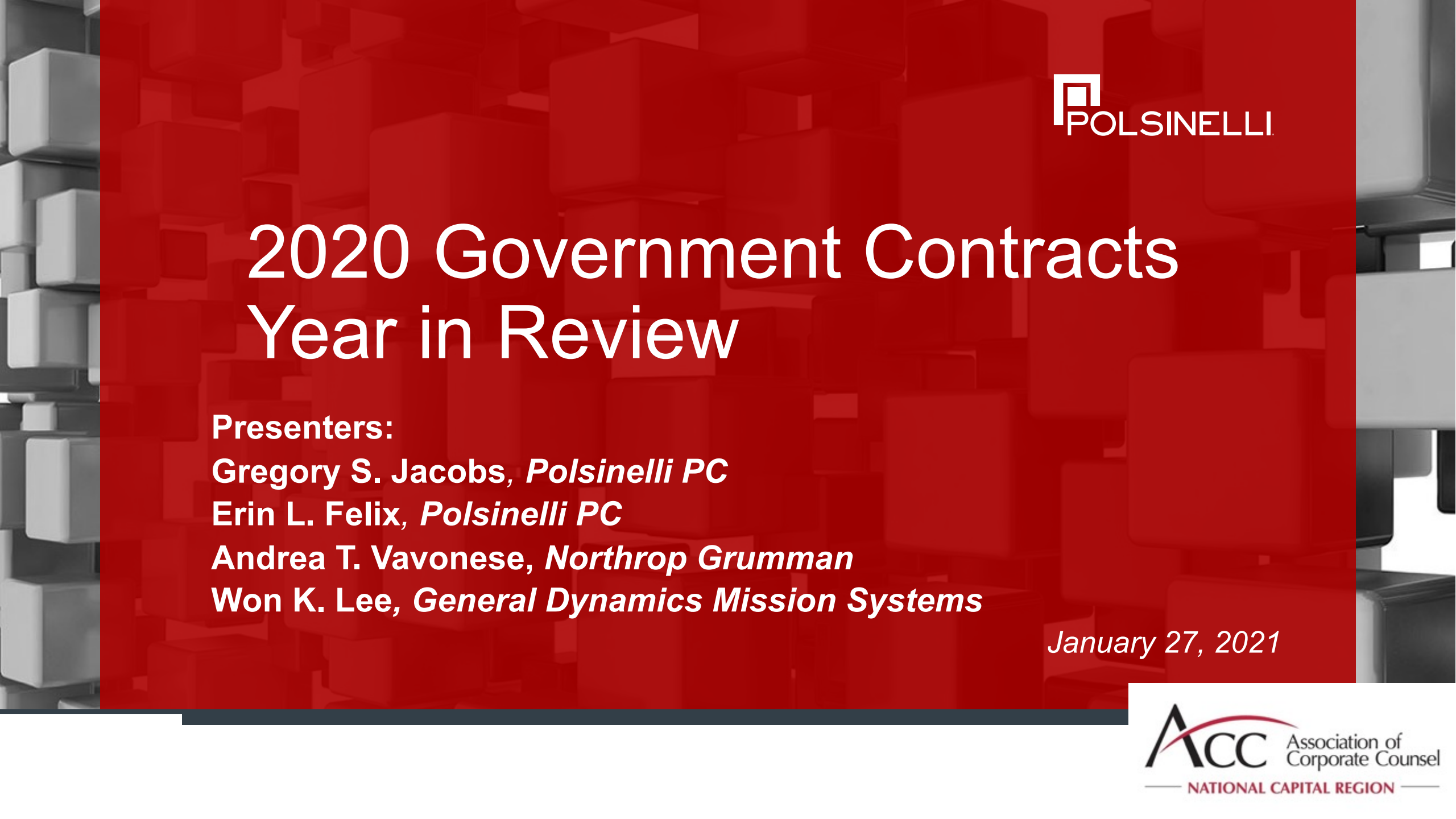

POLSINELLI

2020 Government Contracts Year in Review

Presenters:

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January 27, 2021

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Outline

I. Laws and Regulations
   - A. NDAA Section 889
   - B. CMMC
   - C. Executive Orders
   - D. FY2021 NDAA

II. Cases
   - A. Protests
   - B. Appeals
   - C. Other Cases

III. COVID Contracting
   - A. Defense Production Act
   - B. PREP ACT
   - C. CARES Act Sec. 3610
   - D. *Force Majure* and Other Clauses

Laws and Regulations

NDAA Section 889

- Part A – Sale prohibition (Section 889(a)(1)(**A**)) – Aug. 2019
  - Prohibits ***procuring*** telecommunication and video surveillance equipment and services as a "substantial or essential component" of any system or as "critical technology" from five Chinese companies
  - Requires submission of a representation with each offer any telecommunications equipment or services from the named companies
- Part B – Use prohibition (Section 889(a)(1)(**B**)) – Aug. 2020
  - Prohibits ***use*** of "covered telecommunications equipment or services" from the five Chinese companies
- Five Chinese Companies: Huawei Technologies Company, ZTE Corporation, Dahua Technology Company, Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Compan[illegible]

NDAA Section 889

- Implemented with FAR clauses:
  - FAR 52.204-24 (Solicitation clause requiring representation)
  - FAR 52.204-25 (Contract clause prohibition and requiring reporting)
  - FAR 52.204-26 (Annual SAM representation)
- A contractor is required to conduct a “reasonable inquiry” before representing whether it does or does not use covered telecommunications equipment or services
- Rule encourages a “risk-based” compliance plan

NDAA Section 889

- Compliance Plans
  - Develop and document the plan
    - No requirement to document, but prudent to do so
  - Learn the regulation and track its evolution
  - Tracking via reasonable inquiry
    - Annual reps/certs refreshers from suppliers regarding what is supplied or used
  - Educate program management, contracts, IT and other key teams
  - Replace providers/equipment as applicable
  - Make representation that reflects status accurately
  - Re-evaluate periodically to ensure compliance

