR-controlled items to China.
  - Non-compliances concerning embargoed countries require mandatory disclosure; disclosures of other ITAR-non-compliances are technically voluntary.
- Contractors should identify hybrid FMS/DCS sales. For example, foreign party may acquire weapon system as a FMS, but may acquire parts and maintenance through DCS.

Export Control Considerations for CONUS Work

Contractors with solely CONUS scope still must consider export controls:

- Ensure systems containing export controlled information are set up to:
  - Ensure controlled information is housed in the U.S.;
  - Inaccessible from non-U.S. locations;
  - Inaccessible by non-U.S. person employees.
- Understand "deemed export" risks.
  - Perform diligence on subcontractors and vendors, especially vendors handling or storing your data, including IT and litigation vendors.
- Even if you are not exporting ITAR-controlled information, you are required to register with DDTC if you are a manufacturer of defense articles.
  - Most subcontractors under U.S. weapon programs are required to register;
  - May also need to register under the Joint Certification Program with the Defense Logistics Agency.

Updates and Trends

- Final Stages of Export Control Reform (“ECR”)
- Discernible Policies under Trump Administration
- CFIUS
- Penalties and Enforcement Trends

Updates and Trends

Final Stages of Export Control Reform (“ECR”)

- ECR was an early initiative of the Obama Administration to “fundamentally reform the U.S. export control system.”
  - Phases I and II: Reconcile definitions, regulations, and policies. Nearing completion
  - Phase III: Creation of a single control list, single licensing policy, unified IT system, and enforcement center.
- The most laborious aspect has been the transfer of most military parts and components from the U.S. Munitions List under the ITAR to the Commerce Control List under the EAR.
  - Designed to disentangle commercial or non-sensitive parts used on defense articles from the ITAR’s rigorous licensing regime.
  - Government has revised lists for 18 of 21 USML categories.
- Transforms the USML into a positive list.
  - Items transferred to EAR are classified under 600 Series classification numbers, and are still subject generally to stricter licensing requirements.
- Substantial reduction in licenses: 2/3 reduction in ITAR licenses for aircraft and related items.

Updates and Trends

Discernible Policies under Trump Administration

- Still unknown in the ITAR/EAR space. Are we going to see the "job creator" or the protectionist? Signs go both ways.
- Has publicly announced "Buy American" efforts to alleviate restrictions on sales of military UAVs and make it easier for small arms sales abroad.
- Have seen a more aggressive Congress and President in the sanctions space.
  - Congress's enhanced Russian sanctions, and the President's continuous efforts to sanction North Korea from various sectors.
- Have also seen a more aggressive Administration in regulating foreign investment (see next slide).

Updates and Trends

CFIUS – The Committee on Foreign Investment in the United States

- CFIUS reviews M&A and investment transactions where U.S. businesses will be "controlled" by foreign persons.
  - U.S. businesses and "control" are both broadly defined.
  - Technically a voluntary notification, but, in certain sectors and for certain investor communities, it has become a necessity.
- CFIUS is experiencing an unprecedented case load in 2017. Already has more cases in 2017, than it did in 2016, which was the busiest year in modern CFIUS history.
- Process is taking longer than before – longer pre-filing phase, more investigations, and "pull-and-refiles" becoming more common.
- Scrutiny is much higher, especially in the high-tech space: semiconductors, AI, IoT, bid data, geospatial technologies.
  - Scrutiny remains on export-controlled technologies, but anxiety has spread to non-controlled technologies because regulations have not kept pace with technologies.

Updates and Trends

Penalties and Enforcement Trends

- EAR:
  - $250,000 per civil violation (or 2x value of transaction)
  - Up to 20 years in prison and/or up to $1M per criminal violation.
- ITAR:
  - Up to $1.1M per civil violation (huge catch-up adjustment in 2016)
  - Up to 20 years in prison and/or up to $1M per criminal violation.
- Other administrative penalties possible under both regimes, including: suspension and debarment, presumption of license denial, revocation of existing authorizations. and compliance and monitoring obligations.

Updates and Trends

Penalties and Enforcement Trends:

- DDTC still outwardly evidences strict and aggressive enforcement of the ITAR.
- Powerful incentives for voluntary disclosures and a well-recognized mitigating factor. Often results in DDTC taking no enforcement action.
  - Note that some ITAR violations must be disclosed; i.e., those involving ITAR 126.1 violations.
- BIS announced in 2016 a ½ reduction in the possible penalty amount for "non-egregious" cases resulting from voluntary self-disclosures.
  - Also announced "aggravating" factors, including willfulness, awareness of conduct, and "harm to regulatory objectives."

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BEST PRACTICES IN GOVERNMENT CONTRACTS TRANSACTIONS AND DEALING WITH SOCIO-ECONOMIC CHALLENGES

Damien Specht and Steve Cave

Date

Current Issues in GovCon Transactions

- Diligence Issues
- Increase in Asset Transactions
- Evolving Treatment of Pending Proposals
- Small Business Recertification

Current Trends in Diligence

- In our buy-side diligence, the problems that we see the most often are:
  - GSA Schedule/Most Favored Customer Compliance
  - Labor Mapping
  - Small Business Compliance
  - Poor Intellectual Property Tracking
  - Cost Accounting Issues

Non-Compliance Mitigation Strategies

- Significant issues identified in a due diligence review frequently can be dealt with through a combination of mitigation strategies
  - Corrective actions prior to closing
  - Disclosure prior to closing
  - Representations, warranties, covenants and/or special indemnity coverage
  - Carve out segregable business units/contracts/territories out of the transaction (subject to asset restrictions, or creation of a new entity with separate ownership interests)

Increase In Asset Transactions

- Vast majority of transactions in our space are stock transactions.
- In recent years, we have seen an increase in asset transactions
  - Acquisition of specific contracts
  - Spin-off from larger transaction or existing business
  - Avoidance of compliance issues
  - Acquisitions from bankruptcy estate
  - Transfer or assignment of interests in government contracts is generally prohibited by the Anti-Assignment statutes, unless the consent of the U.S. government is obtained, typically through the novation process

Challenges In Asset Transactions

- Identification of required assets
- Integration challenges
- Novation requirements (articulated in FAR 42.1204)
  - Time consuming
    - Obtaining approval for a novation request can take many months or greater than a year
    - Requires acquiring entity to act as a subcontractor even though it technically acquired all related assets
    - Requires selling entity to continue to exist and "guarantee" performance until novation is ultimately approved
  - Cumbersome submission process
    - Paper submission of all required documents including purchase agreement, opinion of counsel, relevant financials, and board consents
    - Submission requirements from both buyer and seller must be coordinated and can prolong the submission, which ultimately delays approval of the request

Evolving Treatment of Pending Proposals

- What happens to a pending proposal after a transaction?
- What GAO has said: "There can also be no dispute that the substitution of a new prime contractor, in place of the original offeror, may well have a material effect on both the costs incurred and technical approach employed during contract performance." *Wyle (2013)*.
- What agency evaluators have said: "It is unknown, and unknowable, what impacts the new LM-Leidos corporate structure will have on future performance, whether past performance is still a predictor of future performance of offerors, and how small business will be utilized. Therefore, there are potential risks associated with the delivery of the technical capabilities proposed. Based on the above, LMIS's proposal should therefore not be considered for award." *LMIS (2016)*.

Pending Proposals (cont'd)

- Proposals that include references to corporate parent or affiliate resources are at higher risk.
  - Even general statements such as "the offeror is part of a multi-billion dollar organization" can be problematic. *Wyle* (2013).
- In general, stock transactions (and most mergers) will be less disruptive than asset transactions. *Cf FCI Federal* (2015).
- Agencies are unlikely to accept rate caps – and may conclude that proposed caps increase the Government's risk. *Wyle* (2013), *LMIS* (2016).

Pending Proposal Strategies

- If possible, proposal should be submitted by the intended performer of the contract and reflect actual costs.
- If considering a spin off or divestiture, avoid claiming technical qualifications or past performance that may leave with that entity.
- If you will need resources that may be spun off or sold, consider including a proposal to issue a subcontract to access those resources during performance.
- Recognize that proposals for cost-type contracts are at risk of a finding that performance costs are essentially unknowable.
- If the restructuring or acquisition is uncertain or will happen well after award date, it may be better to say nothing in the proposal.

Small Business Transfer Issues

- Business size status may change in connection with investment and/or acquisition of ownership interests
  - Rules requiring recertification differ depending on the status of the entity being acquired and the type of designated contract(s)
  - Default rules on impact of continuation of contract performance vary based on type of contract(s)
  - Recent successes with 8(a) transfer and continued performance of 8(a) contracts
- Special rules applicable to “long term contracts”
  - FAR 52.219-28; 13 C.F.R. § 121.404
  - Considered to be small for the life of a long term contract except, must recertify or inform of a change in size status within 30 days after closing a merger, sale or stock acquisition, or within 30 days after an approved novation
  - Timely notification critical to avoid potential False Claims Act issues

Recent Socio-Economic Status Issues

- Effect *Kingdomware* on large and small businesses.
- New subcontracting regulations
- Minority investment rules
- All-Smalls mentor protégé program

Kingdomware and VA Contracts

- The Veterans Benefits, Health Care, and Information Technology Act of 2006: VA "shall award" contracts to SDVOSBs when there is a "reasonable expectation" that two or more such businesses will compete at "a fair and reasonable price. . ."
- VA refused to follow the statute because it was meeting its SDVOSB goals.
- An SDVOSB named *Kingdomware* sued.
  - After losing at the Court of Federal Claim and Federal Circuit, appealed to the Supreme Court.
- The Supreme Court held that SDVOSB set asides were mandatory and apply to ***all*** VA orders and contracts.

Kindomware: Going Forward

- VA has issued extensive guidance and instructed procurement officials to comply.
- Has ***doubled*** the number of VA procurements set aside for SDVOSBs
- Increased desirability of SDVOSBs for Mentor Protégé arrangements.
- Increase pressure on non-SDVOSBs to frame competitiosn.
- May result in increased small business set asides under the GSA schedule across all agencies.
  - GSA has asserted that the Small Business Rule of Two does not apply to FSS orders: "FAR 8.405-5(1) states 'preference programs of [P]art 19 are not mandatory in this subpart.'
  - Kingdomware decision declared "orders" to be "contracts."

Investing In Small Business

- Increasing set aside awards has led to an increase in investments in those businesses.
- The trick is keeping a business "small" after investment.
  - Balancing protecting investment with "control"
- Impermissible controls
  - Preventing a quorum or otherwise block action by the board of directors or shareholders.
  - Supermajority requirements for day-to-day actions
  - Control over executive hiring, firing, compensation
  - SDVOSB and 8(a) programs may limit restrictions on transfer

Investing in Small Business (cont'd)

- Permissable controls
  - No perfect formula
  - Relate to protection of investment
  - Can always find affiliation based on the "totality of the circumstances
- Issuance of additional stock
- Amendment of charter or bylaws
- Entry into substantially different lines of businesses
- Adding new members to a limited liability company
- Dissolution of the company

All Small Mentor Protégé Agreements

- In late 2016, SBA's mentor-protégé program expanded to cover all small businesses.
- 300 current agreements.
- Benefits to Mentor
  - Up to 60% workshare under 8(a), HUBZone, WOSB, SDVOSB, and small business contracts based on protégé status.
  - May invest up to 40% equity in small business
  - Avoid affiliation based on mentor protégé relationship (not other factors)
  - Likely more certain than teaming agreement
- Benefits to Protégé
  - Financial/Management/Contracting Assistance
  - Past performance of mentor considered for JV proposals
  - Ability to pursue larger contracts

All Small Mentor Protégé Agreements

- Failure to follow SBA regulations= **Affiliation**
  - Potential pitfalls
    - Noncompliant Mentor-Protégé Agreement (MPA) or Joint Venture (JV) agreement
    - Failure by mentor to provide assistance terminates MPA
    - Failure to pre-approve changes to the MPA
    - Reporting requirements
- Extensive joint venturing between partners
  - More than 8 JVs with 15 contracts

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AND YOU THOUGHT DATA RIGHTS WERE DIFFICULT

W. Jay DeVecchio & Locke Bell

Date

Simplicity in Government Contracts

- Government contracts can be long and complicated, because of:
  - Legal and policy requirements when dealing with taxpayer funds
  - Congressional wisdom
  - Bureaucracy
- But ***often*** the ***underlying principles*** behind a densely-worded government contract clause ***are simple***.
- The "***data rights***" ***clauses*** – which address a contractor's and the government's rights in technical data & computer software – are ***good examples***.

Simplicity in Government Contracts

- Think about a common-sense allocation of data rights based on who has paid to develop a piece of hardware or software.
- If a ***company*** has ***developed*** something at its own ***private expense*** without being paid to do it under a contract, who should have the greatest ***rights*** in that thing and its associated technical data?
  - ***The company***, of course. Common sense.
  - The company also should be able to use that thing to its competitive advantage. ***Common sense***.

Simplicity in Government Contracts

- If a company has developed something at ***private expense*** without being paid to do it under a contract, who should ***own*** that thing and its associated technical data?
  - ***The company*** of course. That's ***common sense***.
- If a company ***owns*** something, doesn't it have the ***right to sell, lease, or license*** it to anyone it pleases?
  - Certainly it does, that's common sense too.

Simplicity in Government Contracts

- That is exactly how the data rights clauses in your government contract work.
- ***If your company has paid to develop an item***, component, or software without government contract (or subcontract) payment for that development, ***you have the ability to***:
  - ***Limit*** the government's rights in technical data,
  - ***Restrict*** the government's rights in software, and
  - ***Sell***, lease, or license that thing to third parties.

When Does Development Occur?

- Under the data rights clauses, an item or software generally is considered to have been developed when

  reasonable people skilled in the applicable
  art say there is a ***high probability*** it will work as intended.

- This means a company can develop something for data rights purposes ***before*** the final version of the item or software, *e.g.,*
  - A rough prototype or engineering model
  - Beta software

Therefore, Improvements May Not Be Developments

- Government may take the position that it obtains ***unlimited rights*** in the entire item as a result of funding ***improvements***. This is ***too broad*** an interpretation.

  Bell Helicopter Textron:

  > All "***development***" of an item or component ***need not be 100% complete***. There will often be further development of an item or component after it has reached the point of being "developed" for data rights purposes.

  ASBCA No. 21192, 85-3 BCA ¶ 18,415 (1985)(emphasis added).

What Is Private Expense?

- If the ***government pays*** your company directly under a contract (or subcontract) to engage in work, such as development work, that is ***not private expense***.
- If your ***company pays*** for development work with any other source of funds – properly charged to that source of funds – that ***is private expense***, *e.g.,*
  - Independent Research & Development (***IR&D*** or IRAD)
  - Any other "indirect" cost account (*overhead*)
  - Bottom line *profit* dollars

But Doesn't the Government Need Some Rights?

- Yes, if you are using your privately-developed item or software to perform the contract, the government needs ***minimum rights*** to ***use*** it to perform the contract and for other purposes, such as repair, overhaul, training, maintenance, and internal activities.
- The government will get very broad ***unlimited rights to use*** if it has paid under the contract (or subcontract) for the development of an item or software, *e.g.,*
  - Give it to others to work on a government contract
  - Include the data in a competitive solicitation

Figuring This Out at the Lowest Component Level

- Hardware has subcomponents (gears, shafts, electronics).
- Software comprises modules and subroutines.
- Development does not occur all at once, but rather at these discrete segregable levels.
- So, it makes sense that one should figures out development and the source of funds at these lowest component levels rather than the final product.
- This is why the DOD regulations instruct that determining rights is done "at the lowest practicable level." The procurement laws and court decisions say this, too.

Putting This Together: Development at the Lowest Component Level

Module A Development Entirely at Private Expense Complete on January 1 **Limited or Restricted**	**Module B** Development Entirely at Private Expense Complete on February 2 **Limited or Restricted**
Module C Development With Mixed (Private and Government Funding) Complete on March 1 **GPR at DoD – Unlimited Civilian**	**Module D** Development Entirely at Government Expense Complete on April 1 **Unlimited**

Some Legal "Common Sense"

- We've been discussing the government's ***rights of use*** under the data rights clauses.
- A right to use something is a "***license***":
  - Driver's license
  - Business license
- License rights are ***not ownership***:
  - You own the car you are licensed to drive.
  - You own the business you are licensed to run.

