

# While You Were Social Distancing: Recent Developments in Commercial Item Contracting

Kevin Joyce, *Head of Global Public Sector Compliance, ServiceNow*  
Townsend Bourne, *Partner, Sheppard Mullin*  
Ryan Roberts, *Partner, Sheppard Mullin*

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**SheppardMullin**

# COMMERCIAL ITEM JEOPARDY!

## HOST



**Kevin Joyce**

**Head of Global Public  
Sector Compliance**

**ServiceNow**

## COMPETITORS



**Townsend Bourne**

**Partner**

**Sheppard Mullin**



**Ryan Roberts**

**Partner**

**Sheppard Mullin**

GSA SCHEDULE GOT ME CONFUSED	NDAA POTPOURRI	CONTRACT ISSUE CORNUCOPIA	WHOOOPS, I'M IN LEGAL TROUBLE
\$200	\$200	\$200	\$200
\$400	\$400	\$400	\$400
\$600	\$600	\$600	\$600

CONTRACT ISSUE CORNUCOPIA · \$200

THIS IS THE REASON WE ARE  
ALL HERE TODAY



CONTRACT ISSUE CORNUCOPIA · \$200

# WHAT ARE COMMERCIAL ITEMS?

# Commercial Items Overview

# Commercial Item Acquisition

- Federal Acquisition Streamlining Act sets forth Federal Government preference for commercial item acquisitions
- The FAR provides streamlined acquisition processes for commercial items (e.g., FAR Part 12, FAR Part 8.4)
- Current FAR definition of “commercial item” includes products and services (FAR 2.101)
- On October 15, 2020, the FAR Council released a proposed rule which would divide the definition of a commercial item into two definitions, one for commercial products and one for commercial services
  - Comments due by December 14, 2020



## Is it a “Commercial Item”? (FAR 2.101)

- Any item “*of a type customarily used by the general public*” and
  - (i) “sold, leased, or licensed to the general public” OR
  - (ii) “offered for sale, lease, or license to the general public”
- An item that evolved through advances in technology or performance that is ***not yet commercially available, but will be available*** in time to satisfy delivery requirements under a government solicitation
- An item with “*modifications of a type customarily available in the commercial marketplace*” OR minor modifications made to meet Federal Government requirements
- Need not prove the ***exact*** item is sold or offered to the public

## Is it a “Commercial Item”? (FAR 2.101)

- Includes services (installation, maintenance, repair, training, etc.) to support a commercial item where *similar services are provided contemporaneously to the general public* under similar terms
- Services “*of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices*”
- Nondevelopmental items where “*developed exclusively at private expense and sold in substantial quantities*, on a competitive basis, to multiple State and local governments or to multiple foreign governments”
- Whether an item is a commercial item is largely within the discretion of the contracting agency. See *NLB Corp.*, B-286846, 2001 CPD ¶ 67.

## Commercially Available Off-the-Shelf (COTS) Items (FAR 2.101)

- Commercially Available Off-the-Shelf (COTS) products:
  - (i) commercial items
  - (ii) **actually** sold in substantial quantities in the commercial marketplace; and
  - (iii) offered to the Government, without modification, in the same form in which they are sold in the commercial marketplace.
- Contractor need not sell “substantial quantities” itself
  - “Multiple vendors may sell the item in substantial quantities.” See 74 Fed. Reg. 2713, 2714 (Jan. 15, 2009)

## What do I win?

- Fewer FAR clauses!
- Favorable IP provisions!
- Ability to negotiate changes with the government!
- No requirement to comply with the Cost Accounting Standards (CAS)!
- No requirement to submit certified cost or pricing data!
- Opportunity to sell under General Services Administration (GSA) Federal Supply Schedule (FSS) contracts!



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THIS ONGOING TRANSFORMATIVE  
PROJECT HAS GSA SCHEDULE  
CONTRACTORS SHAKING THEIR HEADS



GSA SCHEDULES GOT ME CONFUSED · \$200

# WHAT IS THE GSA SCHEDULES CONSOLIDATION?

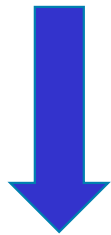
# **GSA Schedules Consolidation**

# Overview of the Consolidation Process

- **Phase 1 – Development of the New Schedule (complete)**
  - Consolidate 24 GSA Schedules into a single contract for products, services, and solutions
- **Phase 2 – Mass Modifications (complete)**
  - Modify current contracts to streamline terms and conditions for the new solicitation
- **Phase 3 – Multiple Contract Consolidation (began August 3, 2020)**
  - Goal: 1 MAS contract per DUNS number

