POLSINELLI
What a law firm should be.™

2023 Government Contracts Year in Review

Presenters:
Gregory S. Jacobs, *Polsinelli PC*
Erin L. Felix, *Polsinelli PC*
Holly A. Roth, *Polsinelli PC*
Jessica Lehman, *Verizon*
Virginia Robinson, *Tlingit Haida Tribal Business Corporation*

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Outline

I. Laws and Regulations
   A. Executive Orders
   B. Regulations
   C. FY2024 NDAA
   D. DOJ Strike Force Update

II. Cases
   A. Protests
   B. Appeals
   C. False Claims Act and Other Cases

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.™

Executive Orders

E.O. 14104, Federal Research and Development in Support of Domestic Manufacturing and United States Jobs

Issued July 28, 2023

- Strengthens domestic manufacturing obligation
  - Agencies must consider how R&D funding agreements support broader domestic manufacturing objectives
  - Includes SBIR/STTR programs and OTs
- Updates Subject Invention reporting – requires recipients of federal R&D to
  - track and update agency on the location where subject inventions are manufactured; and
  - report annually to the agency the names of licensees and manufacturing locations of the applicable subject inventions
- Govt must evaluate whether "exceptional circumstances" exist to warrant extension of the requirement to manufacture "substantially in the United States"
  - to recipients of Federal R&D funding agreements
  - to non-exclusive licensees of subject inventions
  - for use or sale of subject inventions outside the United States

POLSINELLI. What a law firm should be.™

ACC Association of Corporate Counsel NATIONAL CAPITAL REGION

Issued March 27, 2023

> "The Government "shall not make operational use of commercial spyware that poses significant counterintelligence or security risks to the United States Government or significant risks of improper use by a foreign government or foreign person."

POLSINELLI®
What a law firm should be.™

E.O. 14093, Prohibition on Use by the United States Government of Commercial Spyware That Poses Risks to National Security

"**Commercial spyware**" = end-to-end software furnished for commercial purposes that provides enables a user's remote access to a computer, without consent, to:

- access, collect, exploit, extract, intercept, retrieve, or transmit content (including information stored on or transmitted through a computer connected to the internet);
- record the computer's audio or video calls or use the computer to record audio or video; or
- track the computer's location

Prohibition on Operational Use: Prohibits commercial spyware where "such use poses significant counterintelligence or security risks to the United States Government" or "poses significant risks of improper use by a foreign government or foreign person."

- Determination must be based on "credible information"
- Agency also cannot directly enable a third party to use such spyware
- Federal Acquisition Security Council must consider intelligence assessments in evaluating whether commercial spyware poses a supply chain risk

Procurement:
Prior to procuring commercial spyware, agency must consider

- whether any entity furnishing spyware being considered for procurement
- has implemented reasonable due diligence and controls
- to enable the entity to identify and prevent uses of the commercial spyware
- that pose significant counterintelligence or security risks to the USG or significant risks of improper use by a foreign government or foreign person.

E.O. 14105, Addressing US Investments in Certain National Security Technologies and Products in Countries of Concern

Intended Purpose	Program intended to target a narrow sector of investments in very sensitive technologies and products in the interest of national security while maintaining open investment globally
	Meant to address national security threat posed by countries seeking to develop and exploit technologies and products critical for military, intelligence surveillance, or cyber-enabled capabilities
Overview	Dept of Treasury to implement regulations requiring either 1) notification of or 2) prohibition of certain investment activities ("covered transactions") by US persons (as defined) in countries of concern (China)
	Tailored to investments related to semiconductors & microelectronics, quantum information technologies, and certain AI intelligence systems

EO 14105 on Addressing US Investments in Certain National Security Technologies and Products in Countries of Concern (cont'd)

- Treasury published advance notice of proposed rulemaking subject to public comments
- Treasury to define what is a "covered transaction" (single term for both notifiable and prohibited transactions)
    - → Proposed definition includes examples: 1) acquisition of equity interest in a covered foreign person; 2) provision of debt financing to a covered foreign person; and 3) establishment of JV formed with covered foreign person
- Regs are likely to provide civil penalties, while potential criminal violations likely to be referred to DOJ
- Prohibition not intended to impede all U.S. investment into China or impose sector-wide restrictions, but will it have a chilling effect?

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.™

Regulations

Notable New Small Business Rules

8(a) ownership - The SBA in 13 C.F.R. § 124.105(i)(1) included a new process for allowing a participant to change its ownership as long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. This will primarily benefit acquisitions of former participants by entities (ANCs, Tribes, NHOs, and CDCs). In addition, language was added to § 124.105(h)(2) clarifying that a mentor in an SBA-approved Mentor-Protégé Agreement may own up to 40% of its protégé, regardless of whether the mentor and protégé are in the same or similar line of business.