Putting This Together: License Rights, Not Ownership

- Therefore, the government gets license rights ***not ownership*** under the data rights clauses no matter who paid for the development.
- So, ***even if the government gets "unlimited" license rights*** because it paid for the development, the ***Company still owns*** the rights to the data or software.
- Therefore, the company can use, sell, lease, or license the data or software as it pleases, subject to
  - National security rules
  - Export control

The Clauses Recognize This Fact

- The Contractor ***shall have the right*** to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract,

Except

  - As prohibited by Federal law or regulation (e.g., ***export control*** or ***national security*** laws or regulations),
  - As expressly set forth in the contract

FAR 52.227-14(d).

Putting This Together: License Rights Are Not Exclusive Rights

- ***License rights are defined by the contract***. If the right is not expressed in the contract, there is no such right. (Common and legal sense)
- There are three main data rights clauses, one for civilian agencies (52.227-14) and two for DOD (252.227-7013 and -7014).
- There is ***not one word*** in any of those clauses ***stating*** or suggesting that ***the government has title*** to, ownership of, exclusive rights to, or sole rights to data or software.

Putting This Together: License Rights Do Not Include Delivery Rights

- There also is ***not one word*** in any of the clauses ***giving the government the right to delivery*** of the data or software in which it gets license rights.
- If the government wants delivery of the data or software in which it has rights, it knows how to (and must) specify delivery somewhere else in the contract:
  - The CDRL
  - The SOW
  - A “deferred ordering” or “deferred delivery” clause

The Clauses Recognize This Fact

Data Rights clauses ***do not*** specify the type, quantity, or quality of data that is ***to be*** delivered, but only the respective rights of the government and the contractor regarding the use, disclosure, or reproduction of the data. Accordingly, the contract shall specify the data to be delivered.

FAR 27.403 (DEC 2007).

You Will Lose Your Rights If You Don't Mark Data Software Correctly

- There are ***specific legends*** that ***must*** be put on technical data or computer software depending upon which rights apply. ["Magic Words"]
- These legends are different between data and software.
- These legends are different between civilian agencies and DOD.

Marking Software at DOD

- Recognize that ***firmware*** – *i.e.*, software on a silicon chip – is computer software, and must be marked with the legend in the regulation. If you can't put it on the chip, put it somewhere and tell the government.

ASBCA No. 49196, 02-01 BCA ¶ 31,798
DFARS 252.227-7014(f)(1)

Commercial Software License Terms

- Tailoring commercial license terms is necessary to meet federal government requirements.
- Some terms are never enforceable with government customers.
- Examples of problematic clauses to remove or scrub:
  - Indemnification: A lesson in the Anti-Deficiency Act ("ADA")
  - Disputes/choice of law and forum: ("CICA") Only COFC or a board of contract appeals, and federal law.
  - Definition of contracting parties: Agency not a person.
  - Order of precedence: License cannot pre-empt applicable laws.
  - Contractor assumption of control of legal proceedings: Cannot happen.
  - Government agreement to be bound by third-party terms.

License Terms

- Automatic renewals of term-limited agreements. (ADA)
- Advance Payment for Services. (ADA)
- Future fees, penalties, or interest: (Prompt Payment Act)
- Taxes. USG usually does not pay.
- Assignment: Comply with Assignment of Claims Act (32 U.S.C. § 3727) and FAR 42.12 (Anti-Assignment Act).
  - Successor in Interest.
  - Novation; asset sale (41 U.S.C. § 6305).
  - Name change.
- Audit: Government cannot pay for; no access to government systems or records without consent.
- Unilateral termination for contractor's convenience or government breach.

Pricing Commercial Computer Software

- Misconception that if software is developed under a government contract, it cannot later be sold back to the government as a commercial item.
  - Nothing in any definition of commercial software discusses who paid for its development.
  - Both the FAR and the DFARS contemplate circumstances where software is developed for the government and later becomes commercial.
  - Previously obtained USG rights remain (if USG paid for part of development), but this does not mean contractor can not charge government for subsequent additional software licenses.
  - Could be an exception if original contract contains a deferred ordering clause.

Pricing Commercial Computer Software

- If software is commercial, then it can be priced commercially at a fair and reasonable price, independent of whatever the costs were to develop the software.
- This is reflected in FAR Part 15, which exempts commercial items from the requirement to provide certified cost or pricing data under the Truth In Negotiations Act.
  - Being exempted from having to provide cost or pricing data means that the government does not require any detailed cost information about the commercial item.
- FAR Part 15 provides that the government must use "price analysis" for commercial items. FAR 15.403-3(c)(1). Price analysis is defined as "the process of examining and evaluating a proposed price ***without evaluating its separate cost elements*** and proposed profit." FAR 15.404-1(b)(1) (emphasis added).

Looking Forward: DOD Wrestling with Congress' Directions

- Two long-awaited events last year:
  - DOD's June 16, 2016, proposed rule to implement Section 815 of FY 2012 NDAA, which substantially amended 10 U.S.C. § 2320.
    - Significant changes, particularly broadening rights for data and software necessary for "segregation & reintegration."
    - Issued after years of careful evaluation by DOD of input from industry and academia.
  - The FY 2017 NDAA, as released in the November 30, 2016, Conference Report and enacted December 23, 2016:
    - Modified criticized portions of Section 815;
    - Codified the DOD's Modular Open Systems Architecture ("MOSA") approach; and
    - Extended the 813 panel and invites is comments on MOSA.

DOD Proposed Rule: Segregation or Reintegration Data

- From Section 815: Data that are "necessary for the ***segregation*** of an item or process from, or the ***reintegration*** of that item or process (or a physically or functionally equivalent item or process) with, other items or processes."
- "Reintegration" was an entirely unknown concept, and "segregation" suggested data previously understood as "form, fit, and function (FFF)" data in which government obtains unlimited rights.
- But Congress said, "no" these could be subject to limited rights.
- Therefore, something new and distinct from FFF, but what?

DOD Proposed Rule: Segregation or Reintegration Data

- Proposed rule: Segregation or reintegration data are "more detailed than form, fit, and function data."
  - New category would expressly apply to and include both technical data and computer software (Congress doesn't recognize software).
  - Proposed rule also would update the definition of form, fit, and function data – which are unlimited rights data – to include computer software, but expressly ***exclude*** source code and detailed manufacturing or process data.
    - Important to rebut common assertion that these are FFF.
- Therefore, conversely, segregation and reintegration data are not subject to unlimited rights but: "***May include***, but would not ***typically*** require, ***detailed manufacturing or process data*** or computer software ***source code***."

DOD Proposed Rule: Segregation or Reintegration Data

- Segregation or reintegration data are subject to limited or restricted rights, and may be provided to third parties:
  - Reproduction, release, disclosure or use allowed if "necessary" for segregation or reintegration of an item or process
  - Recipient must destroy data promptly following completion of the segregation or reintegration activities and provide notice
- Segregation or reintegration data must be of the "nature, quality, and level of technical detail . . . required for ***persons reasonably skilled in the art*** to perform such segregation or reintegration activities."
  - Contractor and the government may agree, through discussions or negotiations, to further define the "nature, quality, and level of technical detail" of the segregation or reintegration data they will be required to provide under a contract.

DOD Proposed Rule: Segregation or Reintegration Data

- The definitional scope of segregation or reintegration data may be in the eye of the beholder. And simply stating that segregation or reintegration data "typically" would not include manufacturing data or software will not deter contracting officers and their representatives from contending they are essential.
- We shall see the effect of the MOSA regulations and the 813 panel's report on this:

  "The conferees understand the importance of technical precision in establishing ***clear delineation*** of ***major system platforms***, ***major system interfaces***, and ***major system components***. As such, the conferees urge the Department to carefully consider and take input from the advisory panel and industry on the meanings and implications of these key terms. The conferees expect the Department to include this consideration in its review of the MOSA authorities and its briefing on the implementation of MOSA."

DOD Proposed Rule: Segregation or Reintegration Data

- Doctrine of Segregability also reinvigorated in the 2016 proposed regulations:
  - Segregation or reintegration can occur down to the "lowest practicable segregable level, e.g., a subitem or subcomponent level, or any segregable portion of a process, computer software (e.g., a software subroutine that performs a specific function), or documentation."
- Would allow for a DOD argument that segregation or reintegration data associated with a software subroutine covers source code.
- If similar language is promulgated in the future, Contractors should proactively identify data they perceive to be segregation or reintegration data.

FY 2017 NDAA: Limited to Interfaces

- The FY 2017 NDAA ameliorated some of this by limiting (we think) segregation and reintegration to "interfaces," amending 2320(a)(2)(D)(i)(II) to read as follows:

> "[T]he United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if – (i) such release, disclosure, or use –
>
> > (II) is a release, disclosure, or use of technical data ***pertaining to an interface*** between an item or process or other items or processes necessary for the segregation of an item or process from, or the reintegration of that item or process ... with, other items or processes." [Emphasis added.]

DOD Proposed Rule: Unlimited Deferred Ordering

- Section 815 required, and the proposed regulations would add at DFARS 252.227-7029:

  Government may order delivery, "***at any time***," of technical data "***generated or utilized***" in performance.

- A big change, with some limits. Government must first find that:
  1. The data is needed for the development, reprocurement, sustainment, modification, or upgrade ***of***
  2. A major system, weapons system, noncommercial item, or portion of a commercial item developed at government expense ***and***
  3. The data (a) was generated with or pertains to an item or process developed with government ***or mixed funds***, **or** (b) is form, fit, and function data or segregation or reintegration data
- Clause would be required except in FAR Part 12 solicitations that are not for major systems, weapons systems, or subsystems thereof.

DOD Proposed Rule: Unlimited Deferred Ordering

- "Generated or utilized" defined broadly in the regulations to include data:
  - Pertaining to an item or process that is developed, delivered, or incorporated into the design of a system
  - Used to provide services in performance
  - Necessary to access, use, reproduce, modify, perform, display, release, or disclose other generated or utilized technical data (except COTS software).
- This would mean contractors planning to "utilize" third-party computer software during performance would have proactively to secure necessary rights from third parties.
- Also, contractors would have to attempt to determine the scope of – and quantify the value of – technical data or computer software they may be required to deliver as a condition of contract performance.

FY 2017 NDAA: A Return to Reason

- But Congress listened to industry concerns about the breadth of this deferred ordering: "Various representatives of industry have expressed concern .... Therefore, the conferees believe the amendments to technical data rights ... are necessary at this time."
- Two key reversals:
  - Congress limited deferred ordering to ***six*** years after acceptance of the last item (other than technical data) or contract termination, whichever is later.
  - Congress also deleted "utilized" and returned deferred ordering to data ***generated*** in contract performance.

FY 2017 NDAA: Implements MOSA

- The data rights provisions in the FY 2017 NDAA continue to be driven by MOSA.
- FY 2017 NDAA Section 805 cements MOSA in statute at 10 U.S.C. § 2446a.
  - To "maximum extent possible," ensure any major defense acquisition program receiving Milestone A or Milestone B approval after January 1, 2019 is designed and developed with a "modular open system approach to enable incremental development and enhance competition, innovation, and interoperability."
  - Defines MOSA as "an integrated business and technical strategy" that "employs a modular design that uses major system interfaces" and "uses a system architecture that allows severable major system components at the appropriate level to be incrementally added, removed or replaced throughout the life cycle.
  - Provides that MOSA is a strategy that "complies with the technical data rights set forth in [10 U.S.C. § 2320 (as amended by the FY 2017 NDAA)]."

FY 2017 NDAA: Interface Data

- FY 2017 NDAA Section 809 limits scope of segregation and reintegration data.
  - FY 2012 NDAA Section 815 provided that all data necessary for segregation and reintegration were potentially subject to disclosure.
  - FY 2017 NDAA Section 809 restricts this provision to data "pertaining to an interface."
- Congress defined a "major system interface," expanding on DOD's reference to a "physical, logical, or operational interface" when defining segregation or reintegration data:

  A "major system interface" is a "shared boundary between a major system platform and a major system component, between major system components, or between major system platforms, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements" that "is characterized clearly in terms of form, function, and the content that flows across the interface in order to enable technological innovation, incremental improvements, integration, and interoperability."

FY 2017 NDAA: Negotiated Rights for Mixed Funding

- FY 2017 NDAA Section 809 removes presumption that government retains government purpose rights in data developed with mixed public and private funding, and requires parties negotiate the government's rights in such data.
- Exceptions— The government retains government purpose rights in:
  - Technical data pertaining to an interface developed with mixed funding
  - Technical data pertaining to a "major system interface" developed either with mixed funding ***or exclusively at private expense***.
- DOD instructed to negotiate appropriate and reasonable compensation with contractor for government purpose rights in data developed exclusively at private expense.

Looking Forward: Developments in the FY 2018 NDAA

- The Section 813 Panel has yet to weigh in, and DOD has yet to promulgate new regulations. But Congress looks to continue legislating around data rights in the NDAA for FY 2018.
- Key measures heading into Conference:
  - **Senate**:
    - Would include software, including open source software, in the statutory definition of technical data.
    - Would require all unclassified computer software and related technical data developed under a DOD contract to be managed as open source software and released in a public repository.
  - **House**:
    - Would require DOD to negotiate a price for delivery of technical data prior to awarding a contract for EMD or production of a major weapon system, and create a statutory preference for specially negotiated license rights in technical data to support a major weapon system's product support strategy.
    - Would establish a DOD Office of Intellectual Property.

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APPENDIX

SPEAKER BIOS

KEVIN P. MULLEN

Partner, Washington, (202) 887-1560, kmullen@mofo.com

Kevin P. Mullen is Co-chair of the Government Contracts & Public Procurement practice. Mr. Mullen has broad experience in numerous facets of government contracts matters including agency procurements, subcontracting, teaming and joint venture relationships, contract performance issues, intellectual property, compliance matters, due diligence for mergers and acquisitions, and procurement fraud matters. Mr. Mullen has particular experience assisting shipbuilders and other contractors involved in major weapon system programs responding to government solicitations, negotiating subcontractor and supplier agreements, and resolving disputes with the government customer and subcontractors/suppliers during the course of performance.

Examples of Mr. Mullen's experience in these areas of government contract law include the following matters:

- Provided counseling and representation to the marine division of a major defense contractor – specifically, its business units for surface destroyers, submarines, and cargo ships – which covered a broad range of legal issues, including negotiation of agreements and resolution of disputes with teaming partners, subcontractors and suppliers, as well as matters involving government customers (i.e., U.S. Navy and U.S. Coast Guard).
- Represented a major shipbuilder in a dispute with the U.S. Navy concerning a claim for an upward price adjustment under a contract for construction of a surface destroyer. Over the course of several years, he assisted the shipbuilder with the preparation and submission of the claim, as well as the settlement of the dispute after the initiation of litigation. Resolution of the claim was important to the shipbuilder client because it posed a significant financial risk to the company and the resulting dispute threatened to undermine its relationship with its main customer, the Navy.

EDUCATION

University of Virginia (B.A., 1984)

University of Virginia School of Law (J.D., 1988)

RANKINGS

Chambers USA **2017**
Sources commend Kevin Mullen as "*superb, capable, dedicated, hard-working and highly respected.*" His public procurement practice encompasses transactional, regulatory and litigation counseling.

BTI Client Services All-Star **2016**

Who's Who Legal **2015-2017**
Public Procurement

- Provided advice regarding intellectual property rights to a major Canadian shipbuilder as it prepared to participate in a competitive government procurement which would require the client to negotiate subcontracts and supplier agreements with U.S. defense contractors.
- Assisted a large U.S. defense contractor with matters related to its subcontract for electronics and mission systems with a major Australian shipbuilder.
- Represented a large defense contractor in negotiations with the U.S. Navy concerning the client's role as the systems integrator for a shipbuilding program.

Mr. Mullen also represents clients in the preparation and litigation of contract adjustment claims and terminations for both government contracts and construction projects. Over the course of his 27-year career, Mr. Mullen has handled more than 200 bid protest cases, representing both protesters and contract awardees before the U.S. Government Accountability Office, the U.S. Court of Federal Claims, federal district courts and state protest forums.

Mr. Mullen is a Council member for the Public Contract Law Section of the American Bar Association, and he has served as a Co-Chair of the Contract Claims and Disputes Resolution Committee and the Bid Protest Committee, and as a Vice-Chair of the Acquisition Reform and Emerging Issues Committee. He also served on the Board of Governors of the U.S. Court of Federal Claims Bar Association.

Mr. Mullen has been recognized by Chambers & Partners USA as one of the leading lawyers nationwide in the area of Government Contracts and has been named a "Top Washington Lawyer" in Government Contracts Law by Washingtonian magazine. He was named to the BTI Consulting Group's "Client Service All-Stars 2015" list, a registry of 354 of the legal profession's client service elite.