DoD Cyber Requirements/ CMMC

- New Interim Rule, effective November 30, 2020 (85 FR 61505)
  - Implements time-phased ramp up to 'full' CMMC between now and Sept. 30, 2025
    - On Oct. 1, 2025, all DoD sub/contractors will be required to be CMMC certified at the appropriate level as a condition of award
  - Until then, sub/contractors must perform a self-assessment against NIST 800-171 requirements using a specified DoD methodology and have its score and gap-closure date on file in SPRS as a condition of award
    - COTS providers remain exempt
  - Does not change the requirements of DFARS 252.204-7012 itself
- 3 new DFARS clauses
  - 252.204-7019: Notice of NIST SP 800-171 DoD Assessment Requirements
  - 252.204-7020: NIST SP 800-171 DoD Assessment Requirements
  - 252.204-7021: Cybersecurity Maturity Model Certification Requirements

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EO 13950 – Combatting Race & Sex Stereotyping

- INTENT: prohibit "divisive" diversity training by the USG and contractors, subcontractors and grant recipients
- PROHIBITED: promoting, including providing training that promotes, "race or sex ***stereotyping*** or ***scapegoating***"
  - ❑Stereotyping - ascribing character traits, values, moral and ethical codes, privileges, status or beliefs to an entire race or sex, or to individuals because of their race or sex
  - ❑Scapegoating - assigning fault, blame or bias to a race or sex, or members of a race of sex, because of their race or sex
- EFFECTIVE: 9/22/2020; applied to contracts entered into after 11/21/2020
- NON-COMPLIANCE: potential termination, suspension or debarment

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EO 13950 – Combatting Race & Sex Stereotyping (Cont.)

Santa Cruz Lesbian and Gay Community Center et al. v. Donald J. Trump Case 5:20-cv-07741-BLF (ND CA Dec 22, 2020)

- Court issued a preliminary injunction prohibiting OFCCP from implementing, enforcing, or effectuating Section 4 [workplace training conducted by contractors] and 5 [grants] of EO 13950 "in any manner against any recipient of federal funding by way of contract [or] subcontract…."
  - Plaintiffs alleged violation of First Amendment (overly broad restriction of speech unrelated to purpose of federal contract/grant) and due process clause (requirements too vague to enforce)
- OFCCP quickly shut down enforcement program – stopped reviewing training and investigating complaints
- Agencies issued guidance not to enforce
- President Biden revoked the EO on 1/20/21 (EO 13985)

EO 13881 – Maximizing Use of American-Made Goods

- Refines **Buy American Act**, 41 USC Ch 83, which encourages use of domestic end products by imposing price preference for domestic end products
- BAA currently includes 2 part test in determining if product is of domestic origin: (1) end product manufactured in US and (2) more than 50% of product components are manufactured in US
- EO requires implementation of new rule that increases domestic content requirement

EO 13881 – Maximizing Use of American-Made Goods (Cont.)

- 9/14/2020 – FAR counsel issued proposed rule to implement EO 13881
  - ❑Adds specific requirements for steel and iron – considered foreign origin unless 95% cost of components used in composition of end products are domestic – as estimated in "good faith"
  - ❑For other items, increases requirement for domestic origin from 50% of cost of components to 55%
  - ❑Increases the price premium if foreign end product is proposed from 6% to 20% for other than small businesses and from 12% to 30% for small businesses
  - ❑Restores domestic content test for iron and steel COTS items (except fasteners)

EO 13881 – Maximizing Use of American-Made Goods (Cont.)

- 35 comments received, including:
  - ❑ Views on applicability to COTS
  - ❑ Views on exclusion of fasteners
  - ❑ Concerns about availability of domestic sources
  - ❑ Criticism of good faith test for domestic content of iron and steel as unnecessary and provides potential for fraud (because difficult to estimate cost of foreign content)
  - ❑ Views on change from “components” to “content” test
  - ❑ Views on produced in the US vs manufactured in the US
  - ❑ Requests for clarification that manufacturing of iron and steel is covered, not raw materials

DFARS 252.225-7052 – Restrictions on the Acquisition of Certain Magnets, Tantalum and Tungsten (Oct 2020)

- Implements 10 USC 2533c (NDAA 2019)
- Similar to domestic source requirements of Specialty Metals clause
- Prohibits procurement of “covered material” that was “melted or produced”, or of and an end product containing “covered material” manufactured in, China, Russia, North Korea, or Iran
- Covered material:
  - ❑ samarium-cobalt magnets
  - ❑ neodymium-iron-boron magnets
  - ❑ tungsten metal powder
  - ❑ tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy; and
  - ❑ tantalum metals and alloys

DFARS 252.225-7052 – Restrictions on the Acquisition of Certain Magnets, Tantalum and Tungsten (Oct 2020) (Cont.)

- Does not apply:
  - ❑ When cannot be acquired at a reasonable price within the required timeframe
  - ❑ To acquisitions at or below simplified acquisition threshold
  - ❑ To COTS (with some exception)
  - ❑ For use outside US
  - ❑ To electronic devices (unless domestic sourcing critical for national security)
  - ❑ Certain neodymium-iron-boron magnet

FY21 NDAA Key Provisions

- **§ 816**, Documentation Pertaining to Commercial Item Determinations
  - Requires contracting officers to document commerciality determinations within 30 days of an award
  - Allows contracting officers to request support from experts within DoD as well as consider the views of appropriate public and private sector entities to support those determinations
- **§ 833**, Listing of Other Transaction Authority Consortia
  - Requires DoD to publish on beta.sam.gov a list of the consortia used to announce or otherwise make available opportunities to enter into an Other Transaction

FY21 NDAA Key Provisions

- **§ 835** – Balancing Security and Innovation in Software Development and Acquisition
  - Requires DoD to develop requirements for software security criteria to be included in solicitations for commercial and developmental solutions and the evaluation of bids, including
    - establishment and enforcement of secure coding practices
    - management of supply chain risks and third-party software sources and component risks
    - security of the software development environment
    - secure deployment, configuration, and installation processes; and
    - vulnerability management plan and identification of tools that will be applied to achieve an appropriate level of security
- **§ 863**, Employment Size Standard Requirements for Small Business Concerns
  - Extends window for calculating compliance with employee-based size standards from 12- to 24-month lookback