Recertification - The SBA generally requires entities to recertify in the event of a sale or acquisition. The SBA added language to 13 C.F.R. § 121.404(g)(2)(i) stating that recertification is required only where the sale or acquisition results in a change in control of the entity, and not whenever "any sale of stock occurs, even de minimis amounts."

Notable New Small Business Rules

Ostensible Subcontractor Rule for Construction Projects –

SBA's regulations provide that a subcontractor that is not "similarly situated" to the prime but performs "primary and vital" requirements of a contract will be treated as a joint venturer with the prime for size determination purposes.

The SBA revised 13 C.F.R. § 121.103(h)(3) to clarify that, for construction contracts, the primary role of a prime contractor in a general construction project is to oversee and supervise, manage, and schedule the work, including coordinating the work of subcontractors.

The SBA now requires that the ostensible subcontractor rule for general construction contracts be applied to the management and oversight of the project, not to the construction or specialty trade work performed. The small business prime must retain management of the contract but may delegate a larger portion of the actual construction work.

Limitations of Subcontracting - The SBA revised 13 C.F.R. § 121.103(d) to now require on multiagency set-aside contracts, where more than one agency can issue orders under the contract, that applicable limitations on subcontracting be measured on an order-by-order basis by each ordering agency

Updated Joint Venture Rules

Populated and Unpopulated JVs

The SBA clarified in 13 C.F.R. § 121.103(h) that a joint venture ("JV") which is formed as a separate legal entity, may not be populated with individuals who will perform on set-aside contracts awarded to the JV, unless all JV members are similarly situated entities. Similarly-situated entities are businesses that share the same small business socioeconomic status (i.e., 8(a), VOSB, SDVOSB, WOSB, HUBZone) and are small under the applicable North American Industry Classification System (NAICS) code size standard for the contract.

Populated JV Size

Additional language was also added to 13 C.F.R. § 121.103(h) to clarify that anytime the size of a populated JV is questioned, the SBA will determine the size of that JV by aggregating the revenues or employees of all JV members. In other words, to be awarded a set-aside contract, a populated JV must still be small under the NAICS code assigned to that contract after aggregating the revenues or employees for all JV members.

Updated Joint Venture Rules

JV Recertification

The SBA added 13 C.F.R. § 121.404(g)(6) to clarify that a JV can recertify as small "where all parties to the joint venture qualify as small at the time of recertification, or where the protégé small business in a still active mentor-protégé joint venture qualifies as small at the time of recertification."

Contract Order Clarification

A JV formed pursuant to SBA's regulations typically may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the JV partners being considered affiliated. The SBA added additional language to 13 C.F.R. § 121.103(h) to clarify that the two-year restriction applies to the award of additional contracts rather than the performance of contracts previously awarded. Orders may be placed under previously awarded contracts beyond the two-year period.

SBIR/STTR Programs

- The Small Business Innovation Research ("SBIR") and Small Business Technology Transfer ("STTR") programs encourage domestic small businesses and nonprofit research institutions to engage in government-sponsored research and development with the potential for commercialization
- Effective May 3, 2023, the SBA amended the Policy Directives for the SBIR and STTR programs to incorporate a template for federal agencies to request information concerning security risks from SBIR and STTR applicants
  - The new template provides a uniform method of collecting the required information and includes questions to determine:
    - whether an owner or covered individual of the SBIR/STTR applicant has a relationship with a foreign country or foreign country of concern,
    - whether the SBIR/STTR applicant is a party to a malign foreign talent recruitment program, and
    - the nature of investments held by owners, officers, and covered individuals of the applicant
- Small business concerns that do not comply with providing this information will not receive an evaluation of their proposals

Non-displacement of Qualified Workers

On December 14, 2023, the Department of Labor issued a final rule implementing Executive Order 14055, “Nondisplacement of Qualified Workers Under Service Contracts,” which goes into effect February 12, 2024.

This rule largely mirrors the prior non-displacement rule, implemented in 2009 but rescinded in 2019, with a few alterations. The rule will be located in 29 C.F.R. § 9.

Bona fide offers to service employees will again be required prior to a contractor making offers to other workers. Contractors are now required to give service employees from a predecessor contract a bona fide right of first refusal for employment under SCA-covered contracts, contract-like instruments, or subcontracts for the same or similar work.

Non-displacement of Qualified Workers

The 2009 rule only made the non-displacement requirements applicable when contract performance of the same or similar services would take place in the same location.

The new rule can apply even where a contract location changes. Agency's will now generally be required to make location continuity determinations whenever a location change is possible.

The rule also requires predecessor contractors to provide employee lists no later than 30 calendar days prior to before completion of the contractor's performance of services on a contract and provide additional time (10 business days) for predecessor employees to respond to offers of employment.