Mr. Mullen received his J.D. from the University of Virginia School of Law in 1988 and his B.A. from the University of Virginia in 1984. He is admitted to practice in the District of Columbia and the state of Georgia, and before the United States Supreme Court, the United States Courts of Appeals for the Federal Circuit and the Fourth Circuit, and the United States Court of Federal Claims.

JAMES A. TUCKER

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James Tucker maintains an active practice in bid protests before the Government Accountability Office and contracting agencies and counsels clients in contract disputes and compliance obligations. He has represented contractors in contract terminations, prepared requests for equitable adjustment and contract claims, and has represented clients before the Boards of Contract Appeals.

Jim graduated from the University of Kentucky in 1996, receiving a B.A. in classics and from the Pontifical Gregorian University in Rome in 2000, where he received an S.T.B in theology. In 2012, James earned a J.D. with high honors from the George Washington University Law School, where he was a member of *The George Washington University Law Review*.

While in law school, Jim focused his studies on public procurement law and was an extern at the General Services Administration's Suspension, Debarment, and Contract Remedies Division, where he drafted recommendations to the agency's Suspension and Debarment Official in cases of government contractors being considered for suspension or debarment.

Jim maintains an active pro bono practice, which includes representing victims of human trafficking in civil litigation, administrative actions, and related immigration matters.

EDUCATION

University of Kentucky (B.A., 1996)

Pontifical Gregorian University (OTH, 2001)

The George Washington University Law School (J.D., 2012)

SPEAKING ENGAGEMENTS

- “Tips For Drafting Enforceable Teaming Agreements,” Federal Publications Seminars, June 16, 2015

PUBLICATIONS

- "FEATURE COMMENT: Extending Solicitation Deadlines At GAO Versus The COFC: It's Not Over 'Til Its Over (Unless the COFC Says It Is)," *The Government Contractor*, August 2, 2017

- "Analyzing Price Realism: When A Deal Is Too Good To Be True," Morrison Foerster Government Contracts Insights, August 8, 2016
- Co-Author, "Keeping Your Options Open – Why Not to Worry About GAO's AllWorld Decision on Task Order Options," *The Government Contractor*, Vol. 58, No. 29, August 3, 2016
- Co-Author, "Fed. Circ. Further Dulls CDA's Statute of Limitations," *Law360*, June 14, 2016
- Co-Author, "Has the Court of Federal Claims Radically Expanded Small Business Manufacturing Requirements?" *Bloomberg BNA*, November 4, 2014

CHARLES E. DUROSS

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Charles (Chuck) Duross heads the firm's global anti-corruption practice and is a partner in the Securities Litigation, Enforcement and White-Collar Defense Practice Group. With more than fifteen years of experience principally focused on white-collar cases, Mr. Duross's practice has an emphasis on white-collar criminal matters, including internal corporate investigations, compliance counseling, due diligence regarding third parties and business transactions, and defense of clients before government enforcement agencies. Indeed, Mr. Duross has overseen FCPA investigations relating to business in more than 50 countries. In addition, as a veteran trial attorney, Mr. Duross has a proven track record in the courtroom in high-profile, high-stakes trials.

SELECTED SIGNIFICANT REPRESENTATIONS

- Led FCPA/anti-corruption investigations for various major multinational companies involving conduct in Africa, Asia, Eastern Europe, and Latin America
- Secured declinations on behalf of multiple corporate clients
- Secured a declination for a senior bank executive who was the subject of an FCPA investigation in Latin America
- Conducted pre-investment and pre-acquisition enhanced FCPA/anti-corruption due diligence in numerous multi-billion dollar deals in Africa, Asia, and Latin America
- Assisting numerous companies, from start-ups to Fortune 50 corporations, with drafting codes of conduct and compliance procedures, conducting risk

EDUCATION

University of Michigan (B.A., 1993)

University of Michigan Law School (J.D., 1996)

RANKINGS

Ethisphere Institute
Repeatedly included in the "Attorneys Who Matter" list

Chambers USA**,** ***Law360*****, the** ***Legal 500 US*****, the** ***Washington Post*** **and the** ***Washington Business Journal***
Recognized for his work on FCPA and anti-corruption matters

assessments, gap analysis and compliance benchmarking, and enhancing existing compliance programs

- Go-to outside FCPA and anti-corruption legal and compliance counsel to leading Global 500 multinational corporations across industries and regions

Mr. Duross most recently served as a Deputy Chief in the Fraud Section in the Criminal Division of the U.S. Department of Justice, where he led the Foreign Corrupt Practices Act (FCPA) Unit and was in charge of all of the DOJ's FCPA investigations, prosecutions and resolutions in the United States. Internationally recognized for his leading role in developing and implementing the government's FCPA enforcement strategy, he was widely credited with developing the current enforcement regime and recruiting and leading a talented team of prosecutors who have brought some of the most important FCPA cases in the statute's 36-year history. Under his leadership, the FCPA Unit resolved more than 40 corporate cases resulting in approximately $1.9 billion in monetary penalties and prosecuted dozens of business executives and money launderers. As the head of the FCPA Unit, Mr. Duross oversaw countless voluntary disclosures, decided which matters would be declined, administered DOJ's FCPA Opinion Release Procedure and was responsible for interviewing, selecting and reviewing the work of 17 independent corporate monitors.

In investigating and prosecuting transnational bribery cases, Mr. Duross worked with every major U.S. Attorney's Office and law enforcement agency in the United States, law enforcement counterparts around the world and numerous multi-lateral development banks, including the World Bank. For example, Mr. Duross worked with the Australian Federal Police, Royal Canadian Mounted Police, the Tribunal de Grande Instance de Paris, Indonesia's Anti-Corruption Commission (KPK), the Tokyo Public Prosecutor's Office, Mexico's Procuraduría General de la República, Norway's Økokrim, the Swiss Attorney General's Office, Thailand's National Anti-Corruption Commission, the City of London Police, Crown Prosecution Service, Metropolitan Police and the Serious Fraud Office. Mr. Duross also led training sessions of foreign prosecutors and investigators both in the United States and abroad.

While in the Fraud Section, Mr. Duross led the development of a deferred prosecution agreement (DPA) template for FCPA cases, which formed the basis for a DPA template later adopted for use by the entire Criminal Division, and he also led the effort to update and restructure the enhanced compliance components used in resolving FCPA cases. As a recognized expert, Mr. Duross was consulted by UK officials who were considering whether to pursue legislation permitting deferred prosecution agreements in the United Kingdom.

Mr. Duross's tenure was also marked by his efforts to make FCPA enforcement more transparent and compliance with the statute more understandable to the business community. Working closely with his counterparts at the U.S. Securities and Exchange Commission, Mr. Duross was one of the principal authors of the DOJ and SEC joint publication A Resource Guide to the U.S. Foreign Corrupt Practices Act, which followed a series of consultations with business and compliance leaders. The Guide has received wide praise from the business community, compliance and ethics professionals and private practitioners, and has been described as a "landmark document," an "FCPA hornbook," and a "must-read for compliance officers."

Mr. Duross also served as DOJ's principal representative to the Organisation for Economic Co-operation and Development's Working Group on Bribery for many years and helped develop the OECD's acclaimed *Good Practice Guidance on Internal Controls, Ethics and Compliance*. Besides his involvement in the OECD Phase 1 of Russia and Phase 2 of South Africa, Mr. Duross's leadership during the OECD Phase 3 of the United States earned him the Assistant Attorney General's Exceptional Service Award, the Criminal Division's highest award for employee performance.

Prior to being appointed Deputy Chief, Mr. Duross served as Assistant Chief of the FCPA Unit from October 2008 to April 2010, and as a line prosecutor with the Fraud Section from December 2006 to October 2008. Beyond FCPA enforcement, Mr. Duross has supervised and tried all manner of white-collar cases, including healthcare fraud, mail and wire fraud, money laundering, public corruption, securities fraud and tax evasion. A veteran trial attorney, Mr. Duross is a recipient of the prestigious Attorney General's Distinguished Service Award, the second-highest award for employee performance, as one of the lead prosecutors who secured the conviction of Congressman William Jefferson following a nearly nine-week trial.

Once dubbed “Mr. FCPA,” Mr. Duross has been repeatedly recognized by the Ethisphere Institute's “Attorneys Who Matter” list, including most recently as a “Top Gun” based upon his expertise and experience. He has also been recognized by *Chambers USA, Law360*, the *Legal 500 US*, the *Washington Post* and the *Washington Business Journal* for his work on FCPA matters.

Mr. Duross earned his J.D., cum laude, from the University of Michigan Law School in 1996 and his B.A., magna cum laude, from the University of Michigan in 1993. After beginning his career as a litigation associate at an international firm in 1996 handling products liability and commercial litigation matters, he joined the U.S. Attorney's Office for the Southern District of Florida in 2001, where he prosecuted a variety of white-collar cases, including bank fraud, embezzlement, mail and wire fraud, money laundering, securities fraud and trademark violations. Mr. Duross rose to the position of Deputy Chief in the Major Crimes Section in Miami before moving to Washington, D.C., in 2006 to join the Fraud Section. Mr. Duross is an adjunct professor at Georgetown University Law Center, where he teaches trial advocacy, has been a guest lecturer at Harvard Law School's Program on the Legal Profession and the University of Michigan's Ross School of Business and has served as an instructor of forensic examiner candidates at the FBI Laboratory in Quantico, Virginia. As an internationally recognized expert on transnational bribery, white-collar crimes, and compliance issues, Mr. Duross is a sought-after speaker, and he routinely speaks at conferences across the United States and around the world. He is admitted to practice in Michigan and the District of Columbia.

JAMES M. KOUKIOS

Partner, Washington D.C., +1 (202) 887-1590, JKoukios@mofo.com

James Koukios is a partner in the Securities Litigation, Enforcement & White-Collar Defense Practice Group. An experienced trial attorney and former federal prosecutor, Mr. Koukios has tried over 20 federal jury cases, including serving as the lead prosecutor in two landmark FCPA-related trials, *United States v. Esquenazi* and *United States v. Duperval*. His practice focuses on white-collar criminal and related matters, including compliance counseling, transactional due diligence, internal corporate investigations, and government enforcement actions.

SELECTED SIGNIFICANT REPRESENTATIONS

- Providing FCPA legal advice, anti-corruption counseling, and transactional due diligence to multinational corporations in several industries, including health care, defense, entertainment technology, and financial services
- Assisting multinational corporations in several industries in presenting results of FCPA internal investigations to enforcement authorities
- Assisting multinational companies in several industries in internal investigations of potential violations of the FCPA and other federal criminal laws
- Representing an individual in a multinational anti-corruption investigation
- Defending independent directors against breach of fiduciary duty claims in federal court

Prior to joining Morrison & Foerster, Mr. Koukios served as the Senior Deputy Chief of the Fraud Section in the Criminal Division of the U.S. Department of Justice (DOJ). In that role, he supervised investigations, prosecutions and resolutions in the Fraud Section's FCPA, Health Care Fraud and Securities and Financial Fraud Units.

EDUCATION

University of Michigan (B.A., 1996)

Harvard Law School (J.D., 1999)

RANKINGS

Ethisphere Institute
Recognized among "Attorneys Who Matter"

The American Lawyer
Named "Lateral All-Stars: The Splashiest Hires of 2015"

ATTORNEY BIO

Mr. Koukios was an Assistant Chief in the Fraud Section's FCPA Unit from 2012 to 2014, directly supervising some of the Unit's most high-profile matters. He assisted with drafting the DOJ and SEC joint publication, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, which followed a series of consultations with business and compliance leaders. He was also a lead examiner for the Phase 2 examination of Russia's compliance with the Anti-Bribery Convention of the Organisation for Economic Co-operation and Development (OECD).

As a line prosecutor in the Fraud Section from 2009 to 2012, Mr. Koukios investigated and prosecuted numerous individuals and corporations for violations of the FCPA and other white-collar crimes. Mr. Koukios was the lead trial lawyer for the United States in the seminal *Esquenazi FCPA* trial and the *Duperval* money laundering trial. The *Esquenazi* trial resulted in the first appellate decision on whether and when a state-owned enterprise qualifies as an “instrumentality” under the FCPA. The *Duperval* trial resulted in the first jury conviction of a foreign official on money laundering offenses related to the FCPA and was also affirmed on appeal. For his work on these matters, he received the Assistant Attorney General's Distinguished Service Award. While at the Fraud Section, he also gained significant experience in investigating and prosecuting individuals and corporations for health care fraud and other white-collar crimes.

From 2010 to 2011, Mr. Koukios served as Special Counsel to FBI Director Robert S. Mueller, III, advising the Director and other FBI executives on criminal policy issues, preparing FBI Executive Management for congressional testimony, representing the FBI at interagency meetings, and acting as a liaison between FBI and other DOJ components.

From 2005 to 2009, Mr. Koukios was an Assistant United States Attorney (AUSA) in the Southern District of Florida. As an AUSA, he represented the United States in hundreds of proceedings, served as trial attorney in 19 federal felony jury trials, and prosecuted fraud, public corruption, export control, money laundering, narcotics, violent crime, and immigration offenses. Among several notable cases, Mr. Koukios was a lead prosecutor in *United States v. AEY, Inc., et al.*, a defense procurement fraud case featured on the front page of *The New York Times*. Throughout his decade-long service as a federal prosecutor, Mr. Koukios worked closely with state, federal, and foreign law enforcement officials, as well as the U.S. Securities and Exchange Commission, U.S. Departments of Defense, State and Commerce, and intelligence agencies.

Following law school, Mr. Koukios clerked for Judge Edith Brown Clement in the U.S. District Court for the Eastern District of Louisiana. He then worked as a litigation associate in the D.C. office of an international law firm, where he litigated white-collar criminal, securities fraud, intellectual property, antitrust, First Amendment, and commercial cases.

In 1999, Mr. Koukios graduated cum laude from Harvard Law School, where he served as supervising editor for the *Harvard Journal on Legislation*, and earned his B.A. with highest distinction in 1996 from the University of Michigan, where he received the William Jennings Bryan award, given annually to the top political science graduate. Mr. Koukios has been recognized by the Ethisphere Institute among the “Attorneys Who Matter” and frequently speaks on anti-corruption and compliance issues. He is an adjunct professor of trial advocacy at Georgetown University Law Center.

DANIEL E. CHUDD

Partner, Northern Virginia, +1 (703) 760-7305, DChudd@mofo.com

Daniel Chudd is a government contracts attorney with significant experience in government contracts litigation and dispute resolution and avoidance. Dan's interest in government contracts was sparked during his clerkship with Judge Mary Ellen Coster Williams of the U.S. Court of Federal Claims. That experience, combined with his in-depth industry knowledge, has made Dan an effective advocate for his clients. In addition, a secondment with a major defense contractor gave Dan valuable insight into the everyday challenges facing government contractors. He draws upon these experiences to develop creative and strategically sound approaches to the myriad issues that his clients face.

Litigation Experience

One of Dan's favorite aspects of government contracts litigation is the variety of different disputes and forums in which he has been able to practice. Dan routinely represents clients in bid protests before the Government Accountability Office (GAO) and the U.S. Court of Federal Claims. He also represents clients in qui tam False Claims Act matters at the district court and appellate levels. Dan has also appeared before federal and state courts, administrative bodies, and the Civilian and Armed Services Boards of Contract Appeals. The subjects of these disputes have ranged from contract claims and termination disputes with a government customer to contractor and subcontractor disputes.

Dan is admitted to practice in the District of Columbia and the state of Virginia and before the United States Courts of Appeals for the Federal Circuit and the Fourth Circuit, the United States District Court for the Eastern District of Virginia, and the United States Court of Federal Claims. Dan also holds an active security clearance and has experience with Special Access Programs

EDUCATION

Georgetown University (B.A., 2000)

Georgetown University Law Center (J.D., 2003)

Georgetown University Law Center (J.D., 2003)

RANKINGS

Law360 **2012**
"Rising Star"

Washington D.C. Super Lawyers
"Rising Star" Government Contracts

Counseling and Investigations

In addition to representing clients in litigation, Dan regularly counsels clients on pre-litigation and dispute avoidance matters, contract changes, and requests for equitable adjustment. He advises clients on matters related to the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS), as well as the Truth in Negotiations Act (TINA), Procurement Integrity Act (PIA), and other legal and ethical obligations. Dan also counsels clients on a number of cybersecurity and data security issues that impact government contractors. In addition, Dan represents clients in internal investigations related to government contracts matters.