# Honey, I Shrunk the GSA Schedules

24 Schedules and  
888 (!!!) SINs



12 large categories,  
87 sub categories,  
316 SINs



# GSA Schedules

**Before consolidation, there were 24 GSA-Managed Schedules**

**00CORP – Professional Services Schedule**

**03FAC – Facilities Maintenance & Management**

**23 V – Automotive Superstore**

**36 – Office, Imaging and Document Solutions**

**48 – Transportation, Delivery, Relocation**

**51 V – Hardware Superstore**

**56 – Building and Building Materials**

**58 I – Professional Audio/Video, etc**

**66 – Scientific Equipment & Services**

**67 – Cameras, Photographic Printers, etc.**

**70 – IT Equipment, Software, and Services**

**71 – Furniture**

**71 II K – Comprehensive Furniture Management Services**

**72 – Furnishings and Floor Coverings**

**73 – Food Service, Hospitality, Cleaning, etc.**

**75 – Office Products, Supplies, and Services**

**76 – Publication Media**

**78 – SPORTS**

**81 I B – Packaging and Packaging Supplies, Services**

**84 – Law Enforcement, Security, etc.**

**599 – Travel Services Solutions**

**736 – Temporary Administrative, Professional Staffing**

**738 X – Human Capital Management**

**751 – Leasing of Automobiles & Light Trucks**

# Consolidated Schedule Structure

The Consolidated Schedule Structure will be divided into “Large Categories” with subcategories within each Large Category – here are the Large Categories with a few of their subcategories

<b>Facilities</b> <ul style="list-style-type: none"><li>• Facilities Services</li><li>• Facilities Solutions</li><li>• Facilities Supplies</li></ul>	<b>Furniture and Furnishings</b> <ul style="list-style-type: none"><li>• Flooring</li><li>• Misc. Furniture</li><li>• Furniture Services</li></ul>	<b>Human Capital</b> <ul style="list-style-type: none"><li>• Background Investigations</li><li>• Compensation and Benefits</li></ul>	<b>Industrial Products and Services</b> <ul style="list-style-type: none"><li>• Machinery and Components</li><li>• Cleaning Supplies</li></ul>
<b>Information Technology</b> <ul style="list-style-type: none"><li>• IT Hardware</li><li>• IT Services</li><li>• IT Solutions</li></ul>	<b>Miscellaneous</b> <ul style="list-style-type: none"><li>• Awards</li><li>• Flags</li><li>• Apparel</li></ul>	<b>Professional Services</b> <ul style="list-style-type: none"><li>• Business Administrative Services</li><li>• Financial Services</li></ul>	<b>Office Management</b> <ul style="list-style-type: none"><li>• Office Supplies</li><li>• Office Services</li><li>• Document Services</li></ul>
<b>Scientific Management Solutions</b> <ul style="list-style-type: none"><li>• Medical Equipment</li><li>• Scientific Services</li></ul>	<b>Security &amp; Protection</b> <ul style="list-style-type: none"><li>• Testing Equipment</li><li>• Protective Equipment</li><li>• Security Systems</li></ul>	<b>Transportation &amp; Logistics</b> <ul style="list-style-type: none"><li>• Package Delivery</li><li>• Packaging Services</li></ul>	<b>Travel</b> <ul style="list-style-type: none"><li>• Employee Relocation</li><li>• Lodging</li></ul>



## Phase 3 Mechanics

- Goal: 1 MAS contract per DUNS
- Timeline: up to 10 years (depending on IDIQs/BPAs)
- PCO will be reaching out (or maybe has already) to create a plan
  - Any products services that need a rush add to old contract?
  - Target date for completing consolidation?
  - Preferred method for submitting contract mods moving forward?

# Impact of Schedules Consolidation

- Elimination of scope issues
- Single GSA Contracting Officer
- (Somewhat) Streamlined set of terms and conditions
- Update CSP disclosures?
- TDR impact

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NDAА POTPOURRI · \$200

THIS NDAА SECTION HAS  
CONTRACTORS PERFORMING A  
“REASONABLE INQUIRY”

NDAА POTPOURRI · \$200

WHAT IS SECTION 889?