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FY21 NDAA Key Provisions

- **§ 868,** Past Performance Ratings of Certain Small Business Concerns
  - Requires the SBA to enact regulations allowing SBs to use the past performance of a JV in which it previously participated if the SB has no relevant past performance of its own, regardless of the size of the other JV member
  - Requires prime contractors to provide a past performance record to first-tier small business subcontractors for use, upon request
- **§ 869**, Extension of Participation in 8(a) Program
  - Extends 8(a) program term from 9 to 10 years for any company that was participating in the program as of September 9, 2020
  - Applies regardless of whether the 8(a) concern previously elected to suspend participation in the program

FY21 NDAA Key Provisions

- **§ 883**, Prohibition on Awarding of Contracts to Contractors that Require Nondisclosure Agreements Relating to Waste, Fraud, or Abuse
  - Expands current restriction under FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements for DoD awards
  - Mandatory contractor representation that it
    - does not require employees to sign internal confidentiality agreements or statements restricting employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract; and
    - will inform it employees of the limitations on confidentiality agreements and other statements described above
- **§ 885**, Disclosure of Beneficial Owners in Database for Federal Agency Contract and Grant Officers
  - Requires prospective contractors and grantees to disclose beneficial ownership data for inclusion in FAPIIS

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FY21 NDAA Key Provisions

- **§ 886**, Repeal of Pilot Program on Payment of Costs for Denied Government Accountability Office Bid Protests
  - Repealed FY18 NDAA's requirement for a pilot program requiring unsuccessful GAO bid protesters reimburse DoD for the cost of defending the losing protest
- **§ 1752**, National Cyber Director
  - Establishes a National Cyber Director within the Executive Office of the President
  - Authorizes the Director to enter into contracts, leases, cooperative agreements, *and other transactions* as necessary to conduct of the work of the Office
- **§ 5301**, National Institute of Standards and Technology Activities
  - Expands NIST's mission to include the development of standards, guidelines, and a risk-mitigation framework for artificial intelligence
  - Authorizes the Director to enter into contracts, leases, cooperative agreements, *and other transactions* as necessary to further these efforts

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Protest Cases

Organizational Conflict of Interest (OCI)

Teledyne Brown Engineering, Inc., B-4187835, B-418835.2, Sept. 25, 2020

- **Factual Background:** Teledyne Brown Engineering, Inc., protested NASA's award of a contract to SGT, LLC, for ground systems and operations services at Marshall Space Flight Center in Huntsville, Alabama
- Among other bases of protest, Teledyne argued that a NASA employee (referred to as Mr. X) who participated in the acquisition had an improper personal conflict of interest

Organizational Conflict of Interest (OCI)

Teledyne Brown Engineering, Inc., B-4187835, B-418835.2, Sept. 25, 2020

- Teledyne specifically alleged that Mr. X had an ongoing personal relationship with an individual who holds a high-level position with COLSA, the predecessor prime contractor for part of the incumbent effort and a major subcontractor to the awardee, SGT
- Outside of his NASA role, Mr. X participated in weekly social gatherings with a group of "ten long-time friends" for "camaraderie, friendship, dinner, and to engage in ***competitive foosball***"

Organizational Conflict of Interest (OCI)

Teledyne Brown Engineering, Inc., B-4187835, B-418835.2, Sept. 25, 2020

- GAO found that Mr. X had an apparent personal conflict of interest that effectively tainted the acquisition
- GAO issued sweeping recommendations
  - Terminate the contract awarded to SGT for the convenience of the government
  - Cancel the solicitation and start a new acquisition without the involvement of individuals who have a conflict of interest

Organizational Conflict of Interest (OCI)

Inquiries, Inc., B-417415.2, Dec. 30, 2019 (published Feb. 5)

- Protest of Defense Security Service's (DSS) award of a contract to iWorks Corporation for personnel security support services for the Defense Vetting Directorate's background investigation and clearance adjudication activities
- GAO sustained the protest because the contracting officer failed to meaningfully consider whether iWorks's subcontractor's performance on a related task order resulted in an impaired objectivity OCI

Organizational Conflict of Interest (OCI)

Leidos, Inc., B-417994, Dec. 17, 2019

- Leidos protested its exclusion from an Air Force competition for the Common Computing Environment Cloud ("Cloud One") contract. Leidos objected to the Air Force's determination that the firm had impaired objectivity and unequal access to information organizational conflicts of interest (OCI) created by its proposed use of a subcontractor
- Subcontractor served as a subcontractor on an advisory and assistance services contract for the technology and strategic planning division of the Air Force office responsible for the Cloud One procurement
- GAO denied Leidos' protest agreeing with the Air Force's determination

Key Personnel

MindPoint Group, LLC, GAO, B-418875.2; B-418875.4, October 8, 2020

- Protest award of a contract to Centerpoint, Inc. for cybersecurity support services for the Department of Health and Human Service
- Centerpoint became aware that the individual had concerns about waiting for award and would be “pursuing another offer”
- GAO denied protest alleging that Centerpoint failed to notify the agency of material changes in proposed staffing before award
- GAO found this was a close call, but ultimately could not conclude that Centerpoint had ***actual knowledge*** that the key person was unavailable prior to award

Key Personnel

AVER, LLC, GAO, B-419244, Nov. 2, 2020

- AVER challenged the Department of Justice's issuance of a task order to IntePros Federal, Inc., for support of DOJ's Executive Office for Immigration Review (EOIR)
- GAO dismissed the protest alleging that one of IntePros's key personnel was unavailable for performance due to a ***non-compete agreement*** because GAO does not review disputes between private parties that do not involve the procuring agency
- GAO will consider allegations of material misrepresentation that has an adverse effect on the integrity of the competitive procurement system