More about Dan

Dan is active in the American Bar Association's Public Contract Law Section, serving as the co-chair of its Membership Committee and as a vice-chair of its Bid Protest and Cybersecurity, Privacy, and Data Protection Committees. Dan also serves as a member of the firm's Litigation Associate Evaluation Committee and as Secretary of the Board of Directors of Homestretch, a non-profit organization focused on assisting homeless families in the Northern Virginia area.

When he is not practicing law, Dan enjoys spending time with his family, coaching Little League, and playing golf.In addition to his litigation work, Mr. Chudd

REPRESENTATIVE MATTERS

- **Protest of New Mexico State University, B-409566 (GAO 2014)**
  Represented Orbital Sciences Corporation as intervenor in a pre-award protest brought by New Mexico State University concerning the terms of a NASA Solicitation. The GAO sided with the government and Orbital and denied the protest.
- **Protest of Navistar Defense LLC and AM General, LLC, B-407975.2, et al (GAO and Court of Federal Claims 2013)**
  Represented General Dynamics Ordnance and Tactical Systems in a GAO protest brought by Navistar and AM General, and continued by AM General in the Court of Federal Claims, concerning the award by the Air Force of a contract to GD-OTS for Ground Mobility Vehicles. The GAO and the Court of Federal Claims sided with the government and GD-OTS and denied the protests.
- **MorphoTrust USA, Inc. v. Contract Appeals Bd. 115 A.3d 571 (2015)**
  Represented MorphoTrust USA in protesting the terms of a solicitation for the production of drivers' licenses in Washington D.C. After the District of Columbia's Contract Appeals Board denied the Protest, the decision was appealed to the District of Columbia Superior Court and the District of Columbia Court of Appeals. The Court of Appeals found in favor of MorphoTrust and vacated the Contract Appeals Board's initial decision.

- **IAP World Services, Inc., B-407917.2, *et al* (GAO 2013)**
  Represented IAP World Services in its successful protest of the Navy's award of the base operating services contract for Patuxent River Naval Air Station. Following the protest and re-evaluation of proposals, the Navy awarded the contract to IAP.
- **Fortune 100 Company**
  Represented a Fortune 100 company in a complex, multi-million dollar False Claims Act matter. Following extensive discovery and summary judgment motions, the parties settled the matter favorably for the client.
- **Termination for Cause Dispute (GAO)**
  Represented a government contractor in its appeal at the Civilian Board of Contract Appeals of a Contracting Officer's Final Decision terminating the contract for cause. Following a mediation and additional negotiations prior to trial, the Agency reversed its decision and re-instated the contract.

SPEAKING ENGAGEMENTS

- "Bid Protests -- From Soup to Nuts," Federal Publications Webinar, May 30, 2017
- "Consequences of Cyber Non-compliance: Protests, Claims, and False Claims," ABA Public Contract Law Section Cybersecurity, Privacy, and Data Protection Committee, April 26, 2017
- "E-Discovery in Government Contracts Cases: What You Need to Know Now," ABA Public Contract Law Section Federal Procurement Institute, March 12, 2015
- "Small Business Issues In Government Contracts Mergers & Acquisitions," West LegalEdcenter, February 03, 2015
- Co-Chair, ABA Section of Public Contract Law Annual Meeting, August 07, 2014 to August 09, 2014
- "Scared Straight: Why Legal Practitioners Should Care About Cybersecurity," BCA Bar Association Annual Program, December 18, 2013

PUBLICATIONS

- Co-Author, "The 'Buy American, Hire American' Executive Order, Digested," *Thomson Reuters Westlaw*, July 31, 2017
- Co-Author, "Protecting Privilege in FCA Cases From Start to Finish," *Law360*, May 24, 2017
- Co-Author, "Courts are Taking Materiality Seriously Post-Escobar," *Law360*, September 20, 2016
- "COFC Splits with GAO on IDIQ Awardee's Standing to Protest Additional Awards," Government Contracts Insights Blog, May 5, 2016

ATTORNEY BIO

- Co-Author, “For Cybersecurity, Share and Share Alike,” *Daily Journal*, December 22, 2014
- Co-Author, “Cybersecurity Begins with the C-Suite,” *Daily Journal*, October 1, 2014
- Co-Author, “Small Business Issues in Government Contracts Mergers & Acquisitions,” *Briefing Papers*, August 2014
- Co-Author, “Mental Health Concerns Give Way to Broader Audit Concerns,” *Law360*, September 9, 2014
- “COFC Provides Excluded Contractors with NAICS Code Protest Right,” *The Government Contractor*, August 6, 2014
- NIST Releases First Cybersecurity Framework, but Questions Remain for Implementation, February 24, 2014
- “Dissecting the NIST Preliminary Cybersecurity Framework,” *Financial Fraud Report*, January 2014
- "Is Litigation the Weak Link in Information Supply Chain Security?" *Security Magazine*, October 3, 2013
- “5 Lessons From Recent Small-Business Issues at the GAO,” *Law360*, May 10, 2013

RACHAEL K. PLYMALE

Associate, Washington D.C., +1 (202) 887-1582, RPlymale@mofo.com

Rachael Plymale represents both large and small government contractors in a wide variety of litigation including bid protests, contracts claims and disputes, size determinations, and False Claims Act cases.

Rachael has assisted clients in a variety of litigation and compliance matters. She has represented clients in both pre- and post-award bid protests before the Government Accountability Office and the Court of Federal Claims as well contract terminations and requests for equitable adjustment at the Boards of Contract Appeals. Her practice also includes counseling clients on compliance issues, particularly in small business matters such as size determinations and appeals and small business subcontracting.

Rachael graduated summa cum laude from the University of Kentucky in 2010, receiving a B.A. in History. In 2014, she earned her J.D. with honors from the George Washington University Law School, where she focused her studies on public procurement and interned in the General Counsel's Office at General Dynamics Advanced Information Systems.

Rachael maintains an active pro bono practice representing victims of human trafficking in immigration matters.

EDUCATION

University of Kentucky (B.A., 2010)

The George Washington University Law School (J.D., 2014)

JOHN P. CARLIN

Partner, New York, Washington D.C., +1 (212) 336-8600, JCarlin@mofo.com

John P. Carlin, former Assistant Attorney General for the U.S. Department of Justice's (DOJ) National Security Division (NSD), chairs Morrison & Foerster's global risk and crisis management team and advises industry-leading organizations in sensitive cyber and other national security matters, white collar investigations, and government enforcement actions.

Mr. Carlin has served as a top-level official in both Republican and Democratic administrations, most recently as Assistant Attorney General for National Security, the DOJ's highest-ranking national security lawyer. In this capacity, for which Mr. Carlin was nominated by the President and overwhelmingly confirmed by the Senate on a bipartisan basis, he oversaw nearly 400 employees responsible for protecting the nation against terrorism, espionage, and cyber and other national security threats. Under his leadership, the NSD:

- Created a threat analysis team to study potential national security challenges posed by the Internet of Things;
- Launched a nationwide outreach effort across industries to raise awareness of national security, cyber, and espionage threats against American companies and encourage greater C-suite involvement in corporate cyber security matters;
- Oversaw DOJ's Counterintelligence and Export Control Section, responsible for investigating and prosecuting espionage cases, cases involving the illegal export of military and strategic commodities, and cases involving certain cyber-related activity;
- Brought an unprecedented indictment against five members of the Chinese military for economic espionage;
- Led investigations into breaches of public and private sector e-mail systems and protocol;
- Investigated the attack on Sony Entertainment's computer systems;

EDUCATION

Williams College (B.A., 1995)

Harvard Law School (J.D., 1999)

- Brought charges, in conjunction with the FBI, against seven Iranians working for Islamic Revolutionary Guard Corps-affiliated entities for conducting a coordinated campaign of cyber attacks against the U.S. financial sector;
- Oversaw the efforts of the National Security Cyber Specialist Network and the National Security/Anti-Terrorism Advisory Council program;
- Secured the first federal jury conviction on charges brought under the Economic Espionage Act of 1996;
- Led DOJ's participation on the Committee on Foreign Investments in the United States;
- Disrupted multiple terrorist plots and national security threats, bringing those involved to justice;
- Prosecuted the Boston Marathon bombing cases; and
- Provided legal oversight of the NSA's surveillance activities and represented the government before the Foreign Intelligence Surveillance Court.

Prior to assuming his role in the NSD, Mr. Carlin served as Chief of Staff and Senior Counsel to Robert S. Mueller, III, former director of the FBI, where he helped lead the FBI's evolution to meet growing and changing national security threats, including cyber threats. Mr. Carlin also held positions as National Coordinator of the DOJ's Computer Hacking and Intellectual Property Program and Assistant United States Attorney for the District of Columbia, where he prosecuted cyber, fraud, and public corruption matters, among others, trying more than 40 cases to verdict.

Mr. Carlin has been featured or cited as a leading authority on cyber and economic espionage matters by numerous major media outlets, including *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *The Los Angeles Times*, *USA Today*, CBS's *60 Minutes*, NBC's *Meet the Press*, PBS's *Charlie Rose* and *Newshour*, ABC's *Nightline* and *Good Morning America*, NPR, CNN, and *Vanity Fair*, among others.

Mr. Carlin, who joined DOJ through the Attorney General's Honors Program, is a five-time recipient of the Department of Justice Award for Special Achievement and has drawn bipartisan praise, with U.S. Attorney General Loretta Lynch calling him “a trusted and tireless leader” and former U.S. Attorney General Michael Mukasey calling him “a superb civil servant.” He earned his Juris Doctorate from Harvard Law School, where he received the Samuel J. Heyman Fellowship for Federal Government Service and served as Articles editor for the *Harvard Journal on Legislation*, and earned his Bachelor of Arts degree, *magna cum laude*, from Williams College, where he was elected to Phi Beta Kappa.

BAR ADMISSIONS

- District of Columbia
- New York

TINA D REYNOLDS

Partner, Northern Virginia, +1 (703) 760-7701, TReynolds@mofo.com

Tina Reynolds is a Partner in Morrison & Foerster's Government Contracts practice. She represents a wide variety of government contractors including information technology, defense, biotechnology and pharmaceutical companies, with a focus on general contract counseling, compliance, and litigation.

Tina counsels contractors on compliance with federal acquisition and ethics regulations. She has been involved with numerous internal investigations and compliance reviews, and with voluntary disclosures to agency Inspectors General. Tina routinely advises clients concerning prime-subcontractor relationships, sources of supply, price reductions and price reporting issues, organizational conflicts of interest, the safeguarding of intellectual property and other proprietary interests, the handling of classified materials, and agency suspension and debarment proceedings. She also assists clients with due diligence and other activities related to the acquisition of government contracting concerns, and with the drafting and negotiation of teaming agreements, subcontracts, licensing agreements, and cooperative research and development agreements.

EDUCATION

American University (B.A., 1992)

University of North Carolina (J.D., 1995)

Tina's litigation experience includes government contracts claims litigation in federal courts and before boards of contract appeals, bid protests before the Government Accountability Office and the Court of Federal Claims, and complex disputes in federal courts, including civil fraud and False Claims Act litigation. She has extensive experience with class action defense and multidistrict litigation.

Tina joined Morrison & Foerster in 2012 after serving as counsel at Dickstein Shapiro, where she practiced since 1997. Previously she worked as a trial attorney in the Office of the General Counsel of the Navy, Navy Litigation Office.

Tina is admitted to practice in Virginia, North Carolina, the District of Columbia, and before the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit and the U.S. District Court for the District of Columbia. She is a member of the North Carolina, District of Columbia, Virginia and American Bar Associations.

REPRESENTATIVE MATTERS

- Lead on government contracts compliance review for Fortune 50 Company recommending process improvements and policy changes.
- Negotiated prime contract and major subcontracts related to the Department of Energy's next generation supercomputer program.
- Assisted multiple clients with voluntary disclosures to various agency Inspectors General of pricing irregularities and regulatory violations.
- Negotiated several Other Transaction Authority Agreements with DARPA on behalf of biotech clients.
- Conduct due diligence for major government contract mergers and acquisitions.
- Successfully defended awards of a DISA cloud computing and IT services contract and a DLA fuel service card processing contract at the Government Accountability Office.

SPEAKING ENGAGEMENTS

- "Government Contracts Forum Boot Camp: Intellectual Property and Data Rights in Government Contracting," ACC National Capital Region (June 2017)
- "What Every Government Contractor Needs to Know About Cybersecurity," PLI Webcast Briefing (December 2016)
- "Government Contract Management Best Practices and Dangers," Lorman Webinar (November 2016)
- "2016 AIA/NDIA Technical Data Rights Forum," Intellectual Property Strategies and Impact on the Defense Industrial Base (October 2016)
- "Government Contracts Compliance panel," Technology Council of Maryland's Bio + Tech Conference (May 2016)
- "The OmniCircular – 2 CFR 200," PSC – Council of International Development Companies Teleconference, Speaker (September 2014)
- "Federal Grants & Cooperative Agreements – Understanding the New Rules," Morrison & Foerster Webinar, Speaker (February 2014)
- "Protecting Your IP From Uncle Sam," WMACCA Government Contractors and Technology & IP Forums, Speaker (November 2013)
- "Navigating Grant and Contracting Opportunities with the U.S.: A Primer on Strategies for Success and Compliance," MoFo BioMed Luncheon Series, Speaker, San Diego and Palo Alto (March 2013)

PUBLICATIONS

- NARA Issues Final Rule on Controlled Unclassified Information, Government Contracts Insights Blog (September 20, 2016)
- Why Congress Should Act Quickly to Reauthorize SBIR, STTR, *Law360* (August 31, 2016)
- GSA Releases New Cybersecurity SINs on Schedule 70, Government Contracts Insights Blog (August 25, 2016)
- The Import of Federal SBIR and STTR Programs and Why Congress Should Act Quickly to Reauthorize These Programs and Make Them Permanent, Government Contracts Insights Blog (August 22, 2016)
- Top Takeaways Concerning GSA's Final Rule on Transactional Data Reporting, Government Contracts Insights Blog (June 29, 2016)
- Latest Requirements for Safeguarding IT Systems, Government Contracts Insights Blog (May 18, 2016)
- A New Hope for an Expedited FedRAMP Process, Government Contracts Insights Blog (April 12, 2016)
- Even Popular Charities Must Follow Federal Grant Regulations, Morrison Foerster Government Contracts Insights Blog (January 25, 2016)
- Defense Contractors Get Extension of Time for Compliance with New Cybersecurity Security and Reporting Requirements, Morrison Foerster Government Contracts Insights Blog (January 4, 2016)
- OMB Encourages Agency Collaboration in Shared Services and Earned Value Management System Certification Processes, Morrison Foerster Government Contracts Insights Blog (November 5, 2015)
- Cybersecurity Information Sharing Legislation, Morrison Foerster Government Contracts Insights Blog (November 4, 2015)
- OMB Circular A-130 Revised To Reflect IT Policy Changes and Cybersecurity Needs, Morrison Foerster Government Contracts Insights Blog (October 27, 2015)
- U.S. Federal Government Cybersecurity and Data Protection Policies And The Desperate Need For Direction And Consistency, Morrison Foerster Government Contracts Insights Blog (October 14, 2015)
- KBR And Maintaining Privilege Throughout Investigations *Law360*, Co-author (September 28, 2015)
- Changed Requirements for Department Of Energy Grant Recipients, Morrison Foerster Government Contracts Insights Blog (September 15, 2015)
- DOD Requires Government Contractors to Report Cybersecurity Breaches, Morrison Foerster Government Contracts Insights Blog (August 27, 2015)

- GSA's Proposed Transactional Data Reporting Rule Has Significant Implications for Contractors with GSA Contract Vehicles, Morrison Foerster Client Alert (April 30, 2015)
- "Federal Contractor Minimum Wage Provisions Finalized," Morrison & Foerster Client Alert, Co-author (October 2014)
- "New Executive Order Places Additional Reporting Obligations on Government Contractors and Creates and Additional Weapon in the Government's Labor Law Enforcement Arsenal," Morrison & Foerster Client Alert, Co-author (August 2014)
- "Executive Order Extends LGBT Protections to Federal Contractor Employees," Morrison & Foerster Client Alert, Co-author (July 2014)
- "World Bank Suspension and Debarment Report," Morrison & Foerster Client Alert, Co-author (July 2014)
- "New Affirmative Action Rules Require Immediate Action by Government Contractors and Subcontractors," Morrison & Foerster Client Alert, Author (March 2014)
- "The United States Revises Its Rules Governing Federal Grants and Cooperative Agreements," Global Procurement Quarterly – Winter 2014, Morrison & Foerster Newsletter, Co-author (March 2014)
- "OMB Revises and Consolidates Rules Governing Most Federal Grants," Morrison & Foerster Client Alert, Co-author (January 2014)

BRADLEY D. WINE

Partner, Northern Virginia, +1 (703) 760-7316, BWine@mofo.com

Bradley Wine is Co-Chair of Morrison & Foerster's Government Contracts and Public Procurement practice. He represents a wide range of government contractors and other businesses in highly regulated industries with a focus on civil litigation, compliance, and counseling.