# **NDAA Section 889**



## Section 889

- Background
  - Prohibits executive agencies from purchasing restricted products and services from certain Chinese telecommunications companies and working with contractors that use such products and services (“Covered Technology”)
  - The rule covers products and services that incorporate telecommunications equipment produced by **Huawei Technologies Company** or **ZTE Corporation** (or any subsidiary or affiliate of such entities)
  - In the public safety context, the rule covers telecommunications or surveillance equipment or services produced by **Hytera Communications Corporation**, **Hangzhou Hikvision Digital Technology Company**, or **Dahua Technology Company** (or any subsidiary or affiliate of those entities)
- There are two key subsections of Section 889 – Part A and Part B

## Section 889 – Part A

- Part A went into effect August 13, 2019
  - The Government cannot procure or obtain products that incorporate Covered Technology
  - The Government cannot procure or obtain services that use Covered Technology in the performance of the service
  - Prohibits contractors from selling to the Government equipment or services that incorporate Huawei, ZTE, *et al.* technology (with minimal exceptions)
  - Offerors must represent whether or not they will provide Covered Technology and, if so, furnish additional detail about the Covered Technology
  - Mandates that contractors report, **within one business day**, any Covered Technology discovered during the course of contract performance
- Created two key contract clauses
  - FAR 52.204-24 – includes required offeror representations
  - FAR 52.204-25 – contains the sale prohibition and reporting requirement

# Compliance with Part A

- Compliance with Part A is not necessarily easy or inexpensive, but it is doable
- Best practices:
  - Original Equipment Manufacturers (“OEMs”) should secure representations from their component suppliers, as well as develop a system to identify and evaluate covered components
  - Non-manufacturing prime contractors should secure representations from their OEMs and/or distributors
  - Service providers should secure representations from their subcontractors
  - Resellers should develop a process that ensures the Government receives only compliant products if you are a reseller of multiple products, some of which incorporate covered technology and some that don't
  - If you identify Covered Technology in some of your products, you should respond affirmatively to the FAR 52.204-24 representation and provide the Government additional information

## Section 889 – Part B

- Part B became effective August 13, 2020
  - Prohibits the Government from procuring or obtaining products or services from companies that *use* banned technology
- FAR 52.204-24 and FAR 52.204-25 revised to implement Part B prohibition
  - Offerors must submit an additional representation stating whether, after a “reasonable inquiry,” the offeror uses covered telecommunications equipment or services
  - Prohibits executive agencies from entering into a contract (or extending or renewing a contract) with an entity that *uses* any covered telecommunications equipment or services as a substantial or essential component or critical technology
- Applicability and scope is quite broad
  - Applies to all contracts, including contracts under the micro-purchase threshold and contracts for the acquisition of COTS items
  - “Use” is not restricted to usage in the performance of work under a federal contract

# Compliance with Part B

- The Interim Rule requires contractors to develop a compliance plan and provides suggestions for how contractors can adopt a “robust, risk-based compliance approach [to] help reduce the likelihood of noncompliance”
- The Interim Rule provides six steps that contractors should incorporate in their Compliance Plan



**Regulatory  
Familiarization**



**Corporate  
Enterprise  
Tracking**



**Education**



**Cost Of  
Removal**



**Representation**



**Phase-Out  
Plan/Waiver**

## Is There A List of “Covered Technology”?

- There is no definitive list of affiliates and subsidiaries of the 5 named Chinese companies
- There is no definitive list of products incorporating Huawei, ZTE, or other companies’ covered technology
  - Huawei holds 87,805 patents
  - Huawei produces consumer goods, such as phones, tablets, laptops, and smart watches
  - Huawei also produces telecommunications equipment and 5G technology in many countries around the world
- The primary products to look out for are products incorporating cellular, 5G, and/or Bluetooth communications technology



## “Substantial or Essential”

- Both Part A and Part B provide restrictions on “covered technology” as a “***substantial or essential*** component of any system, or as critical technology as part of any system”
- However, FAR 52.204-24 (the representation requirement) does not include this language but instead seems to capture ***any*** product/service that incorporates telecommunications from Huawei, ZTE, *et al.*
- The FAR 52.204-25 definition of “substantial or essential component” is “any component necessary for the proper function or performance of a piece of equipment, system, or service”
  - This definition is quite broad and circular, therefore providing little assistance in determining whether the covered technology is a substantial or essential component

## “Reasonable Inquiry”

- FAR 52.204-25 provides a definition of “reasonable inquiry”:
  - An inquiry designed to uncover any information *in the entity's possession* about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit
- Contractors should develop and document a methodology to use for conducting the reasonable inquiry

# Consequences of Non-Compliance

- Failure to submit an accurate representation or the failure to provide compliant products/services constitutes a breach of contract which can lead to:
  - Cancellation
  - Termination
  - Various financial consequences
- The primary fear is a False Claims Act allegation

## Section 889 – Summary

- Prime contractors cannot sell products or services that incorporate covered technology to the Government
- Prime contractors cannot USE banned telecommunications equipment, regardless of connection to Government work
- Perform and document your “reasonable inquiry”
- Develop and implement your Compliance Plan
- Keep your Law Department in the loop

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NDAА POTPOURRI · \$400

THIS NDAА SECTION HAS  
CONTRACTORS THROWING OUT  
THEIR SCHEDULE PRICE LISTS

NDAa POTPOURRI · \$400

WHAT IS SECTION 876?