Key Personnel

T3I Solutions, LLC, B-418034, B-418034.2, Dec. 13, 2019

- T3I Solutions protested the Air Force's award of a contract to Darton Innovative Technologies for courseware development and training services for operators handling intercontinental ballistic missiles
- GAO sustained the protest because Darton represented in its proposal that it would be using a specific incumbent employee on the new contract, but Darton had ***never actually contacted the individual about employment***
- Speculation regarding the availability of a potential hire cannot reasonably support a contractor's inclusion of that individual in a proposal. Darton had no reasonable basis to believe the incumbent employee would be available to work for Darton upon award

Key Personnel

22nd Century Technologies, Inc., B-418404, Apr. 16, 2020

- Protest of the Defense Information Systems Agency's (DISA) decision to exclude 22nd Century's proposal from a competition for various IT support services for DISA's Department of Defense Network environment
- The solicitation advised "[g]eneric resumes (not identified to an individual) will not be accepted" and "sensitive Personally Identifiable Information (PII)" must be omitted from the resumes of key personnel
- DISA cited a narrow definition of "sensitive PII" from the DHS Handbook for Safeguarding Sensitive PII that did not encompass names
- GAO found unobjectionable DISA's decision to reject 22nd Century's proposal as noncompliant where 22nd Century's resumes for key personnel did not include any names and were thus deemed generic

Other Transactions

System Architecture Information Technology, B-418721, June 2, 2020
Tactical Solutions International, Inc., B-418748, June 4, 2020

- *GAO dismissed two separate protests because challenges to the award of a non-procurement instrument are outside GAO's bid protest jurisdiction*
- *System Architecture Information Technology (SAIT)* – Other Transaction
  - Army prototype OT with Medical Technology Enterprise Consortium (MTEC)
  - SAIT eliminated from consideration under Request for Project Proposals (RPP)
  - GAO dismissed for lack of jurisdiction over OTs
- *Tactical Solutions International, Inc. (TSI)* – Cooperative Agreement
  - TSI eliminated from consideration under a Department of State Notice of Funding Opportunity
  - GAO dismissed for lack of jurisdiction over Cooperative Agreements
- "The only exception to this general rule are situations where…[a protester alleges] that the agency is improperly exercising [its] authority to avoid using a procurement contract." (*SAIT)*

Other Transactions

MD Helicopters, Inc. v. U.S., 435 F.Supp.3d 1003, Jan. 24, 2020

- *For the first time, a federal district court considered—and rejected—its jurisdiction to review the award of non-procurement instruments issued under an agency's OT authority*
- MD Helicopters was a disappointed offeror under U.S. Army's OT solicitation for Future Attack Reconnaissance Aircraft Competitive Prototype
  - Initial protest at GAO denied for lack of jurisdiction (B-417379)
  - Filed instead in the District Court of Arizona under the Administrative Dispute Resolution Act of 1996 (ADRA)
- Intervenor argued that the sunset provision ADRA eliminated district courts' jurisdiction
- Government advised the court that because an OTA is not a procurement contract, there was no statutory bar to protest jurisdiction
- In dismissing for lack of jurisdiction, the Court found that "ADRA's applicability does not depend on the present existence of an actual procurement contract so long as the challenged action bears a sufficient connection to a procurement."

Other Transactions

Reporting of Department of Defense Use of Other Transactions for Prototype Projects, Issued Dec. 7, 2020

- The Office of the Under Secretary of Defense issued this memo to collect and report DoD's use of other transactions for prototype projects for fiscal year 2020.
- DoD plans to collect the following data and report to Congress by December 18, 2020:
  - contracting agency,
  - major command,
  - contracting office,
  - award/effective date and completion date (period of performance),
  - product service code,
  - awardee/vendor,
  - award value,
  - dollars obligated,
  - agreements officer,
  - appropriation,
  - budget line item,
  - consortium,
  - total expenditures for the reporting period,
  - purpose/program goal/description,
  - status of project, and
  - a brief description of successes/challenges for case examples.

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JEDI Protests

- Joint Enterprise Defense Infrastructure is a 10-year, $10 billion contract for DoD enterprise cloud services;
- DoD has justified a single award on the basis of cybersecurity concerns and adoptability;
- First introduced in 2018, but the fight for the contract continues;
- DoD announced its original award to Microsoft in October 2019;
  - DoD found that Microsoft was both technically superior and lower-priced
- AWS brought suit, alleging that it was the best value, and the procurement was tainted by President Trump's bias against Amazon and Jeff Bezos;

JEDI Protests (cont)

- COFC issued a preliminary injunction in February 2020, based solely on the first evaluation error in the Motion;
- DoD took corrective action in Spring/Summer 2020 to address evaluation errors and amended the RFP;
- In September 2020, DoD again announced award to Microsoft;
- AWS filed a new protest on October 23, alleging evaluation errors and Trump Administration bias;
- Microsoft moved to dismiss the bias claims in December;

JEDI Protests (cont)

- The resolution on the bias claims will be the key to discovery in this case – and whether Judge Campbell-Smith will order the deposition of key officials and the production of documents;
- Separately, Oracle has challenged the use of a single-award vehicle for the JEDI contract – Oracle's protest was denied by the Court in July 2019 for lack of prejudice, based on the finding that Oracle could not have met the requirements under any contract type. The Federal Circuit affirmed in September 2020.

DoD Relocation Services Protests

- DoD, U.S. Transportation Command $19.9B contract for relocation services;
- Awarded to American Roll-on Roll-off Carrier Group (“ARC”);
- Protests by Connected Global Solutions and HomeSafe Alliance;
- GAO sustained protest grounds relating to discussions, evaluations, and oral presentations;
- GAO also sustained protests regarding USTRANSCOM’s determination that ARC is a responsible contractor;

DoD Relocation Services Protests (cont)

- Specifically, GAO found that the contracting officer reached unreasonable conclusions in determining that two ARC affiliates that pled guilty to criminal antitrust violations would not be meaningfully involved in performance of the contract;
- ARC claimed in its proposal that it would have access to the resources of its affiliates;
- USTRANSCOM argued that the RFP did not require it to conduct an evaluation of the awardee's assets;
  - But GAO determined that it was the FAR, not the RFP, that required the contracting officer to determine whether the affiliates involved in illegal conduct would be involved in contract performance.