Mr. Wine has a proven track record of saving and recovering billions of dollars for clients by providing strategic business advice, addressing statutory and regulatory compliance issues, and securing complex judgments and settlements. Mr. Wine represents client interests with respect to municipal, state, federal, and non-U.S. government entities and has appeared before numerous federal and state courts, administrative tribunals, and arbitration panels in the U.S. and Europe. His clients are leaders in the professional services, information technology, transportation, software development, aerospace and defense, healthcare and life sciences, coatings and manufacturing, homeland security and intelligence, and financial services industries. His extensive experience includes:

- Representing clients in matters involving the False Claims Act, Foreign Corrupt Practices Act, defective pricing, export licensing, handling of classified materials, and other alleged violations and misconduct. Mr. Wine litigates disputes to judgment, conducts internal investigations, drafts and implements compliance programs, conducts training of management and key personnel, defends suspension and debarment actions, and negotiates settlements;
- Successfully litigating bid protests (pre-award, post-award, and size), contract claims, and other commercial disputes before procuring agencies, the Government Accountability Office, Boards of Contract Appeals, the U.S. Court of Federal Claims, state courts, federal district courts, and the U.S. Courts of Appeals. He also counsels and litigates on behalf of clients with

EDUCATION

Vermont Law School (J.D., 1995)

American University (B.A., 1991)

RANKINGS

***BTI Client Services All-Star* 2016**

***Chambers USA* 2016**
A "very bright guy" and "a very knowledgeable government contracts lawyer." He is a regular fixture in the bid protests arena, an area in which he "knows his stuff," according to interviewees.

***Chambers USA* 2015**
Mr. Wine is "is my most trusted lawyer regardless of the issue; he hits it out of the park every time and gets us the right answer on any question immediately."

respect to various supplier, subcontractor, partnership, investor, and employment disputes;

- Advising clients regarding critical legal and business issues as they pertain to safeguarding intellectual property and other proprietary interests, the handling of classified materials, organizational and personal conflicts of interest, ethics, bid preparation and procurement integrity, contract administration, and suspension and debarment; and
- Regularly serving as primary government contracts counsel in transactional matters and counseling hedge funds, family offices, and private equity firms regarding public procurement programs and associated business opportunities.

Mr. Wine holds an active security clearance and is admitted to practice in the State of Maryland, the District of Columbia, and the Commonwealth of Virginia. He is a member in good standing of: the U.S. Supreme Court; the U.S. Courts of Appeals for the Fourth, Federal, and DC Circuits; the U.S. District Courts for the Districts of Maryland and the District of Columbia; the U.S. Court of Federal Claims; the Maryland Court of Appeals; and the DC Court of Appeals. He has served as a member of ***Law360***'s Government Contracts Editorial Advisory Board from 2014-16. In April 2006, President George W. Bush appointed Mr. Wine to a five-year term on the United States Holocaust Memorial Council, the governing body of the United States Holocaust Memorial Museum. He continues to serve as an appointee on the Museum's Committee on Conscience.

- **ASM Research**, January 7, 2016, B-412187 – represented ASM Research – protest sustained where awardee's prior award for the Veteran's Administration resulted in an “impaired objectivity” organization conflict of interest.
- Conducted internal investigation regarding Fortune 100 client's accounting and business systems practices. Represented client's interests with the Defense Contract Audit Agency. Advised C-suite regarding proposed changes and remedial actions.
- Conducted internal investigation of alleged f ITAR and EAR violations for privately held multinational company. Coordinated disclosures to Department of State and Commerce. Served as principal interface with other affected third parties. Advised senior leadership regarding development and implementation of export controls policies and procedures.
- Conducted internal investigation regarding pricing anomalies associated with Fortune 20 client's multiple award schedule contracts. Made required disclosures to General Services Administration Inspector General. Advised C-suite regarding changes to policy and training of employees.
- Conducted multi-national government contracts compliance review and associated risk assessment for a Fortune 50 Company recommending process improvements and policy changes.
- **Softbank Corp.** – served as principal government contracts counsel to Softbank in its $20.1 billion acquisition of a 70% stake in Sprint Nextel, representing the largest outbound investment from Asia ever. Efforts to secure necessary U.S. Government approvals garnered international attention.

- **Next Tier Concepts, Inc.**, B-406620.3, 2012 WL 6951484. Represented Emagine IT, Inc. in successfully defending a $30 million GSA 8(a) STARS II GWAC award for IT services against a myriad of protest allegations filed at GAO.
- **FirstLine Transportation Security, Inc.** before both the GAO and the U.S. Court of Federal Claims to successfully protest the award by the Transportation Security Administration of a multiyear Screening Partnership Program contract for the Kansas City Airport.
- Served as principal outside compliance counsel to one of the world's leading professional services companies. Handled a variety of compliance and counseling matters touching on virtually every aspect of the client's business with its municipal, state, federal and non-U.S. customers.
- Conducted a multi-jurisdictional internal investigation regarding allegations of improper bid preparation and submission for leading international professional services firm.
- Lead internal investigation for leading, multinational information technology firm regarding allegations of improper billing and oversight.
- Secured multimillion dollar arbitration awards from the American Arbitration Association, JAMS, and the International Chamber of Commerce, including awards of fees and costs for pursuing arbitral decisions.
- Successfully litigated and settled complex CERCLA disputes, including those involving government ownership, operation, and control of World War II-era defense operations.

SPEAKING ENGAGEMENTS

- “Privilege Considerations in Planning, Performing and Reporting Out Internal Investigations,” Law Seminars International TeleBriefing Webinar (July 2014)
- “And I Thought Government Contracts Were Tough! – How Your Insurance Contracts Impact Your Government Contract Work – And Vice Versa,” WMACCA Government Contractors Forum Webinar (June 2014)
- “The Inspector General's Perspective on Compliance Hot Buttons,” MAGIC 2013 Conference, Alexandria, VA (July 2013)
- Aspen Institute Clean Energy Forum, Aspen, Colorado (June 2013)
- “U.S. Government Regulation of Israeli High Tech Companies,” Seminar Sponsor, Tel Aviv (April 2013)
- “Navigating Grant and Contracting Opportunities with the U.S.: A Primer on Strategies for Success and Compliance,” MoFo BioMed Luncheon Series, San Diego (March 5) and Palo Alto (March 6)
- “Preparing for Sequestration,” Morrison & Foerster webinar (February 2013)

PUBLICATIONS

- "Courts Are Taking Materiality Seriously Post-Escobar," *Law360*, Co-author (September 20, 2016)
- "FCA In 2015: 10 Qui Tam Highlights From The Past Year," *Law360*, Co-author (December 22, 2015)
- "Supreme Court Will Take Up Implied Certification Theory of FCA Liability," Morrison Foerster Government Contracts Insights Blog (December 4, 2015)
- "The FCA Impact Of DOJ's Increased Focus on Small Business," *Law360*, Co-author (October 21, 2015)
- "The FCA and the Ever-Narrowing Public Disclosure Bar," Morrison & Foerster Client Alert, Co-author (March 2015)
- "Global Procurement Quarterly – Winter 2015," Morrison & Foerster Newsletter, Editor (February 2015)
- "Global Procurement Quarterly – Summer/Fall 2014," Morrison & Foerster Newsletter, Editor (October 2014)
- "Government Contracting Risks: Suspension, Debarment, and Conflicts of Interest," *Government Contracts Compliance: Leading Lawyers on Understanding Enforcement Trends and Updating Compliance Programs (Inside the Minds),* Co-author, *Thomson Reuters*, 2014 ed.
- "World Bank Suspension and Debarment Report," Morrison & Foerster Client Alert, Co-author (July 2014)
- "Global Procurement Quarterly – Spring 2014," Morrison & Foerster Newsletter, Editor (June 2014)
- "Global Procurement Quarterly – Winter 2014," Morrison & Foerster Newsletter, Editor (March 2014)
- "DOD Issues Interim Rule on Supply Chain Security," Morrison & Foerster Client Alert, Co-author (November 2013)
- "Now or Never – Protecting Your Right to Recover Costs Caused by the Government Shutdown," Morrison & Foerster Client Alert, Co-author (October 2013)
- "Wages for Furloughed Employees," Morrison & Foerster Client Alert, Co-author (October 2013)
- "DOD's Secret Contract Awards During the Government Shutdown Undermine CICA," *Law360*, Co-author (October 2013)
- "How Contractors Can Mitigate Government Shutdown Risks," *Law360*, Co-author (October 2013)
- "Dealing with a Government Shutdown: Six-Step Action Plan for Contractors," Morrison & Foerster Client Alert, Author (October 2013)
- "Other Transactional Authority: A Nontraditional Tool for Partnering with the Federal Government," Morrison & Foerster Client Alert, Co-author (May 2013)

CATHERINE L. CHAPPLE

Associate, Northern Virginia, +1 (703) 760-7729, CChapple@mofo.com

Catherine Chapple focuses her practice on dispute resolution and counseling for government contractors, including clients in the aerospace, security, defense, and information technology industries. She has extensive litigation experience and has successfully represented government contractors in claims disputes and bid protests before the U.S. Court of Federal Claims and the U.S. Government Accountability Office, and in alternative dispute resolution proceedings at the Armed Services Board of Contract Appeals.

Catherine's role as counselor extends beyond litigation. She regularly advises clients on a wide range of government contracts issues, including the False Claims Act, organizational conflicts of interest, the Procurement Integrity Act, defective pricing, GSA contracting, teaming agreements and subcontractor relationships, small business regulations, and mergers and acquisitions involving government contractors. She has been involved with numerous internal investigations and compliance reviews, and has advised clients with respect to voluntary disclosures to agency Inspectors General.

EDUCATION

University of California, Santa Barbara (B.S., 2006)

Wake Forest University School of Law (J.D., 2012)

Catherine also maintains a vibrant pro bono practice. She is particularly committed to veterans' rights and is part of a team currently challenging unfair practices of the Army Board for Corrections of Military Records in federal court. She recently went to trial in New York on behalf of home owners facing foreclosure, and helped two siblings gain green cards, allowing them to stay in Virginia with their mother rather than be sent back to El Salvador. Catherine also advises DC Greens, a non-profit that supports food education, access, and policy in the District of Columbia, on contracting and other issues.

Prior to joining Morrison & Foerster, Catherine clerked for the Honorable George W. Miller at the United States Court of Federal Claims in Washington, D.C.

Catherine received her J.D. *cum laude* from the Wake Forest University School of Law, where she served as Executive Editor of the *Wake Forest Law Review*. Also during law school, Catherine worked in the legal

department of a Fortune 100 media corporation, the Office of the Chairman of the Federal Communications Commission, and for the Honorable Eric T. Washington at the District of Columbia Court of Appeals.

Catherine is admitted to practice in California, Virginia, and before the U.S. Court of Federal Claims.

REPRESENTATIVE EXPERIENCE

BID PROTESTS BEFORE THE U.S. COURT OF FEDERAL CLAIMS AND GAO

- Represented Space Exploration Technologies Corp. (SpaceX) in defeating Sierra Nevada Corp's bid protest, filed at GAO, challenging NASA's $2.6 billion contract award for the development of a new spacecraft capable of replacing the Space Shuttle and transporting astronauts to and from the International Space Station. Sierra Nevada Corp., B-410485, 2015 WL 237331.
- Represented SpaceX in defeating Sierra Nevada's challenge of NASA's override of the CICA stay at the U.S. Court of Federal Claims.
- Represented DynCorp International in a successful post-award bid protest at GAO challenging the Department of State's improper discussions with offerors and subsequent award decision of a $131 million task order for life mission and support services in Afghanistan. DynCorp Int'l LLC, B-409874.2.
- Represented SpaceX in successfully prosecuting a multi-billion-dollar bid protest at the U.S. Court of Federal Claims and negotiating a favorable settlement resolving the U.S. Air Force's unlawful failure to conduct full and open competition for national security satellite launch services.

FALSE CLAIMS ACT AND INTERNAL INVESTIGATIONS

- Conducted internal investigation of accounting and business practices at Fortune 500 company, including representing client's interests with the Defense Contract Audit Agency and advising client executive team with respect to proposed changes and remedial actions.

REGULATORY COMPLIANCE COUNSELING

- Implemented program to monitor compliance developments with the potential to affect government contracting business of Fortune 500 professional services firm.

MERGERS AND ACQUISITIONS

- Conducted diligence review and analyzed government contracts issues to support mergers and acquisitions involving government contracts, including SoftBank's $20.1 billion dollar acquisition of Sprint Nextel Corporation.

J. ALEX WARD

Partner, Washington D.C., +1 (202) 887-1574, alexward@mofo.com

J. Alex Ward is co-chair of Morrison & Foerster's Government Contracts and Public Procurement practice. His practice covers a full range of government contracts matters, including bid protests, claims, investigations, corporate transactions, and counseling. In addition, he regularly handles federal and state court litigation and alternative dispute resolution involving government contractors. In all matters, Mr. Ward's constant goal is to provide his clients the highest level of efficient, ethical, and effective representation.

Mr. Ward has served as lead counsel in dozens of bid protests involving military and civilian agency procurements of a wide range of products and services, including all manner of pre- and post-award protests in the GAO, the U.S. Court of Federal Claims, and state tribunals, as well as appeals to the U.S. Court of Appeals for the Federal Circuit and size protests before the SBA's Office of Hearings and Appeals. He has handled all aspects of the claims process, from the initial assessment and drafting of requests for equitable adjustment through litigation in the Boards of Contract Appeals and the Court of Federal Claims. He has represented contractors in internal and external investigations, disclosures to the government, and qui tam litigation, with a great deal of success in reducing or eliminating his clients' exposure through active engagement with the relevant government bodies. His work on transactions involving the purchase, sale, and restructuring of government contractors has ranged from overseeing diligence on the target company's government contracts portfolio to advising on issues such as FOCI and CFIUS review.

Mr. Ward's litigation and ADR practice covers the gamut of controversies confronting government contractors, including prime-sub, teaming partner, employer-employee, competitor, and indemnification disputes. His litigation work also includes a variety of pro bono engagements, in which he has represented both individual and institutional clients in matters ranging from criminal defense to protection of the environment.

Prior to joining the firm, Mr. Ward served in the U.S. Army as a commissioned officer and an Assistant to the General Counsel of the Army. His work for the Army included civil works and international matters.

EDUCATION

Duke University (A.B., 1989)

Harvard Law School (J.D., 1992)

REPRESENTATIVE CASES & DECISIONS

- *A-T Solutions, Inc.*, B-410167 (successfully protested scope of work for Army's Asymmetric Integration Training Program and Mission Command Training Program contract, resulting in voluntary corrective action).
- *American Institutes for Research v. State of New Mexico*, No. D-101-CV-2014-00138, slip op. (Sante Fe County, NM, District Court May 31, 2014) (sustaining challenge to state agency's dismissal of protest of Common Core operational assessment testing platform).
- *CACI-WGI, Inc.*, B-408520.2, 2013 CPD ¶ 293, 2013 WL 6729720 (Comp. Gen. Dec. 16, 2013) (intervened to successfully oppose protest of Army's award to client of Asymmetrical Warfare Group support contract).
- *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.,* 533 Fed. App'x 912 (11th Cir. 2013) (denying appeal of summary judgment in favor of client in indemnification dispute and sustaining client's cross-appeal seeking increased damages award).
- *IAP World Servs., Inc.*, B-407917.2 et seq., 2013 CPD ¶ 171, 2013 WL 3817472 (Comp. Gen. July 10, 2013) (successfully protested Navy's award of Patuxent Naval Air Station base operating services contract, with cost recovery and contract award to client after re-evaluation of proposals).
- *Size Appeal of IAP World Servs., Inc.*, SBA No. SIZ-5480 (SBA OHA June 24, 2013) (granting client's size appeal in contract for base operating services).
- *Al-Ghanim v. IAP Worldwide Servs., Inc.*, No. 6:11-cv-467-Orl-19DAB, slip op. (M.D. Fla. Jan. 17, 2012) (successfully opposed suit seeking international discovery from client in connection with Kuwait joint venture dispute).
- *IAP Worldwide Servs., Inc.*, B-407315.1, 2. &.3 (successfully protested Army's award of contract for power services at Camp Leatherneck in Afghanistan, resulting in two rounds of voluntary corrective action and ultimate award of contract to client).
- *Threat Mgm't Group*, B-407766.1 (successfully protested Air Force's award of contract for explosive ordnance disposal support services, resulting in voluntary corrective action and cost recovery for client).
- *IAP World Servs., Inc.*, B-406339.1 (successfully protested Army's award of contract for base operating services at Fort Irwin, resulting in voluntary corrective action).
- *General Dynamics – American Overseas Marine,* B-401874.2 & .5 (successfully protested Navy's award of ship operation and maintenance contract, resulting in voluntary corrective action).
- *O'Gara Training & Servs., LLC*, B-404901.2, 2011 CPD ¶ 171, 2011 WL 3856322 (Comp. Gen. July 28, 2011) (intervened to successfully oppose protest of Navy's award of contract for explosive ordnance disposal training).