# **NDAA Section 876**

## Section 876 – Increasing Competition at the Task Order Level

- Agencies must evaluate cost or price to the Government in evaluating proposals (41 U.S.C. § 3306)
  - Section 876 provides a limited exception to this general requirement
- Authorizes the award of IDIQ contracts for *services* “on an hourly basis” without consideration of price
- Pricing and value are determined through competition for specific customer agency task order requirements

# GSA ASTRO Solicitation



- GSA's first use of its Section 876 authority
- GSA issued a solicitation on August 24, 2020 for drone services – the ASTRO Solicitation
  - 10 IDIQ awardees for “manned, unmanned, and optionally manned platforms and robotics” for DoD
- Will award multiple contracts for services on an hourly basis without considering price as an evaluation factor at the IDIQ level
  - After award at the contract level, the competition at the task order level is where the agency will focus on reducing the price as low as possible while ensuring they are receiving high-quality work
- Next – Schedules program?

# Section 876 – Extension to the Schedules Program

- August 19, 2020 – GSA issued an Advance Notice of Proposed Rulemaking regarding implementation of Section 876
- Proposal would eliminate the requirement to consider price at the MAS contract award level for certain Schedules and (maybe) certain contract types (LH and T&M)
- Industry comments very supportive
  - Reduces barriers to entry to the Schedules program
    - Easier for commercial companies to submit proposals to get on Schedule, and easier for GSA to award Schedule contracts
  - Reduces the administrative burden for contractors
  - Eliminate PRC and fundamentally change audits and FCA investigations
- Potential to extend to products in the future

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NDAА POTPOURRI · \$600

THIS SECTION HAS CONTRACTORS  
CONTEMPLATING THE FUTURE OF THE  
SCHEDULES PROGRAM

NDAА POTPOURRI · \$600

WHAT IS NDAА SECTION 846?



# **NDAA Section 846**

# Section 846 – Procurement Through Commercial E-Commerce Portals

- Directs GSA, in partnership with the Office of Management and Budget, to establish a program to enable Federal agencies to procure COTS items through commercial e-commerce portals



# GSA/OMB Implementation

**Phase 1: Implementation  
Plan and Policy Assessment**

**Phase 2: Market Research &  
Consultation**

**Phase 3: Potential Initial  
Rollout**

**Phase 4: Implementation  
Guidance**

**Phase 5: Assess and Scale  
Rollout**

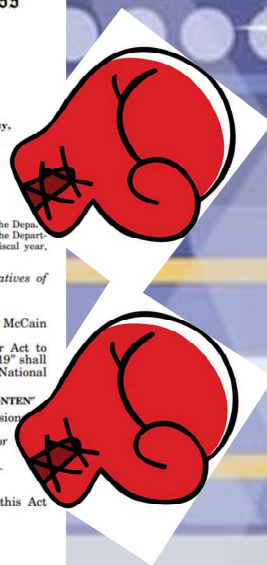
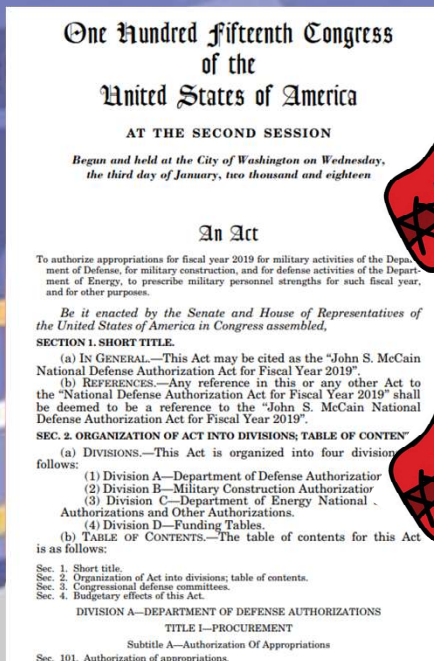
## Section 846 – Key Issues

- Will the E-Marketplace model result in lower prices?
- How will the program achieve the Government's policy goals (e.g. TAA, Ability One, 889 compliance)?
- Will value or quality matter?
- How will the portals address supply chain risk management?
- Will services be added?
- How will the portals impact the GSA Schedule program?

## Section 846 – Current Status

- June 26, 2020 – GSA awarded proof-of-concepts to
  - Amazon Business,
  - Overstock.com, and
  - Fischer Scientific
- Nothing rolled out yet – but 5 agencies have agreed to participate in the eventual pilot
- Big question – how will these marketplaces impact commercial item procurement vehicles?