Peraton – Common Interest

- GAO denied protest challenging the scope of corrective action;
- The Department of State originally made award to ManTech – Peraton protested;
- GAO held outcome prediction and informed the parties that it intended to sustain one ground protest;
- Following ADR, counsel for ManTech emailed agency counsel legal analysis regarding the scope of corrective action;
- In Peraton's protest, State initially withheld those emails and asserted common interest privilege;

Peraton – Common Interest (cont)

- GAO rejected the application of the common interest doctrine in this case, finding that in the case of corrective action the agency's and intervenor's interest cannot be truly aligned;
  - Peraton argued that the emails showed the agency's bias in favor of ManTech, which GAO rejected;
- GAO did not reach the broader question of whether communications between an agency and intervenor can ever qualify for the common interest exception.

MicroTechnologies – Covered Telecommunications Equipment Cert

- MicroTech protested the rejection of its proposal due to its completion of the FAR 52.204-24 certification;
- MicroTech checked the box indicating that it “will” provide covered telecommunications equipment and services, but then failed to make the required disclosures identifying such equipment and services;
- MicroTech argued that the agency had an obligation to clarify its certification, which it claimed was in error;
- GAO found that the agency acted reasonably and was not required to clarify MicroTech’s proposal.

Late Proposal Protests

- *Cla-Val Company*:
  - Protester had a FedEx receipt showing delivery to an agency facility prior to the deadline;
  - However, the agency did not show that it received the package until the following day, when it was logged into the central receiving facility;
  - GAO applied its rule that a commercial delivery receipt, without more, does not establish timely receipt of a proposal.
- *Vizocom:*
  - Protester argued that proposal was late because agency personnel were unable to direct the courier to the right location for delivery;
  - GAO disagreed and found that it was the protester's late dispatching of the courier, and not any improper government action, that resulted in the late delivery.

Appeals

COVID Related Cases

Pernix Serka Joint Venture v. Dep. of State, CBCA 5683, April 22, 2020

- In September 2013, DOS awarded a firm, fixed-price contract to Pernix Serka Joint Venture (PSJV) to construct a rainwater capture and storage system in Freetown, Sierra Leone
- In July 2014, the Ebola epidemic had spread to Freetown, Sierra Leone
- Not hearing any direction from DOS, PSJV decided to demobilize, leave the jobsite, and provide a notice of delay and request for equitable adjustment to DOS
- DOS acknowledged receipt of the notice but stated that it would not pay any additional, incurred costs

COVID Related Cases

Pernix Serka Joint Venture v. Dep. of State, CBCA 5683, April 22, 2020

- PSJV submitted a claim for increased costs for differing site conditions, disruption of work, and demobilization and remobilization of personnel, all related PSJV's response to the Ebola epidemic
- The FFP contract included an Excusable Delays clause, which provided: "The Contractor will be allowed time, not money, for excusable delays as defined in FAR 52.249-10. . . . Examples of such cases include . . . epidemics"
- Board granted DOS's motion for summary judgment and denied PSJV's claim for additional costs

COVID Related Cases

Valerie Lewis Janitorial v. Dep. of Veterans Affairs, CBCA 4026, May 5, 2020

- On August 18, 2010, the Department of Veterans Affairs (VA) awarded Lewis Janitorial a firm-fixed price contract for aseptic or custodial cleaning services for several buildings at the VA Northern California Health Care System, Martinez facility
- In February 2012, the VA determined that a bacterial outbreak clostridium difficile (C. diff) had occurred at a facility
- On May 29, 2012, the COR, sent an email to Lewis Janitorial stating she was ensuring the "housekeeping contractor" appropriately responded by using bleach and a two-step process (clean then disinfect) to be compliant with the enhanced cleaning regime

COVID Related Cases

Valerie Lewis Janitorial v. Dep. of Veterans Affairs, CBCA 4026, May 5, 2020

- In June 2012, four months into the new cleaning regime, Lewis Janitorial advised the VA of additional supplies and manpower needed to fulfill the new obligations
- On Jan. 27, 2014, Lewis Janitorial and the VA executed a bilateral modification, which added a two-step cleaning process to the SOW. The consideration for the two-step process was to be determined upon resolution of a certified claim, whereupon the contract would be modified to incorporate a fair and reasonable price
- On March 17, 2014, Lewis Janitorial filed its second certified claim in the amount of $441,138.06, which included the total increased actual costs from Feb. 2011 to April 30, 2014

COVID Related Cases

Valerie Lewis Janitorial v. Dep. of Veterans Affairs, CBCA 4026, May 5, 2020

- In May 2014, the VA issued a COFD denying both of VLJ's claims and counterclaimed for the costs of Lewis Janitorial' s use of VA's mops and laundry service and additional costs of services that the VA argued it had to purchase to supplement those provided by Lewis
- Lewis Janitorial timely appealed the contracting officer's final decision to the CBCA
- The Civilian Board of Contract Appeals (CBCA) granted Lewis Janitorial an equitable adjustment due to a ***constructive change*** for enhanced cleaning costs in response to the bacterial outbreak

Other Appeals

Appeal of Mountain Movers/Ainsworth-Benning, LLC, ASBCA No. 62164, Aug. 7, 2020

- *The Board found that it had jurisdiction over claims, even when the government purported that the claims involved fraud*
- MM/AB appeal of denied claim under an Army Task Order for facility repairs
- After appeal was docketed, Contracting Officer rescinded final decision due the discovery of alleged prior fraudulent statements by MM/AB
- Government filed Motion to Dismiss due to lack of Board subject matter jurisdiction due to the Contracting Officer's determination of fraud
- In finding jurisdiction, the Board determined that it could adjudicate the merits of the claim without having to make a finding regarding the alleged fraud
    - "The Government's motion essentially seeks to create a government right of removal that would allow the government to unilaterally compel contractors to litigate their appeals before the [COFC]."