- *IAP Worldwide Servs., Inc. v. Johnson Controls, Inc.*, No. 5:09cv331, slip op., 2011 WL 2181849 (N.D. Fla. June 3, 2011) (granting summary judgment to client for indemnification under stock purchase agreement for acquisition of subsidiary).
- *AAR Mobility Sys.*, B-403888.2 (intervened to successfully oppose protest of Army's award of contract for production of tactical shelters).
- *A-T Solutions, Inc.*, B-404901.1 (successfully protested Navy's award of contract for explosive ordnance disposal training, resulting in voluntary corrective action and award of contract to client).
- *Matt Martin Real Estate Mgm't, LLC v. United States*, 96 Fed. Cl. 106 (2010) (intervened to successfully oppose protest of HUD's award of contracts for marketing of portfolio of foreclosed homes).
- *Pyramid Real Estate Servs., LLC v. United States*, 95 Fed. Cl. 125 (2010) (intervened to successfully oppose protest of HUD's award of contracts for marketing of portfolio of foreclosed homes).
- *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.*, No. 509cv331, slip op., 2010 WL 3610449 (N.D. Fla., Sept. 13, 2010) (granting in part client's motion for summary judgment in subcontract dispute).
- *Harrington, Moran, Barksdale, Inc.*, B-401934.2, B-401934.3, 2010 CPD ¶ 231, 2010 WL 3994253 (Comp. Gen. Sept. 10, 2010) (intervened to successfully oppose protest of HUD's award of contracts for marketing of portfolio of foreclosed homes).
- *Homesource Real Estate Asset Servs., Inc. v. United States*, 94 Fed. Cl. 466 (2010) (intervened to successfully oppose protest of HUD's award of contracts for marketing of portfolio of foreclosed homes).
- *Ocean Ships, Inc.*, B-401526.4, 2010 CPD ¶ 106, 2010 WL 1766756 (Comp. Gen. Apr. 21, 2010) (intervened to successfully oppose protest of Navy's award of contract for operation and maintenance of roll-on/roll-off ships).
- *Keystone Sealift Servs., Inc.*, B-401526.3, 2010 CPD ¶ 95, 2010 WL 1514157 (Comp. Gen. Apr. 13, 2010) (intervened to successfully oppose protest of Navy's award of contract for operation and maintenance of roll-on/rolloff ships).
- *ITT Corp., Sys. Div.*, B-310102.6 et al., 2010 CPD ¶ 12, 2009 WL 5447710 (Comp. Gen. Dec. 4, 2009) (intervened to successfully oppose protest of Navy's award of contract for air traffic control services in Southwest Asia).
- *IAP Worldwide Servs., Inc. v. Fluor Intercontinental, Inc.*, No. 509cv331, slip op., 2009 WL 4730509 (N.D. Fla., Dec. 4, 2009) (successfully opposed motion to dismiss client's suit in favor of arbitration).
- *FedSys, Inc.*, B-401453, 2009 CPD ¶ 181, 2009 WL 3018114 (Comp. Gen. Sept. 8, 2009) (intervened to successfully oppose protest of Army's award of counter-improvised explosive device training contract).

- *Academy Facilities Mgm't v. United States*, 87 Fed. Cl. 441 (2009) (intervened to successfully oppose protest of Navy's award of U.S. Naval Academy facilities service contract).
- *Academy Facilities Management -- Advisory Opinion*, B-401094.3, 2009 CPD ¶ 139, 2009 WL 2217662 (Comp. Gen. May 21, 2009) (intervened to successfully obtain opinion recommending denial of protest award of facilities service contract).
- *Evans Security Solutions, Inc.*, B-311035, 2008 CPD ¶ 58, 2008 WL 746861 (Comp. Gen. Mar. 19, 2008) (intervened to successfully oppose protest of Government Printing Office's award of contract for smart card identification system).
- *Contingency Mgm't Group, LLC and IAP Worldwide Servs., Inc.*, B-309752 et seq., 2008 CPD ¶ 83, 2007 WL 5178258 (Comp. Gen. Oct. 5, 2007) (successfully protested Army's award of $150 billion Logistics Civil Augmentation Program ("LOGCAP") contracts).
- *Kellogg Brown & Root Services, Inc.*, B-298694.7, 2007 CPD ¶ 124, 2007 WL 1932070 (Comp. Gen. June 22, 2007) (intervened to successfully oppose protest of Navy's award of $1 billion global contingency construction contract).
- *Liberty Power Corp.*, No. B-295502, 2005 WL 696284 (Comp. Gen. Mar. 14, 2005) (successfully protested General Services Administration's award of contract for electric power supply to federal facilities).

PUBLICATIONS

- Co-Author, "SBA's Presumed Loss Safe Harbor Remains Insufficient," *Law360*, July 11, 2014
- Co-Author, "How New SBA Regs Will Affect Mentor-Protege Ventures," *Law360*, February 15, 2011
- "Government Procurement Challenges for Contractors," *The Impact of Recent Changes in Government Contracts*, 2010
- "Copyrighting Context: Law for Plumbing's Sake," 17 Column.-VLA J.L. & Arts 159, 1993

SANDEEP N. NANDIVADA

Associate, Northern Virginia, Washington D.C., +1 (202) 887-1593,

SNandivada@mofo.com

Sandeep Nandivada is an associate in the Litigation Department of Morrison & Foerster's Northern Virginia office. Mr. Nandivada's practice focuses on government contracts counseling and dispute resolution for clients in the information technology, health care, and aerospace and defense industries.

Mr. Nandivada has extensive experience litigating bid protests and contract disputes, and has assisted clients with internal investigations with False Claims Act, Foreign Corrupt Practices Act, and suspension and debarment implications, including helping clients with mandatory disclosures required under the Federal Acquisition Regulation (FAR). Mr. Nandivada also regularly advises clients on FAR and Defense FAR Supplement (DFARS) compliance issues, and has counseled clients on international government contracting matters, including market entry, Status of Forces Agreements, offsets, and foreign military sales.

EDUCATION

Cornell University (B.A., 2010)

The George Washington University Law School (J.D., 2013)

Mr. Nandivada graduated with honors from the George Washington University Law School, where he was Editor-In-Chief of *The George Washington Journal of Energy and Environmental Law*, Vice President of Internal Competitions for the Moot Court Board, a legal writing fellow, and a member of the Alternative Disputes Resolution Board. He received his undergraduate degree from Cornell University with *Distinction in all Subjects* in History.

Mr. Nandivada is admitted to practice in Virginia, the District of Columbia, and before the U.S. Court of Federal Claims and the U.S. District Court for the Eastern District of Virginia.

RICK VACURA

Partner, Northern Virginia, +1 (703) 760-7764, RVacura@mofo.com

Mr. Vacura is a partner in the firm's Government Contracts and Public Procurement practice in the firm's Northern Virginia office. He advises both U.S. and non-U.S. companies in contracts with the U.S. government, as well as international governments. His experience in government contract matters includes counseling, litigation, and claims development for major aerospace, shipbuilding, telecommunications, and electronics companies.

Mr. Vacura's counseling experience includes due diligence reviews for domestic and foreign acquisitions, novation and assignment issues, drafting and negotiating teaming and joint venture agreements, technical data and nondisclosure agreements, export control, international anti-corruption, national security, and standard domestic and international solicitations and contract/subcontract terms and conditions. Mr. Vacura is named a Leading Lawyer in Government Contracts by *Chambers USA* (2008 – 2015), and has been named to *Best Lawyers in America* (2013 – 2016). He has also been named a Top Government Contracts Lawyer by the *Washington Business Journal*.

Mr. Vacura has extensive litigation experience involving major weapon systems, software development, communications systems, technical data rights, procurement fraud and classified matters, as well as prime/subcontract disputes, bid protests, injunctive suits, Freedom of Information Act actions, False Claims Act cases, and Federal Tort Claims Act cases. He also served as interim division counsel for a major telecommunications and electronics client.

Mr. Vacura entered private practice after serving as a major in the U.S. Air Force Judge Advocate General's Department. With the Air Force, he served as a trial attorney for the Air Force Contract Litigation Division at the Pentagon, a procurement legal advisor for the Ballistic Missile Organization in California, a criminal defense counsel, and a prosecutor. Mr. Vacura lectures and conducts

EDUCATION

The George Washington University Law School (LL.M., 1991)

William Mitchell College of Law (J.D., 1983)

University of Texas (B.A., 1974)

RANKINGS

Chambers USA **2017**
"Richard Vacura is regarded by sources as 'a very strong lawyer' and a 'knowledgeable resource.' Clients further describe him as 'a levelheaded, calm and sound thinker.' He is sought out by contractors in the defense, aerospace and IT industries to handle high-stakes litigation and internal investigations."

seminars on a variety of federal procurement topics for clients, and for eGov, Federal Publications, the Contract Services Association of America, the Council of Defense & Space Industry Associations, the National Contract Management Association, and various Department of Defense organizations.

Mr. Vacura is an active member of the American Bar Association, and is a Vice-Chair of the Public Contract Law Section, Contract Claims and Disputes Resolution Committee, as well as the International Procurement Committee. He also serves on the Board of Governors for the Boards of Contract Appeals Bar Association.

Mr. Vacura is admitted to the bars of Minnesota, Virginia and the District of Columbia, as well as the Court of Appeals for the Federal Circuit, the Court of Federal Claims, and the District Court for the District of Columbia.

REPRESENTATIVE MATTERS: LITIGATION

- **Honeywell Technology Solutions, Inc.** in a successful “reverse” Freedom of Information Act case in federal district court seeking to enjoin the Air Force's release of confidential commercial information related to technical solutions and allocated costs submitted in a proposal and incorporated into an Air Force contract for supplies and services to sustain and evolve the Air Force Satellite Control Network. The court permanently enjoined the Air Force from releasing the majority of Honeywell's confidential contract information, and remanded the remaining issues back to the Air Force for additional review.
- Large multinational Fortune 500 company in an extensive internal investigation and in the DoD/DoJ Voluntary Disclosure Program related to contract noncompliance allegations and potentially involving False Claims Act violations and procurement fraud.
- Major defense contractor at the Court of Appeals for the Federal Circuit in the Navy's appeal of a favorable ASBCA decision involving $30 million in breach of warranty claims related to the Navy's SQQ-89 antisubmarine warfare system. The case included extensive motion practice, discovery on numerous technical issues, and a three-week trial involving multiple experts and numerous fact witnesses.
- U.S. company accused of Foreign Corrupt Practices Act (FCPA) violations related to sales of aerospace supplies in the Far East. The allegations included bribes paid to government officials to obtain large contracts with the foreign government.
- Large multinational foreign company sanctioned by the U.S. Sate Department for violations of the Iran, North Korea, and Syria Nonproliferation Act. The violations related to sales of controlled products and services to Iran and Syria.
- Major DOD aerospace company in “reverse” Freedom of Information Act case in federal district court seeking to enjoin the Air Force's release of confidential commercial information submitted in a proposal and incorporated into an Air Force contract. Based on the client's cross-motion for summary judgment, the court determined that the Air Force had not properly justified the basis for its decision to release the information and permanently enjoined the Air Force from releasing the information.

ATTORNEY BIO

- Major developer in a $155 million Federal Tort Claims Act case against the Army for environmental damages related to property purchased pursuant to the closure of a former Air Force base.
- Major defense contractor involving over 15 directed and constructive changes to the contract requirements, as well as termination claims valued at over $27 million. The case involved the client's contract for the design, engineering development, fabrication, test, and certification for the Global Air Traffic Control Program related to military aircraft, and resulted in a favorable settlement for the client.
- Major defense contractor involving directed and constructive changes to its shipbuilding contract with the Navy. The case involves schedule analysis experts and extensive delay and disruption valued at over $45 million caused by the Navy's changes to the technical baseline of the ship's systems.
- Leading supplier of oxidizing agent for solid propellant rocket motors in its request for equitable adjustment for directed and constructive changes to its supply contracts. The case resulted in a favorable settlement, which included restructuring the contract terms and conditions.
- Case involving a major DOD aerospace company in litigation before the Armed Services Board of Contract Appeals. The case involved over $1.8 billion in claims in a complex major weapon systems procurement, the C-17 aircraft. The case settled on the eve of the first of 8 scheduled trials for $480 million, and numerous concessions concerning technical requirements.
- Telecommunications company in litigation of more than 30 constructive change and partial termination claims valued at over $200 million before the ASBCA. The case involved the client's contract to design, build, and test the Air Force's Consolidated Satellite Operations and Control Center (CSOC). The case settled shortly before the first trial through intensive, unassisted ADR, and provided a very favorable monetary settlement for the client and concessions by the government regarding technical and performance issues.
- Case at the ASBCA involving $40 million in constructive change and termination claims related to the highly complex technical effort to design, develop, and build a classified system for the Air Force. Obtained a very favorable settlement through unassisted ADR.
- Co-counsel, with another law firm, represented a major DoD aerospace company at the Court of Federal Claims involving $1 billion in claims for the Air Force's termination of a stealth missile contract. The program was classified as covert and involved approximately 30 million pages of documents.
- Major defense contractor pursuing constructive change and termination claims at the ASBCA involving a Defense Intelligence Agency contract to design, develop, and build a classified computer system for processing satellite imagery.
- Large telecommunications company in dispute with subcontractor on project to design and construct 32 meter antennas. Obtained favorable settlement through ADR.

REPRESENTATIVE MATTERS: BID PROTEST EXPERIENCE

- **Global Linguist Solutions (GLS)** in successfully defending against a bid protest at the U.S. Court of Federal Claims. GLS competitor challenged the award to GLS of a U.S. Army contract for linguistic and translation services valued at $7.6 billion. After briefing and a hearing, the court denied all counts of the competitor's complaint and affirmed the award of the contract to GLS.
- **DynCorp International** in bid protests at the Government Accountability Office (GAO) related to a $1 billion U.S. Army contract to train Afghan police. In its successful challenge, Morrison & Foerster argued on behalf of DynCorp that the contested contracts should be subject to full and open competition as required by the Competition In Contracting Act, which would allow DynCorp the chance to compete. The GAO agreed and in addition to sustaining the protest in DynCorp's favor, the GAO also held that the Army was required to pay attorney's fees and costs. After the U.S. Army opened the Afghan police training contract to full and open competition and DynCorp was selected as the winner, disappointed bidders separately protested the award decision to the GAO. The protesters challenged all aspects of the Army's evaluation and award, including its evaluation of the bidders' technical, past performance, and cost proposals. DynCorp intervened in the protests and after extensive briefing by all parties, the GAO upheld the award to DynCorp and denied all protest grounds.
- **Space Exploration Technologies Corporation** in successfully defending its award by NASA of a $3.1 billion contract for launch supply services to resupply the International Space Station. A disappointed bidder first filed a protest of the contract award at the Government Accountability Office (GAO), and then filed an action at the Court of Federal Claims challenging NASA's decision to override the automatic stay of performance imposed by the Competition in Contracting Act. Both actions by the protester were unsuccessful.
- **Knowledge Consulting Group** in successfully defending its award by the Deaprtment of Homeland Security of a $71 million contract for information technology security support services.
- **Northrop Grumman** in a successful bid protest that challenged the $150 million contract award by National Geospatial-Intelligence Agency to another bidder for the acquisition of services under a comprehensive base operations and services contract for the agency's eastern facilities.
- **NeuStar** in successful multiple bid protests at the GAO over its award by the Department of Commerce of the contract for administering thedomain top-level Internet, .us, which is the official country code domain for the United States. The case involved jurisdictional arguments of first impression at the GAO related to whether the protester had met statutorily imposed timeliness requirements. In its decision, the GAO agreed with our client's position and dismissed the majority of the protest grounds as untimely filed.
- **DynCorp International** in successfully defending its award of a Department of State contract for supplies and services in support of the Columbian Police Aviation program. Disappointed bidders protested the award first to the GAO, and then the Court of Federal Claims.