# The Rumble In . . . Government E-Commerce



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WHOOPS, I'M IN LEGAL TROUBLE · \$200

THIS RULE HAS CONTRACTORS  
ASKING THEMSELVES,  
“DID I DO THAT?!”

WHOOPS, I'M IN LEGAL TROUBLE · \$200

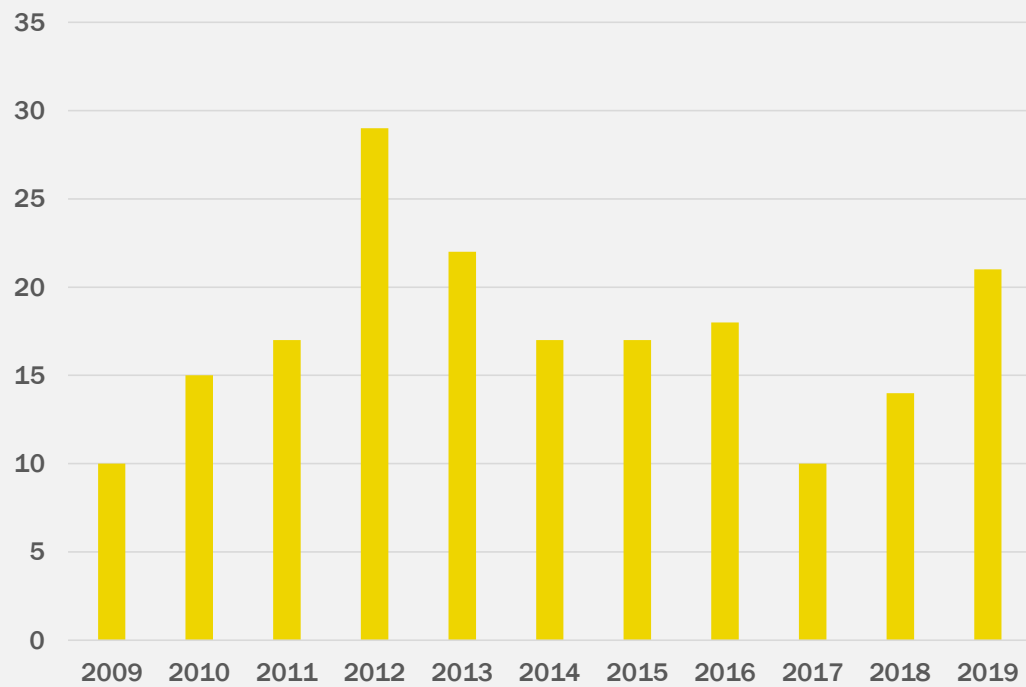
# WHAT IS THE MANDATORY DISCLOSURE RULE?