Other Appeals

Avue Techs. Corp., CBCA No. 6360, Feb. 3, 2020, 20-1 BCA ¶ 37,503

- *Does the Government's acceptance of the EULA terms create a direct right of action by the OEM/subcontractor?*
- FDA purchased a license to Avue's software through a third party's GSA Schedule
  - Purchase/payment through the reseller's Schedule contract
  - Software usage subject to Avue's End User License Agreement terms
- Avue alleged FDA breached its license by installing more copies than purchased
- Avue brought a *direct* claim/appeal, arguing "FDA and FDA users had privity of contract with Avue through its licensing agreements," which were expressly incorporated into the Schedule terms
- Both HHS and GSA argued the Board has no jurisdiction because Avue is a subcontractor under the GSA Schedule and lacks privity with the Government

Other Appeals

Avue Techs. Corp., CBCA No. 6360, Feb. 3, 2020, 20-1 BCA ¶ 37,503

- In denying the Motion to Dismiss, CBCA noted the interrelationship of the merits and jurisdictional issue:
  - "Both agencies' jurisdictional arguments are intertwined with and overlap arguments going to the merits of Avue's novel claim regarding whether the EULA is a freestanding contract and, if so, whom the contract binds. Answering such merits questions may shed light on jurisdictional issues."
- Stay tuned!

Other Appeals

Alloy Surfaces Co., ASBCA No. 59625, Apr. 9, 2020, 20-1 BCA ¶ 37,574

- *The Board found that job cost sheets for in-process manufacturing process changes were not sufficiently certain information to be certified cost or pricing data*
- Alloy held an IDIQ contract with the Army, and the government requested a proposal for a substantial additional quantity to be procured under a delivery order (DO 14)
- At the time, Alloy was in the process of automating certain manufacturing processes and bringing two additional plants on-line.
- By early September 2006, Alloy completed DO 13, utilizing its automated manufacturing processes at its original plant.
- Alloy submitted its proposal for DO 14 in April 2006
  - Proposal did not contain any material and labor usage data related to DO 13
  - Instead, contained similar data from earlier jobs which were produced without the automated processes utilized in DO 13
  - In August 2006, negotiations began on the proposal which ultimately led to award of DO 14.

Other Appeals

Alloy Surfaces Co., ASBCA No. 59625, Apr. 9, 2020, 20-1 BCA ¶ 37,574

- The government argued it relied on defective material and usage rates when it negotiated the price for DO 14 and that it agreed to a higher price than it would have if it had access to the DO 13 data.
- ASBCA held that job cost sheets prepared by Alloy during the production of DO 13 were management tools that contained both factual and judgmental information, *but did not possess the requisite degree of certainty necessary for providing certified cost data to the government*.
    - In particular, at the time of price agreement on September 25, 2006, the reports were not sufficiently certain to be certified as "cost and pricing data" pursuant to the Truth in Negotiations Act, 10 U.S.C. § 2306a.

Other Cases

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False Claims Act Developments

- The Government recovered $2.2B under the Civil FCA in FY2020 – that is down from just over $3B in FY2019.
  - Approximately $1.8B was health care industry fraud
- In the *UCB* case, the 7th Circuit introduced a new standard for government dismissal.
  - Under the DC Circuit's *Swift* standard, the government may freely dismiss;
  - Under the 9th Circuit's *Sequoia Orange* standard, DOJ must express a valid government purpose;
  - The 7th Circuit found that the government must intervene in order to dismiss a case, but then has broad discretion to do so (intervention – where it declines to do so initially – requires "good cause")

Acetris – Federal Circuit Decision

- Acetris brought a bid protest at the Court of Federal Claims, challenging the VA's rejecting of its proposal for pharmaceutical products;
- The VA determined that Acetris' products were not TAA compliant because their API was manufactured in India;
- Customs and Border Protection had previously concluded that the pharmaceuticals in question were products of India;
- The Court of Federal Claims found for Acetris and determined that (1) the VA must make its own determination of TAA compliance and (2) the VA misinterpreted the FAR's TAA clause.

Acetris – Federal Circuit Decision (cont)

- CBP applied the "substantial transformation" test and determined that the products, which were finished in the US, were nonetheless products of India due to the API;
- The COFC found that, unlike designated country end products that must be substantially transformed or wholly manufactured in the country, merely being manufactured in the US was sufficient;
- In affirming the COFC, the CAFC confirmed the plain language of the TAA clause permitting products "manufactured" in the US;
- The CAFC also held that the product in question could not be of Indian origin because it is neither "wholly" the product of India nor substantially transformed in India;

Acetris – Federal Circuit Decision (cont)

- This decision eviscerates the longstanding ‘API rule’;
- It also likely has broader implications for other products that have major components from India, China, etc. where the manufacturing process is finished in the US;
- Future cases will explore how much US “manufacturing” is enough.

Other Cases

The Boeing Company v. Secretary of the Air Force, Fed. Cir. No. 2019-2147 (Dec. 21, 2020)

- *The Federal Circuit held that DFARS 252.227-7013 applies only where a contractor seeks to assert restrictions on the government's rights, and additional markings may be appropriate to protect the contractor's technical data vis-à-vis third parties*
- Boeing entered into two contracts with the United States Air Force which required Boeing to deliver technical data to the Air Force with broad, "unlimited" license rights
- Boeing delivered its data marked with a legend separately reflecting both the Government's unlimited rights *but also asserting additional proprietary protections vis-à-vis third parties*
  - *"Non-U.S. Government recipients may use and disclose only as authorized by Boeing or the U.S. Government."*
- The Air Force issued two Contracting Officer Final Decisions finding that Boeing's legend was an impermissible non-conforming marking under the DFARS, Boeing appealed to the ASBCA, and the Board denied