- **SpaceX** in its successful challenge to billions of dollars in sole source contracts being awarded by the Air Force. Through the litigation, the Air Force agreed to open the space launch contracts to competition on a yearly basis.
- Leading information management company in its protest of the award of a contract by the U.S. Department of Homeland Security for digitization of all Alien-File data that resides in the various U.S. Citizenship and Immigration Services centers.
- Engineering services company in its successful protest of the Navy's sole source award of a contract for training systems engineering services in support of the Navy's Aegis Cruisers and Aegis Destroyer baseline development. The protest challenged the award as an out-of-scope task order, and the Navy took corrective action in response to the protest.
- Awardee of a Department of Housing and Urban Development contract for management and marketing services in connection with disposition of single-family homes and other property owned by HUD. The protester challenged at the GAO and the Court of Federal Claims virtually all aspects of HUD's evaluation and elimination of the protester from the competitive range. The GAO protest decision upheld the agency's evaluation and denied the protest on all counts. The subsequent protest at the Court was withdrawn after the Court denied the protester's request for a temporary restraining order.
- Information technology company in its protest of the State Department's award of a contract for information technology support services to be performed for the chief technology officer within the Bureau of Diplomatic Security.
- Leading provider of geospatial and database products in its protest of the award of a contract by the National Geospatial-Intelligence Agency for mapping database software and geographic data as part of NGA's Homeland Security Infrastructure Database for all Federal, State, and Local users. The protest successfully challenged NGA's technical evaluations and the awardee's ability to meet the contract requirements. Based on the issues raised in the protest, the agency took corrective action and terminated the awarded contract.
- Commercial space launch contractor in successful protest of NASA's decision to procure data to demonstrate the ability of commercial space launch systems to support the International Space Station on a sole source basis. The anticipated $227 million sole source contract was challenged on numerous grounds involving complex technical and programmatic issues. Based on GAO's outcome prediction indicating a favorable decision for the protester, NASA agreed to take corrective action and to pay protest costs, including attorney fees.
- Major defense contractor protesting NASA's contract for test operations services at the Stennis Space Center and the Marshall Space Flight Center. The matter involved multiple protesters challenging NASA's evaluations of technical issues, and its cost realism analysis. After a hearing and taking written testimony from the protester's expert witness, the GAO sustained the protest and recommended that NASA take corrective action. The client also recovered protest costs, including attorney fees.

- Leading provider of secure off-site data storage protesting Social Security Administration contract for the provision of all labor, facilities, and equipment for a secure off-site magnetic media vault facility for SSA's disaster recovery program. The protest challenged the awardee's ability to meet all of the minimum mandatory technical requirements stated in the solicitation. Based on the issues raised in the protest, SSA agreed to take corrective action.
- Awardee of a Navy contract for INMARSAT Saturn-Bm terminals high-speed modem capability, Saturn-Bm antennas, integrated antenna hand-over upgrade kits as well as engineering services and maintenance support for satellite communications on Navy ships. The protester challenged the Navy's evaluation of its technical solution and compatibility with INMARSAT requirements. The protest decision upheld the agency's evaluation and denied the protest on all counts.
- Major defense contractor in the protest of the award of an Air Force contract for ground carts to cool aircraft avionics during maintenance. The protest successfully challenged the Air Force's technical evaluations and the awardee's ability to meet the minimum mandatory requirements. With the assistance of written testimony from the protester's technical expert, the Air Force agreed to take corrective action, settled the protest, and paid the client's attorney fees.
- Lead counsel representing a joint venture company awarded a $2.4 billion Army contract for the Abrams-Crusader Common Engine Program contract. The multibillion dollar contract required the design, development, and fielding of a new propulsion system for the M1 Abrams main battle tank and the Crusader artillery system. The protester challenged all aspects the Army's technical evaluations, as well as life cycle costs and pricing issues. The protest itself was selected by the GAO as a test case for its E-Filing Pilot Project, which provided for electronic filings and submittal of electronic media. Protester withdrew the protest prior to the GAO issuing a decision.
- Major defense contractor in defense of the Air Force's award of the Counterdrug Surveillance and Control System contract for a network of radar systems in the Caribbean and South America. Successfully argued government contract issues supporting the Department of Justice in the TRO/PI hearing.
- Awardee of an information technology contract for electronic record conversion and recordkeeping of gun registration records for the Bureau of Alcohol, Tobacco and Firearms. The matter involved technical and pricing issues, requiring written testimony of an expert witness. The decision is one of several key cases interpreting the requirement for meaningful discussions after the FAR Part 15 rewrite.
- Major defense contractor protesting the Navy's award of a $6.5 billion contract for the operation and management of the Bettis Atomic Power Laboratory. Protest involved extensive challenges to evaluation of technical proposals, and included substantial motion practice, multiple experts, and a GAO hearing.
- Protester of a Navy contract for comprehensive reduction and disposal of radioactive waste at the Pearl Harbor Naval Shipyard. Protest challenged technical evaluations involving complex waste disposal methods and technology. GAO sustained the protest based on various flaws in the evaluations raised by the protester.

- Awardee of DoD's worldwide express small package delivery contract. A motion to dismiss caused the GAO to narrow the scope from numerous issues to one issue before production of the agency report. Upon review of agency report, the protester withdrew the protest.
- Awardee of contract for design, development, installation, and maintenance of inmate telephone systems in all federal prisons.
- Major Defense contractor protesting the Army's award of a contract for the design and development of war-fighting technology.
- Major Defense contractor concerning Navy's award of a contract for production of multiple lots of underwater anti-submarine warfare system.

REPRESENTATIVE MATTERS: COUNSELING AND TRANSACTIONAL

DUE DILIGENCE AND M&A

- Major defense contractor in its acquisition of a software development company, which involved small business, intellectual property, and cost accounting issues, as well as classified contracts.
- Foreign company in its acquisitions of several domestic companies, which involved the successful review and approval by the Committee on Foreign Investment in the United States (CFIUS).
- Professional services company in its acquisition by a foreign company, which involved CFIUS approval and security issues under the National Industrial Security Program Operating Manual (NISPOM).
- Professional services company in its acquisition of a company performing classified contracts, which required resolution of numerous NISPOM-related issues.
- Defense contractor in its acquisition of a professional services contractor performing overseas defense contracts, which required resolution of various issues related to Status of Forces Agreements in multiple foreign countries.
- Foreign client in its acquisition of domestic company performing grants and other U.S. government funding agreements, which required resolution of numerous intellectual property issues under the Bayh-Dole Act.
- International transportation company in performing the government contract due diligence of over 90 government contracts for the $260 million acquisition of an international freight forwarding company.
- Major international company in its acquisition of a U.S. defense company.
- Provide counsel and advise on national security issues, including the CFIUS.
- Conducted government contracts due diligence for Fortune 50 company in its acquisition of a European defense company.

- Fortune 50 company in its attempted acquisition of a major U.S. defense contractor.
- Conducted due diligence for Fortune 10 company in its acquisition of a European defense company.

INTELLECTUAL PROPERTY AND TECHNICAL DATA

- Fortune 500 company in negotiations with the government concerning rights in data related to electronic transactions.
- Counsel clients regarding protection of intellectual property and data related to e-business.
- Fortune 500 companies concerning protection of intellectual property and data sought by competitors under the Freedom of Information Act.
- Provide counseling and review of intellectual property clauses and provisions for both prime and subcontractors for the government.

CONTRACTUAL ARRANGEMENTS AND AGREEMENTS

- Provided claims and contract related support for structured workout negotiations for client manufacturing products controlled by the Nuclear Regulatory Commission.
- Provide counseling and review of agreements related to Foreign Corrupt Practices Act issues.
- Counsel clients concerning export control issues and compliance.
- Counsel clients regarding international anticorruption issues and compliance.
- Provide counseling and review of domestic and international teaming and joint venture agreements.
- Provided counseling and in-house training for major wireless telecommunications provider selling commercial items and services to the government.
- Counsel clients and review contract terms and conditions related to the government's implementation of secure E-Business.

SPEECHES, ARTICLES AND PRESS

- “Paid Sick Leave – Proposed Regulations May Carry Significant Burdens for Federal Contractors,” Morrison & Foerster Government Contracts Insights, March 15, 2016
- “GAO Further Clarifies Its Rule on Differing Technical Reevaluations,” Morrison & Foerster Government Contracts Insights, February 29, 2016
- “An Ace in the Hole for Small Businesses? Proposed Legislation to Increase Small Business Contracting Goals,” Morrison & Foerster Government Contracts Insights, August 21, 2015

CHARLES L. CAPITO III

Associate, Washington D.C., +1 (202) 887-1683, CCapito@mofo.com

Charles Capito assists Government Contractors with a variety of litigation issues, with a focus on pre- and post-award bid protests, and contract claims and disputes. He has extensive experience at the Government Accountability Office, the Court of Federal Claims, the boards of contract appeals, and other judicial and administrative tribunals. Charles counsels clients on a variety of Government Contract issues, including prime- and subcontractor disputes, organizational conflicts of interest, small business issues, and compliance with federal procurement regulations.

Charles assists the national security and transactional practices with issues concerning various compliance regimes, including the Export Administration Regulations (EAR), the International Traffic in Arms Regulations (ITAR), the Committee on Foreign Investment in the United States (CFIUS), sanctions administered by the Office of Foreign Assets Control (OFAC), and issues concerning Foreign Ownership, Control, or Influence (FOCI). He has experience in many facets of government contracts mergers and acquisitions.

Charles graduated cum laude from Washington & Lee University School of Law, where he served as senior articles editor of the Washington & Lee Law Review and received an award for Outstanding Student Note for his piece on the ITAR's registration requirements. He received his Bachelor of Arts degree from Duke University.

Prior to joining the firm, Charles served as a law clerk to the Honorable Mary Ellen Coster Williams at the United States Court of Federal Claims and worked as an associate at Jenner & Block LLP.

EDUCATION

Duke University (A.B., 2003)

Washington and Lee University (J.D., 2007)

COURT ADMISSIONS

- U.S. Court of Appeals, Federal Circuit, 2008
- U.S. Court of Federal Claims, 2010
- U.S. Court of International Trade, 2008

- Supreme Court of Virginia, 2007

CLERKSHIPS

- Hon. Mary Ellen Coster Williams, U.S. Court of Federal Claims, 2009-2010

SPEAKING ENGAGEMENTS

- “Contractor M&A – Assessing Transactions Involving Companies with Sensitive Customers,” Federal Publications Webinar, June 6, 2017
- Panelist, “Important VOSB/SDVOSB Cases,” ABA PCLS Small Business Committee, September 29, 2015

PUBLICATIONS

- “10 Competitive Best Practices for Winning Government Contracts,” Contract Management Magazine, June 2016
- Co-Author, “Five Questions Investors and Government Contractors Mus Answer Regarding Foreign Investments in the United States,” Pratt's Government Contracting Law Report, December 2015
- “COFC Provides Excluded Contractors with NAICS Code Protest Right,” *The Government Contractor*, August 6, 2014
- Co-Author, “Debunking Key Misunderstandings In Government Contractor Investments,” *The Deal Pipeline*, March 18, 2014
- “Inadequate Checks and Balances: Critiquing the Imbalance of Power in Arms Export Regulation,” 64 Wash. & Lee L. Rev. 297, 2007, 2007

BAR ADMISSIONS

- Virginia
- District of Columbia

DAMIEN C. SPECHT

Partner, Northern Virginia, +1 (703) 760-7325, DSpecht@mofo.com

Damien C. Specht is a partner in the firm's Government Contracts & Public Procurement practice in the Northern Virginia office. Recognized by multiple publications as a rising star, Mr. Specht represents clients in all facets of government contracts mergers and acquisitions, as well as Federal Acquisition Regulation counseling, negotiation of subcontracts and teaming agreements, contract disputes, size protests, and both pre- and post-award bid protests.

Mr. Specht has played a significant role in dozens of government contracts transactions including representation of Cerberus Capital Management L.P., one of the world's leading private investment firms, in its more than $1 billion acquisition of military contractor DynCorp International Inc.

Other notable transactions include representation of:

- CI Capital Partners LLC in its sale of A-T Solutions to PAE
- Metalmark Capital in numerous transactions including the sale of Asynchrony Inc. to Worldwide Technology Inc.
- QSSI, Inc., a specialized government healthcare IT architecture provider, in its sale to OptumInsight
- 2020 Company, LLC, a provider of healthcare IT solutions to various governmental agencies, in its sale to Acentia, LLC.
- W.W. Grainger Inc. in the acquisition of Safety Solutions Inc., E&R Industrial Sales, Inc., and Techni-Tool, Inc.

Mr. Specht holds an active security clearance. Mr. Specht serves as Co-Chair of the American Bar Association Small Business & Other Socioeconomic Programs Committee and has testified about procurement issues before the United States

EDUCATION

Grinnell College (B.A., 2002)

The George Washington University Law School (J.D., 2007)

RANKINGS

Chambers USA **2017**
Clients comment that "he's a very quick study. He turns work around very quickly and writes very well. He puts together good, cogent arguments in a short timeframe."

Law360 **2016**
Government Contracts "Rising Star"

National Law Journal **2015**
D.C. "Rising Star"

House of Representatives. He is a frequent speaker on government contracts topics including numerous CLE presentations on government contracts topics.

Mr. Specht has been recognized as one of the "most accomplished young attorneys in the DC area" by ***The National Law Journal***, an "Up and Coming" attorney by ***Chambers USA***, a "Next Generation Lawyer" by ***Legal 500***, a "Rising Star" in Government Contracts by ***Law360*** and a Washington, DC "Rising Star" in Government Contracts by ***Super Lawyers***. He has also been ranked by Chambers USA; clients comment that "he's a very quick study. He turns work around very quickly and writes very well. He puts together good, cogent arguments in a short timeframe."

SPEAKING ENGAGEMENTS

- "Judges Panel and Discussion of Key Cases," Small Business Committee, December 13, 2016
- "Government Contract Management Best Practices and Dangers," Lorman Webinar, November 15, 2016
- "Industry Consolidation and Corporate Restructuring: Issues for Government Contractors," ABA Section of Public Contract Law Annual Meeting, August 5, 2016
- "When Small Business Looms Large," Government Contracting Summit, April 27, 2016
- Panelist, "Government Contracts Mergers and Acquisitions 101," ABA CLE Section of Public Contract Law, January 12, 2016
- "Small Business Issues," ABA Bid Protest and Small Business Committees, December 14, 2015
- Panelist, "Small Business Size Protests," American Bar Association Section of Public Contract Law Contract Claims and Disputes Resolution Committee, December 09, 2015
- "Tips For Drafting Enforceable Teaming Agreements," Federal Publications Seminars, June 16, 2015
- "Small Business Protest Issues," ABA PCLS Bid Protest and Small Business Committees, April 20, 2015
- "Government Contract Issues in Bankruptcy," West LegalEdcenter, March 02, 2015
- "Key Issues in Government Contractor Mergers and Acquisitions," American Bar Association, February 12, 2015
- "Small Business Issues In Government Contracts Mergers & Acquisitions," West LegalEdcenter, February 03, 2015
- "Key Issues in Government Contracts Mergers & Acquisitions," Federal Publications Seminars, January 20, 2015

- "The Benefits of a Captive Insurance Company to a Government Contractor: Alternative Risk Management," Watkins Meegan LLC, November 17, 2014
- Moderator, Judges Panel, ABA Small Business & Other Socioeconomic Programs Committee, October 09, 2014
- Moderator, ABA Section of Public Contract Law Annual Meeting, August 07, 2014 to August 09, 2014
- "Selling Companies with Government Contracts," M&A Source, June 18, 2014
- "Key Issues in Government Contracts Mergers and Acquisitions," DC Bar, March 13, 2014

PUBLICATIONS

- Co-Author, "Recent Trends In Government Contracts M&A," Law360, August 29, 2017
- Co-Author, "New Opportunities For All: SBA Expands The Small Business Mentor-Protégé Programs," Westlaw Journal Government Contract, September 12, 2016
- Co-Author, "Kingodmware: Broader Than SCOTUS Intended?" The Government Contractor, July 13, 2016
- Co-Author, "SBA Rule Changes Benefit Contractors, But Pitfalls Remain," Law360, June 23, 2016
- Co-Author, "SBA's Mentor-Protégé Expansion Final Rule Expected This Month," Government Contracts Insights Blog, June 14, 2016
- Co-Author, "Five Questions Investors and Government Contractors Must Answer Regarding Foreign Investments in the United States," Pratt's Government Contracting Law Report, December 2015
- Five Questions Investors And Government Contractors Must Answer Regarding Foreign Investments In The United States, October 6, 2015
- Co-Author, "Has the Court of Federal Claims Radically Expanded Small Business Manufacturing Requirements?" Bloomberg BNA, November 4, 2014
- Co-Author, "Small Business Issues in Government Contracts Mergers & Acquisitions," Briefing Papers, August 2014
- Co-Author, "Ten Tips for Drafting Enforceable Teaming Agreements," Federal Contracts Report, August 19, 2014
- "COFC Provides Excluded Contractors with NAICS Code Protest Right," The Government Contractor, August 6, 2014
- Co-Author, "SBA's Presumed Loss Safe Harbor Remains Insufficient," Law360, July 11, 2014

STEVEN W. CAVE

Associate, Northern Virginia, +1 (703) 760-7308, SCave@mofo.com

Steve Cave is an associate in the Government Contracts Practice, resident in the firm's Northern Virginia office. Mr. Cave advises and counsels a wide variety of clients including information technology and defense contractors clients on a range of issues, including compliance matters and disputes and bid protests before the U.S. Government Accountability Office and the U.S. Court of Federal Claims.