# Mandatory Disclosure Rule

# Mandatory Disclosure Rule

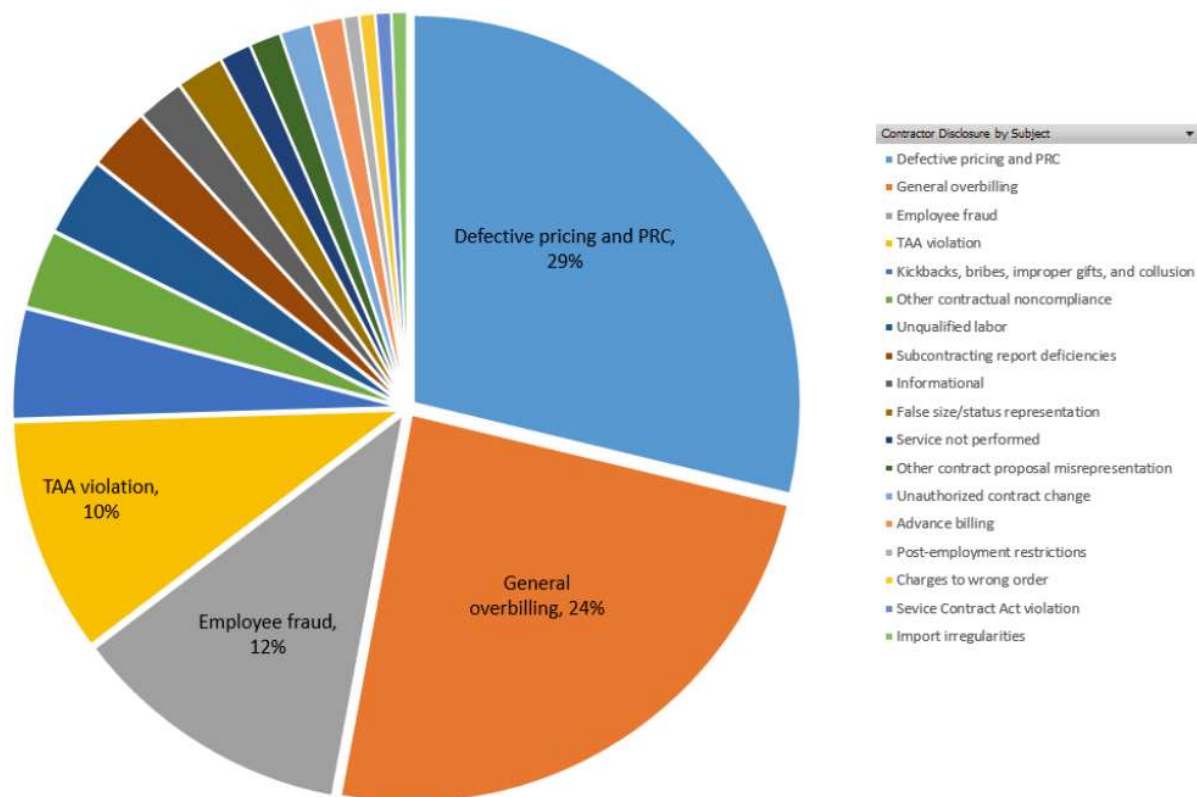
- The Mandatory Disclosure Rule requires federal contractors to *timely* disclose in writing where they have *credible evidence* of:
  - (a) violation of the civil False Claims Act or
  - (b) Federal criminal law involving fraud, conflict of interest, bribery, or gratuity
- FAR 52.203-13(b)(3)(i)
- No definition of “timely” disclosure but notice requirement does not trigger until contractor determines the evidence to be “credible”
- “Credible evidence” is also not defined but contractors are given the opportunity to take time to conduct a preliminary examination of the evidence to determine its credibility prior to disclosing to the Government

# Mandatory Disclosure Data



# Mandatory Disclosure Data

Subject Matter of Disclosures, 2008 - 2017



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WHOOPS, I'M IN LEGAL TROUBLE · \$400

THIS EXECUTIVE ORDER IS  
CAUSING CONTRACTORS TO TAKE  
A HARD LOOK AT THEIR  
EMPLOYEE TRAINING MATERIALS

WHOOPS, I'M IN LEGAL TROUBLE · \$400

WHAT IS TRUMP'S EXECUTIVE ORDER  
ON RACE & SEX STEREOTYPING?



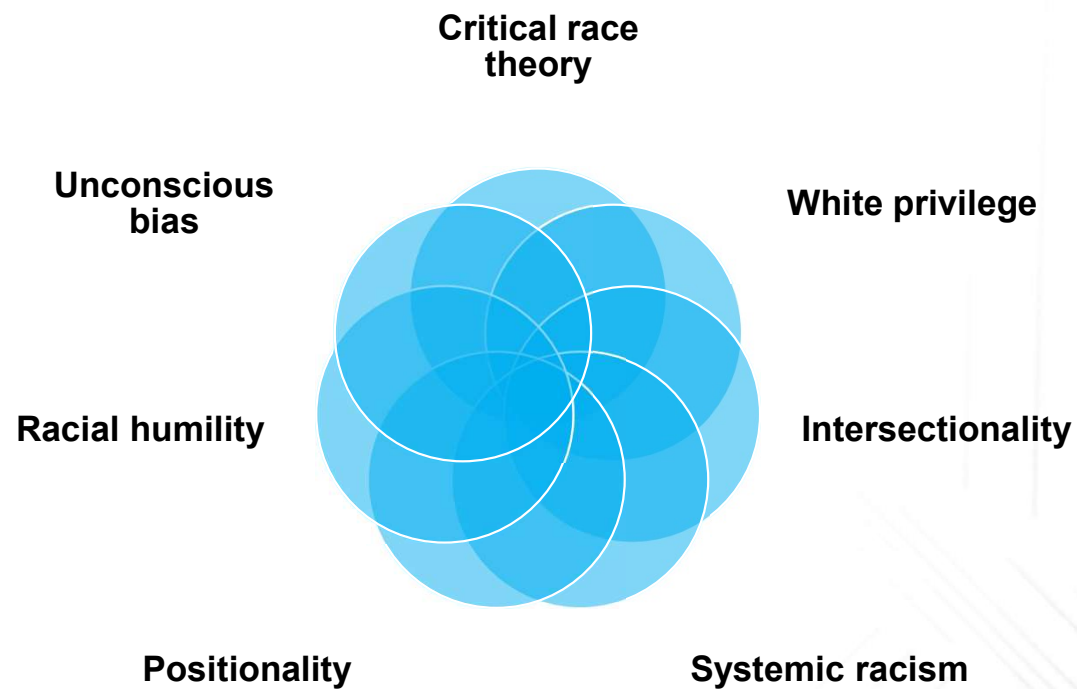
# **Executive Order on Combating Race & Sex Stereotyping**