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Other Cases

The Boeing Company v. Secretary of the Air Force, Fed. Cir. No. 2019-2147 (Dec. 21, 2020)

- Boeing appealed to the Federal Circuit, arguing that
  - the DFARS marking restrictions only apply to legends restricting the *government's* rights; and
  - the DFARS is categorically inapplicable to legends that only restrict the rights of third parties, and its legend cannot be nonconforming
- Federal Circuit held the plain language of DFARS 252.227-7013 demonstrates that it applies only in situations when a contractor seeks to assert restrictions on the government's rights
  - It remains an unresolved factual question, however, whether Boeing's proprietary legend actually restricts the government's rights, and the case was remanded to the Board for further proceedings

COVID Contracting

Defense Production Act

- Purpose is to allow the U.S. Government to expedite and prioritize industrial resources for use in national defense.
- Use of the DPA has been expanded to include emergency preparedness.
- The DPA includes three main features:
  - Prioritization Authority: utilizes a “rated order” system to require government contractors and subcontractors to prioritize government delivery requirements.
  - Allocation Authority: gives the government the power to allocate industrial resources.
  - Increase Industrial Capacity: gives the government the power to expand domestic capacity through economic incentives.

Defense Production Act and COVID

- The Trump Administration issued new DPA delegations of priority rating authority to HHS for “health resources”;
- HHS prominently used that authority in issuing priority-rated contracts for such items as ventilators, needles and syringes, and vaccines and therapeutics.
- The Trump Administration primarily used the DPA allocation authority as a threat, *e.g.*-
  - In March, the Administration issued an order for General Motors to produce ventilators;
  - In April, the Administration issued an order to pressure 3M to stop the export of N-95 masks;

DPA Legal Outlook for 2021

- The Government terminated several priority-rated contracts for convenience, including about 75% of the 43,000 Philips ventilator units ordered;
  - If these terminations result in disputes, we will see the interaction between the DPA and termination for convenience recovery;
- Likely to be 2021 cases that will test the scope of legal protections for recipients of rated orders.

PREP Act

- The Public Readiness and Emergency Preparedness ("PREP") Act, 42 U.S.C. 247d-6d, provides for immunity from suit under federal and state law for losses related to the administration or use of identified "Covered Countermeasures";
- HHS Secretary Azar made a PREP Act Declaration on March 10, 2020;
- Immunity Protections: The PREP Act provides immunity to "Covered Persons" that are engaged in the "Recommended Activities." The immunity does not apply to willful misconduct. However, it does apply to all forms of negligence, including gross negligence.

PREP Act (cont)

- Covered Persons: The “Covered Persons” who are subject to the immunity under the Declaration are: “’manufacturers,’ ‘distributors,’ ‘program planners,’ ‘qualified persons,’ and their officials, agents, and employees, as those terms are defined in the PREP Act.”
- Recommended Activities: the manufacture, distribution, etc. of “Covered Countermeasures” – which include any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19;

PREP Act (cont)

- PREP Act immunity only applies to the provision of Covered Countermeasures in connection with federal contracts, grants, etc., or under authority of a state or local government;
- Application of the PREP Act has been an important contractual provision in federal, state, and local contracts for diagnosis, treatment, etc. of COVID-19;
- Future cases will test the scope of the immunity protections.

Coronavirus Aid, Relief and Economic Security (CARES) Act § 3610

CARES Act enacted 3/27/2020

- Sec. 3610 allows (but does not require) agencies to reimburse contractors and subcontractors for paid leave for employees who, due to COVID-19:
  - ❑ cannot perform work at their duty-station (e.g., federally-owned or leased facility or site approved by federal government) due to closure or other restrictions; and
  - ❑ who cannot telework because of their jobs cannot be performed remotely
- Up to 40 hours per week of paid leave from 3/27/2020 through 3/31/2021 at the minimum applicable contract billing rate, exclusive of profit or fee

Coronavirus Aid, Relief and Economic Security (CARES) Act § 3610 (Cont.)

- Paid leave necessary to keep employees in a “ready state” (able to mobilize in a timely manner) including to protect the life and safety of Government and contractor personnel
  - ❑ E.g., quarantining, social distancing, or other COVID-19 related interruptions
  - ❑ See Office of Management and Budget Memorandum M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (*March 20, 2020)
- Must be offset by any other relief (e.g., Paycheck Protection Program (PPP) or tax credits from the Families First Corona Virus Response Act)
- Contingent on availability of funds

CARES Act 3610 – Agency Guidance

Examples include:

- GSA - GSAR-Deviation-3610-CARES-Act.pdf and GSAR 552.222-70
  - ❑ Applies to task orders but not contract level (IDIQ) or non-FAR based contracts
  - ❑ Recovery should be limited because "nearly all GSA contractors can continue to work"
  - ❑ All contractor/subcontractor work sites are approved, unless CO directs otherwise
- Intel community - Office of Director of National Intelligence issued memorandum (dni.gov) emphasizing desire to apply Section 3610 "to the greatest extent possible"
- DoD - DOD Class Deviation - Section 3610 Reimbursement Requests to FAR Part 31 and DFARS 231.205-79
  - ❑ See also DOD FAQ_Implementation_Guidance_CARES_Act_Sec_3610_1.13.21

CARES Act 3610 – DoD Guidance

- Establishes processes (checklists) for contractors and contracting officers to follow
  - ❑ “abbreviated” process for single contract below $2 million
  - ❑ “multipurpose reimbursement” process for single contract or multiple “homogeneous groups of contracts” (e.g., contracts for a single program or with a single contracting activity or DoD Component)
  - ❑ “global reimbursement” process for reimbursement at a business unit or segment level, which should be submitted to the contractor’s assigned Cognizant Federal Agency Official
- Addresses procedures for subcontractor requests
  - ❑ All subcontractor requests to be submitted to the prime and should include the same supporting information and documentation that is required from the prime (some of which may be submitted directly to the government)
  - ❑ Prime contractor should evaluate its subcontractor’s submission and provide, with its own request, an opinion regarding the subcontractor’s eligibility as an “affected contractor”

CARES Act 3610 – DoD Guidance (Cont.)