Mr. Cave has significant experience related to corporate mergers and acquisitions involving government contractors. He also works with clients to ensure compliance with applicable laws and regulations and to conduct internal investigations into potential violations of such laws and regulations.

Prior to joining Morrison & Foerster, Mr. Cave was an associate in the government contracts practice at a national business law firm. Steve earned a B.A. magna cum laude at Virginia Polytechnic Institute and State University and a J.D. cum laude from the George Mason University School of Law where he served on the editorial board of the *Civil Rights Law Journal*.

EDUCATION

Virginia Polytechnic Institute (B.A., 2006)

George Mason University School of Law (J.D., 2010)

REPRESENTATIVE EXPERIENCE INCLUDES:

- Successfully protested Navy contract award at GAO, resulting in contract award to the small business protester.
- Assisted with defending against a protest of NASA's contract award for the future transportation of astronauts to the International Space Station.
- Assisted multiple clients with internal investigations and related disclosures to various agency Inspectors General.
- Conducted due diligence and managed strategy and risk in connection with significant mergers and acquisitions related to the transfer of ownership over government contracting companies and government contracting assets.

ATTORNEY BIO

- Counseled numerous small businesses in connection with potential transfers of assets or ownership and ongoing compliance issues.
- Assisted multiple clients, including pro bono clients, with compliance and issue resolution related to grant funding.

PUBLICATIONS

- “Potential Increased Sole Source Contracting Opportunities for Woman-Owned Small Businesses,” Morrison Foerster Government Contracts Insights Blog (*January 12, 2016)*
- “Significant Government Contract Litigation: A Year in Review,” Morrison Foerster Government Contracts Insights Blog (*January 7, 2016)*
- “The Department of Veterans Affairs Proposes Amendments to Veteran-Owned Small Business Verification Program,” Morrison Foerster Government Contracts Insights Blog (*November 20, 2015)*
- “Cybersecurity Information Sharing Legislation,” Morrison Foerster Government Contracts Insights Blog (*November 4, 2015)*
- “Information Request Regarding Novation and Name Change Processes,” Morrison Foerster Government Contracts Insights Blog (*October 23, 2015)*
- “The Small Business Administration Proposes a Rule To Provide Credit For Lower Tier Small Business Subcontracting,” Morrison Foerster Government Contracts Insights Blog (*October 13, 2015)*
- “U.S. Regulators Clear Lockheed Martin's Acquisition of Sikorsky,” Morrison Foerster Government Contracts Insights Blog (*September 28 2015)*
- “Small Business Administration Regulation Authorizing Sole Source Contracts To Women-Owned Small Businesses,” Morrison Foerster Government Contracts Insights Blog (*September 21 2015)*
- “Global Procurement Quarterly – Spring 2015,” Morrison & Foerster Newsletter, Editor (June 2015)
- “Global Procurement Quarterly – Winter 2015,” Morrison & Foerster Newsletter, Editor (February 2015)
- “Federal Contractor Minimum Wage Provisions Finalized,” Morrison & Foerster Client Alert, Co-author (October 2014)

W. JAY DEVECCHIO

Partner, Washington D.C., +1 (202) 887-1538, JDeVecchio@mofo.com

W. Jay DeVecchio is a litigator and Co-Chair of Morrison & Foerster's Government Contracts and Public Procurement practice. Clients from the aerospace, technology, and health care sectors seek his representation in all facets of government procurement law, from bid protests to complex claims and disputes through suspension and debarment. He also represents clients in related issues such as criminal and civil fraud, qui tam actions, and internal investigations.

Since 2005, Mr. DeVecchio has been named a leading national practitioner in Government Contract Law by *Chambers USA*. Quoting from a source, *Chambers USA 2014* published this about Jay: "The best litigator in the country on government contracts and related matters." He has been named a Top Washington Lawyer in Government Contracts by both *The Washington Business Journal* (2008) and *The Washingtonian*, most recently for 2015. Mr. DeVecchio has defeated a large qui tam action in a jury trial, and he has litigated the largest defective pricing appeal tried to date, the leading case on latent defects, and the Eleventh Circuit's decision on false claims immunity for Medicare contractors.

He has been a guest instructor at the University of Virginia and The George Washington University Law School Government Contracts Program. Mr. DeVecchio is recognized as a leader in the field of intellectual property rights in government contracts; he has testified as an expert, and teaches nationwide, on the subject. He also conducts seminars on diverse subjects including claims and terminations and has developed and appeared in a series of training videos used by more than 100 companies addressing Labor Charging, Materials Charging, and Procurement Integrity.

EDUCATION

Duke University (B.A., 1974)

The Catholic University of America Columbus School of Law (J.D., 1978)

RANKINGS

***Chambers USA* 2005–2016**
***Who's Who Legal* 2015**
Public Procurement

***The Washingtonian Magazine Top Lawyer* 2009-2015**
***The Washington Business Journal* 2008**
A Top Washington Lawyer in Government Contracts

***Washington DC Super Lawyers* 2013-2015**
Government Contracts

PUBLISHED DECISIONS

- National Government Services, Inc., B-412142 (Comp. Gen.), 2016, CPD ¶

8, 2015 WL 9690358

- Kvichak Marine Industries, Inc. v. United States, 118 Fed.Cl. 385 (2014)
- Kvichak Marine Industries, Inc., B-409301, 2014 WL 1017901, Mar. 6, 2014, 2014 CPD ¶ __.
- Lockheed Martin Aeronautics Co., ASBCA No. 56547, 13-1 BCA ¶ 35,220
- *United States ex rel. Zizic v. Q2Administrators*, LLC, 728 F.3d 228 (3d Cir. 2013)
- URS Federal Services, Inc., B-407114; B-407114.2, Nov. 9, 2012, 2012 CPD ¶ 223
- *United States ex rel. Zizic v. Q2 Administrators, LLC, et al.*, 2012 WL 1019047 (E.D. Pa. March 2012)
- CIGNA Government Services, LLC, B-401068.4; B-401068.5, Sep. 9, 2010, 2010 CPD ¶ 230
- TrailBlazer Health Enterprises, LLC, B-402751; B-402751.2, July 20, 2010, 2010 CPD ¶ 183
- World Airways, Inc., B-402674, June 25, 2010, 2010 CPD ¶ 284
- *U.S. ex rel. Dekort v. Integrated Coast Guard Systems*, 705 F.Supp.2d 519 (N.D. Tex. 2010)
- *Alf v. Donley*, 666 F. Supp.2d 60 (D.D.C. 2009)
- Northrop Grumman Space and Missile Systems Corporations; Textron Marine & Land Systems Corporation, B-400837, et al., Feb. 17, 2009, 2009 CPD ¶ 52
- Femme Comp, Inc., L-3 Services, Inc., et al. v. United States, 83 Fed. Cl. 704 (2008)
- L-3 Communications EOTech v. United States, 83 Fed. Cl. 643 (2008)
- NHIC Corp., B-310801; B-310802.2, Feb. 12, 2008, 2008 CPD ¶ 67
- Raytheon Company, Space and Airborne Systems, B-298626.2; B-298626.3, Sep. 27, 2007, 2007 CPD ¶185
- Lockheed Martin Maritime Systems and Sensors, B-299766;B-299766.2, Aug. 10, 2007, 2008 CPD ¶ 158
- AM General LLC, ASBCA No. 53610, 07-1 BCA ¶ 33,498
- L-3 Communications Titan Corporation, B-299317, et al., Mar. 29, 2007, 2007 CPD ¶ 66
- *U.S. ex rel. Richard Feingold v. Palmetto Gov't Benefits Adm'rs*, 477 F.Supp.2d 1187 (S.D. Fla. 2007), aff'd, 278 Fed.Appx. 923 (11th Cir. 2008), cert. denied, 129 S.Ct. 1001 (2009)
- Laerdal Medical Corp., B-297321; B-297321.2, Dec. 23, 2005, 2006 CPD ¶12
- *United States of America ex rel. Elizabeth Drescher v. Highmark, Inc.*, 305 F.Supp.2d 451 (E.D.Pa. 2004)
- Sundstrand Corporation, ASBCA No. 51572, 01-1 BCA ¶ 31,167

- Lockheed Martin Tactical Aircraft Systems, ASBCA Nos. 49530 and 50057, 00-1 BCA ¶ 30,852
- *United States ex rel. Body v. Blue Cross and Blue Shield of Alabama, Inc.*, 156 F.3d 1098 (11th Cir. 1998)
- *United States ex rel. Foust v. Group Hospitalization and Medical Services*, 26 F.Supp.2d 60 (D.D.C. 1998)
- Lockheed Corp., ASBCA Nos. 36420, 37495, and 39195, 95-2 BCA ¶ 27,722
- United Technologies Corp., Sikorsky Aircraft Division v. United States, 31 Fed.Cl. 698 (1994)
- Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225
- United Technologies Corp., Sikorsky Aircraft Division v. United States, 27 Fed.Cl. 393 (1992)
- *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991)
- Lockheed Corp., ASBCA Nos. 36420, 37495, and 39195, 91-2 BCA ¶ 23,903
- Ruffin's A-1 Contracting, Inc., ASBCA No. 38343, 90-3 BCA ¶ 23,243
- *Novicki v. Cook*, 743 F.Supp. 11 (D.D.C. 1990)
- Aries Marine Corp., ASBCA No. 37826, 90-1 BCA ¶ 22,484
- RCA, ASBCA No. 33866, 87-2 BCA ¶ 19,797
- IBM Corp., ASBCA Nos. 28821 and 29106, 84-3 BCA ¶ 17,689
- *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983)

SPEAKING ENGAGEMENTS

- "Government Contractors Forum Boot Camp: Intellectual Property and Data Rights in Government Contracting," ACC National Capital Region, June 14, 2017
- "Intellectual Property in Government Contracts," Thomson Reuters/West Government Contracts Year In Review, Washington, DC, February 18, 2016
- "2015 Government Contracts Review and Outlook," Federal Publications Seminars, San Diego, CA, November 4-5, 2015
- "Panel on Data Rights, Intellectual Property, Information Technology and Export Controls in Government Contracting," PubK Law's Annual Government Contracts Review FY 15/16, Washington, DC, October 15, 2015
- "Masters Institute in Government Contract Intellectual Property" Federal Publications Seminars, Washington, DC, June 2, 2015

- “Licensing Software and Technology to the Federal Government,” Federal Publications Seminars, Arlington, VA, May 19-20, 2015
- “Intellectual Property in Government Contracts,” Thomson Reuters/West Government Contracts Year In Review, Washington, DC, February 19, 2015
- Course Faculty, “The Masters Institute in Government Contracting,” “Claims, Disputes, and Terminations,” Federal Publications Seminars, Hilton Head, SC, July 23, 2015 & LaJolla, CA, June 2-5, 2015
- “Rights in Technical Data and Computer Software,” Federal Publications Seminars, Arlington, VA, November 13, 2014
- “Intellectual Property in Government Contracts,” Thomson Reuters/West Government Contracts Year In Review Conference, Washington, DC, February 21, 2014
- “Panel 4: Capturing Intellectual Property Rights,” Defense Daily – Open Architecture Summit, Washington, D.C., November 13, 2013
- “Challenges & Opportunities in Commercial Item Acquisitions,” 2013 AIA Data Rights Forum, Arlington, VA, June 19, 2013
- “The Masters Institute in Government Contracting,” Federal Publications Seminars, San Diego, CA, May 6-10, 2013
- “Intellectual Property in Government Contracts,” Thomson Reuters/West Government Contracts Year In Review Conference, Washington, DC, February 22, 2013
- “The 2012 Nash & Cibinic Report Roundtable, Current Technical Data Issues,” Washington, DC, June 6, 2012
- “Licensing Software & Technology to the Federal Government,” Federal Publications Seminars, Arlington, VA, May 23-24, 2012
- Course Faculty, “Masters Institute in Government Contracting,” Federal Publications Seminars, La Jolla, CA, May 9-10, 2012
- “Intellectual Property in Government Contracts,” Thomson Reuters/West Government Contracts Year In Review Conference, Washington, DC, February 24, 2012

PUBLICATIONS

- "Steps for Government Contractors To Take After Hurricanes," *Law360*, October 5, 2017
- "Keeping Your Options Open -- Why Not To Worry About GAO's AllWorld Decision on Task Order Options, *The Government Contractor*, August 3, 2016

- “Inside DOD's Reasonable Approach To Data Rights Rule,” *Law360*, June 29, 2016
- “False Claims Act Trends: Technical Data, Software And IP,” *Law360*, May 17, 2016
- “Licensing Commercial Software to the Government: Notice, Subcontracting & Pricing Issues," Briefing Papers, June 9, 2015
- *"The False Claims Act and Data Rights: What Plaintiffs' Lawyers Need to Know But Do Not Want to Hear," American Bar Association, Public Contract Law Journal, Spring 2014*
- Contributor, *Practicing Under the U.S. Anti-Corruption Laws,* Aspen Book Publishers, 2013 Edition, May 2013
- “Challenging Past Performance Evaluations Under the Contract Disputes Act,” *The Clause,* March 2013
- "No Cost Overstatement Proved In TINA Case," *The Government Contractor,* Thomson Reuters, pp. 12-14, February 20, 2013
- "Rights in Technical Data & Computer Software Under Government Contracts: Key Questions & Answers (Including §815), Edition II," *Briefing Papers*, Thomson Reuters, May 2012
- "Rights in Technical Data & Computer Software Under Government Contracts: Key Questions & Answers," *Briefing Papers Second Series,"* Thomson Reuters, September 2010
- Contributor, "Developing a Compliance Program to Address Mandatory Disclosure," *Inside the Minds: Government Contracts Compliance*, Aspatore Books, 2010
- Contributor, "Practicing Under the U.S. Anti-Corruption Laws," Aspen Book Publishers, 2010
- "The 2007 Rewrite of FAR Part 27, 'Patents, Data & Copyrights'" *Briefing Papers*, Thomson West, Second Series, March 2008
- "Patent Rights Under Government Contracts," *Briefing Papers*, Thomson West, Second Series, June 2007
- Practitioner's Comment, "Decisions: District Court Throws Out FCA Suit by Relator Who Was Never an Insider," *The Government Contractor*, Thomson/West, Vol. 49, No. 18, May 9, 2007
- "Developing an Ethics Function," *Counsel to Counsel*, November 2006
- "Technical Data & Computer Software After Night Vision: Marking, Delivery & Reverse Engineering," *Briefing Papers*, No. 06-5, Thomson West, April 2006
- "Copyright Protection Under Government Contracts," *Briefing Papers*, No. 05-6, May 2005

- Feature Comment, "Big Brother at Work - DOD Directs Extraordinary Oversight of How Prime Contractors Select Affiliates for Subcontracting," *The Government Contractor*, Vol. 46, Thomson West, September 22, 2004
- "Licensing Commercial Computer Software," Briefing Papers, No. 04-3, West, February 2004
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