## E.O. Prohibits “Divisive Concepts” in Training

Contractors cannot use any workplace training that includes “divisive concepts,” including:

- one race or sex is inherently superior to another race or sex;
- an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- an individual’s moral character is necessarily determined by his or her race or sex;
- an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

## Also prohibits training that . . .



# Implementation Timeline

**September  
22, 2020**

OIG reporting  
hotline went live  
and investigations  
commenced

**October 22,  
2020**

RFI published  
seeking copies of  
any diversity and  
inclusion training  
materials  
provided by  
contractors

**November  
21, 2020**

Contract clause  
became effective  
(including  
flowdown  
requirement)

**December  
21, 2020**

Reporting on  
contractor-  
provided training  
to Government  
employees

## Where Do We Go From Here . . .



- Incorporation into Contracts/Grants
- Ongoing Legal Challenges
  - D.D.C. (1:20-cv-03121 – NAACP)
  - N.D. Ca. (5:20-cv-07741 – Lambda Legal)
- January 20, 2020

## Risk Mitigation Steps

Develop a long-term plan

Inventory training materials

Analyze language in trainings

Revise/reframe trainings as required

Craft flow-down language for suppliers/vendors



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CONTRACT ISSUE CORNUCOPIA · \$400

YOUR SUBCONTRACTORS CAN'T SAY  
“NO” TO THESE CLAUSES

CONTRACT ISSUE CORNUCOPIA · \$400

# WHAT ARE COMMERCIAL ITEM FLOWDOWN PROVISIONS?



# Commercial Item Flow-Downs

# FAR Flow-Downs

- Generally, the FAR clause will indicate whether a prime contractor is required to flow down the clause to its subcontractors, sometimes with references to dollar value
- FAR 52.244-6 – lists required clauses for ***non-commercial prime contractors*** to flow down in subcontracts for commercial items. These include:
  - Contractor Code of Business Ethics and Conduct (FAR 52.203-13)
  - Basic Safeguarding of Covered Contractor Information Systems (FAR 52.204-21)
  - Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (FAR 52.204-25)
- FAR 52.212-5(e) – lists required clauses to flow down in subcontracts for commercial items under ***commercial item prime contracts***

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GSA SCHEDULES GOT ME CONFUSED · \$400

THIS ACRONYM IMPACTS A  
CONTRACTOR'S CSP AND PRC



GSA SCHEDULES GOT ME CONFUSED · \$400

# WHAT IS THE TDR? (TRANSACTIONAL DATA REPORTING RULE)

# Transactional Data Reporting

# Transactional Data Reporting Rule

- The Transactional Data Reporting (“TDR”) Rule was intended as an optional, three-year pilot program
- Requires participating contract holders to submit monthly reports to GSA detailing 12 transaction-level data points to GSA
- Tradeoff: in exchange for submitting data monthly, participating contract holders no longer have to submit a CSP or monitor Price Reductions Clause compliance

## TDR Data Points

- Contract/BPA Number
- SIN Number
- Order Number or PIID
- Description of Deliverable
- Manufacturer Name
- Manufacturer Part Number
- Unit of Measure
- Quantity of Item Sold
- Universal Product Code (UPC)
- Price Paid per Unit
- Total Paid Price
- Non-Federal Entity (if applicable)

# What's Next for TDR?

- The TDR pilot initially was scheduled to end in 2019
  - GSA extended it through fiscal year 2020
  - At the end of FY2020, GSA planned to evaluate the TDR pilot program to determine whether to continue, cancel, or expand the pilot program
  - End of FY2020 has passed...
- Key Considerations
  - Does your business model make sense for TDR?
  - Does the data/CSP tradeoff actually reduce your legal risk?