- Contracting officer (CO)to determine, in writing:
  - ❑ if the contractor is an “affected contractor”,
  - ❑ the reimbursement amount, and
  - ❑ the amount of funds available.
- CO will issue bilateral modification to add the new clause DFARS 252.243-7999 Section 3610 Reimbursement (DEVIATION 2020-O0021)
- If contractors receive any other relief specifically identified with the COVID-19 pandemic (e.g., credits or PPP loan forgiveness) → must notify CO within 30 days, and agree to a reduction in the reimbursement

CARES Act 3610 – DoD Guidance (Cont.)

- Early customer engagement encouraged (planning purposes only)
  - ❑ Review requirements
  - ❑ Obtain written CO determination that the contractor is an affected contractor
  - ❑ Determine availability of funding
  - ❑ Discuss whether costs are authorized, frequency of submissions, estimates of claims

CARES Act 3610 – DoD Guidance (Cont.)

Affected Contractor:

- ✓ Provided paid leave specifically paid to keep employees/subcontractors in ready state
- ✓ Does not include paid leave to which employee otherwise entitled
- ✓ Provided and taken between 3/27/2020 - 3/31/2021
- ✓ Leave paid to employees unable to perform work due to COVID-19 related facility closures or other restrictions (e.g., quarantine requirements)
- ✓ Employees unable to perform work remotely
- ✓ Does not include leave that exceeds average of 40 hour/week per employee

CARES Act 3610 – DoD Guidance (Cont.)

Contractors and subcontractors must represent the following with claim:

- ✓ Paid leave specifically paid to keep employees/subcontractors in ready state
- ✓ Contractor segregated and reported actual costs of 3610 leave payments, traceable to individual employee charges
- ✓ Request excludes paid leave costs associated with contractor work as subcontractor to another contractor
- ✓ Subcontractors afforded opportunity to submit 3610 request and requests received are incorporated into contractor's request
- ✓ Request reduced by applicable COVID-19 related credits or loan forgiveness received
- ✓ Costs not requested in another 3610 request
- ✓ Request made in good faith, supporting data accurate and complete to best of contractor's knowledge

CARES Act 3610 – Challenges with Recovery

- Availability of funding
- Exercise of discretion by CO
  - ❑ Best interest of government
  - ❑ Necessary to keep workforce in ready state
  - ❑ Ability of Contractor to take other steps to keep workforce in ready state
  - ❑ Financial need of contractor (e.g., no revenue due to COVID-19 vs other continued sources of revenue)
- No double dipping (e.g., tax incentives, PPP)
- Contractor responsibility for subcontractor claims
- Audits
  - ❑ Entitlement - Documentation of COVID-19 leave – justification, timing, amount
  - ❑ Quantum - Applicability of leave to multiple contracts (allocability)

Contract Clauses – Force Majeure

Applicability

- Does clause include COVID-19
  - ❑ WHO designated COVID-19 a “pandemic”. If no pandemic verbiage in clause, does COVID-19 fit within other language (eg epidemic, act of god, act of Government)
- Is risk of non-performance unforeseeable and unable to be mitigated
- Is performance impossible
  - ❑ Impracticality or burden not sufficient
  - ❑ Local orders, sick leave, supply chain disruption – what reasonable steps are taken to mitigate impact
- Notice requirements - when to provide notice; what to do when notice is received

➢ If no force majeure clause, will common law claims of impossibility or frustration of purpose provide relief. Typically relates to something unforeseen that could not be addressed in contract

Contract Clauses – Force Majeure (Cont.)

Governed by state law - Generally interpreted narrowly, and choice of law matters (e.g. not all require unforseeability)

- ***Palm Springs Mile Associates, Ltd. V. Kirkland's Stores, Inc.,*** 2020 WL 5411353 (S.D. Fla. Sept. 9, 2020) – tenant not excused from paying rent due to disruption of its non-essential business during COVID-19 because tenant failed to show government restrictions caused inability to pay rent
- ***Richards Clearview, LLC. v. Bed Bath & Beyond, Inc.,*** 2020 WL 5229494 (E.D. La. Sept. 2, 2020) – court rejected landlord's claim for eviction, under LA "judicial control" theory finding any deficiency in performance is excusable under the circumstances

Going forward

- Existing contracts: Provide timely notice, keep detailed records of impacts, communicate with counterparty
- New contracts:
  - ❑ Draft force majeure clauses with specificity regarding process in event of force majeure (notice, remedies, impacts on supply chain, etc.)
  - ❑ Consider specifically identifying COVID-19 (pre-existing pandemic may not apply to new contracts, as it is not unforeseeable, unless new restrictions imposed in the future can be considered unforeseeable)

Contract and Other Clauses

- Disclaimer in proposals – impact of COVID-19 not foreseeable
- Excusable delay FAR 52.249-14(a) – schedule relief, no monetary relief; avoidance of termination or breach claim
  - ❑ non-exclusive list including acts of government, epidemic, quarantine
  - ❑ unforeseeable, beyond contractor's and subcontractor's control and without fault or negligence
- Suspension of work (FAR 52.242-14) – construction/engineering contracts where delay by CO in administering contract, entitled to contract price adjustment
- Stop work (FAR 52.242-15) – entitled to equitable adjustment
- Changes (52.243-4) (e.g., government direction impacts cost and/or schedule) – applies to formal and constructive changes
- Special clauses
- Insurance (e.g. business interruption) – does policy exclude pandemics/epidemics; Deductible; Notice requirements

COVID-19 Practice Tips

- Document, document, document
  - ❑ Costs and basis for incurring costs
  - ❑ Foreseeability
  - ❑ Efforts to mitigate
- Evaluate existing contract terms and consider terms in new contracts
- Consider all impacts, including idle labor, facilities and equipment; constructive acceleration; loss of efficiencies
- Communicate with customers and supply chain

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