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<b>\$600</b>		<b>\$600</b>	<b>\$600</b>

CONTRACT ISSUE CORNUCOPIA · \$600

CONTRACTORS MAY STRUGGLE  
WITH THESE COMMERCIAL  
AGREEMENTS THAT LIKELY INCLUDE  
TERMS THAT CONFLICT WITH  
FEDERAL LAW

CONTRACT ISSUE CORNUCOPIA · \$600

# WHAT ARE END USER LICENSE AGREEMENTS (EULAs)?



# End User License Agreements (EULAs)

# End User License Agreements (EULAs)

- Contract between a software developer or vendor and the user of the software (also Terms of Service (“TOS”))
  - GSA defines as Commercial Supplier Agreement (“CSA”)
- Some commercial terms and conditions are inconsistent with federal law and therefore are unenforceable
  - FAR 52.212-4(u) – certain government indemnification terms are unenforceable
- In 2018, GSA published Final Rule for CSAs
  - The Final Rule amended the GSAR to address common CSA terms and addressed common unenforceable terms within GSAR 552.212-4
  - The Final Rule (1) speeds up legal review process prior to contract formation, (2) significantly reduces costs to both the government and contractors, and (3) provides clarity to both the government and contractors as to expectations for terms and conditions

## GSAR 552.212-4(w)

- Includes list of unenforceable clauses, e.g.:
  - **End User** – agreement binds the ordering activity; not government employees
  - **Law and Disputes** – agreement governed by Federal law
  - **Continued Performance** – duty to proceed; follow Contracts Disputes Act
  - **Arbitration** – generally not allowed
  - **Updating Terms** – contractor may unilaterally make non-material revisions
  - **No Automatic Renewals** – Anti-Deficiency Act concerns
  - **Indemnification** – DOJ has sole right to represent U.S.
  - **Non-Assignment** – agreement may not be assigned without approval

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\$600			\$600

WHOOPS, I'M IN LEGAL TROUBLE · \$600

THESE PROCUREMENT CHALLENGES  
HAVE CONTRACTORS CALLING  
THEIR OUTSIDE COUNSEL ON  
FRIDAY AFTERNOONS

WHOOPS, I'M IN LEGAL TROUBLE · \$600

# WHAT ARE BID PROTESTS?

The background of the slide features a low-angle, upward-looking perspective of a modern building's exterior. The architecture is characterized by a series of parallel lines and a glass facade that reflects the sky. A prominent staircase with a metal railing is visible on the right side, leading upwards. The overall color palette is light and airy, with a focus on geometric shapes and lines.

# Bid Protests



# Protests

- **Why Protest?**
  - Pre-award protests can remedy ambiguities or incorrect/improper terms in the solicitation
  - Post-award protests can be used when prejudiced by errors in the evaluation process which caused you to not receive an award
- **In the multiple award context, generally fewer reasons to protest**
  - Limitations on Task Order protests

# Recent Protest Issues

- Offered items must be on Schedule – includes service descriptions
  - Protest will be dismissed where underlying IDIQ contract does not include all services required by the task order solicitation (B-418073, 2020 CPD ¶ 13)
- Schedule vendor lacks standing to protest award of Blanket Purchase Agreement (BPA) unless sufficient time on Schedule contract to cover entire BPA period of performance (including options)
  - “[A] BPA cannot survive the expiration of the underlying FSS contract” (B-418405, 2020 CPD ¶ 145)
- Agency must consider “lowest overall cost alternative” in determining best value for award of BPAs under FSS contracts
  - Price reasonableness already determined based on award of FSS contract (B-418141, 2020 CPD ¶ 32)


GSA SCHEDULE GOT ME CONFUSED	NDA POTPOURRI	CONTRACT ISSUE CORNUCOPIA	WHOOPS, I'M IN LEGAL TROUBLE
\$600			

GSA SCHEDULES GOT ME CONFUSED · \$600

THESE VEHICLES WILL CHANGE THE  
WAY THE GOVERNMENT BUYS  
COMMERCIAL PRODUCTS

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# WHAT ARE GOVERNMENTWIDE ACQUISITION CONTRACTS (GWACs)?



# **Governmentwide Acquisition Contracts (GWACs)**

# Governmentwide Acquisition Contracts (GWACs)

- Governmentwide Acquisition Contracts (“GWACs”) are multiple award IDIQ contracts that agencies use to purchase products and services
  - These contracts are established by one agency for use Governmentwide
- Examples of GWACs:
  - GSA 8(a) STARS II - offers access to highly qualified, certified 8(a) small disadvantaged businesses
  - GSA VETS 2 - offers a unique contribution to the federal acquisition community as it's the only GWAC set-aside exclusively for Service-Disabled, Veteran-Owned Small Businesses (SDVOSB)
  - GSA Alliant 2 - offers comprehensive information technology (IT) solutions through customizable hardware, software, and services solutions purchased as a total package
  - NASA SEWP V - focused on commercial IT products and product based services
- NIH GWAC unique approach for “medium sized” businesses

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# Questions?



# Sheppard Mullin Government Contracts Team



**Ryan Roberts**

[reroberts@sheppardmullin.com](mailto:reroberts@sheppardmullin.com)

202.747.2187



**Townsend Bourne**

[tbourne@sheppardmullin.com](mailto:tbourne@sheppardmullin.com)

202.747.2184