DFARS: Inapplicability of Certain Laws and Regulations to Commercial Items (DFARS Case 2017-D010)

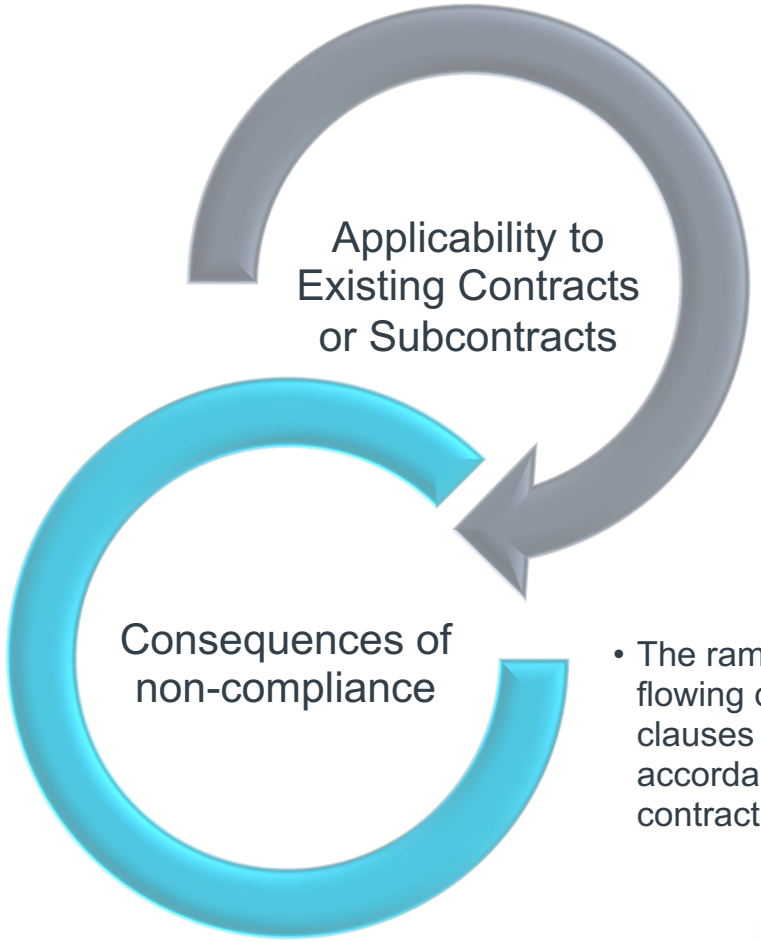
Intended Purpose:

- Addresses the inapplicability of certain laws and regulations to the acquisition of commercial products, including COTS items, and commercial services

Updates to DFARS 252.244-7000:

Subcontracts for Commercial Products or Commercial Services:

- Contractor shall not include the terms of any FAR clause or DFARS clause in subcontract for commercial products or commercial services at any tier **unless so specified in the DFARS clause or listed in certain FAR clauses contemplating commercial items and services** (FAR 52.212-5(e)(1) or FAR 52.244-6(b)(1))



- Contracting officers may use their discretion to apply this final rule to existing contracts; however, they are not required to do so. See FAR 1.108(d).

- The ramifications of improperly flowing down FAR or DFARS clauses would be determined in accordance with the terms of the contract

POLSINELLI. What a law firm should be.™

ACC Association of Corporate Counsel NATIONAL CAPITAL REGION

FAR: Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders

Purpose

- To prevent foreign adversaries from "increasingly creating and exploiting vulnerabilities in information and communications technology to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its citizens."

FASCSA Orders

- FASCSA Orders (as defined) will prohibit contractors from providing or using, as part of the performance of any contract, any covered article or products or services from any covered source identified in an applicable FASCSA order.

Interim Rule

- Contractors to review whether there are any exclusionary orders that are applicable to a solicitation and whether any items or services designated under a FASCSA order will need to be excluded from any resulting contract.
- Contractors also expected to review for removal orders, which will apply to noncompliant systems that are designated during contract performance and need to be removed.

FAR: Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders (cont'd)

New Impacts to the FAR

- FAR 52.204-29. Offeror represents that it has conducted a **reasonable inquiry**, and that the offeror does not propose to provide or use in response to this solicitation any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by an applicable FASCSA order in effect on the date the solicitation was issued

- FAR 52.204-30(c). During contract performance, the **Contractor shall review SAM.gov at least once every three months, or as advised by the Contracting Officer, to check for covered articles subject to FASCSA order(s),** or for products or services produced by a source subject to FASCSA order(s) not currently identified under paragraph (b) of this clause

- FAR 52.204-28(c). Upon notification from the contracting officer, during the performance of the contract, the Contractor shall promptly make any necessary changes or modifications to remove any covered article or any product or service produced or provided by a source that is subject to an applicable Governmentwide FASCSA order

52.204-27 Prohibition on a ByteDance Covered Application

Tik Tok Prohibition

- The Contractor is prohibited from having or using a covered application on any information technology owned or managed by the Government, **or on any information technology used or provided by the Contractor under this contract, including equipment provided by the Contractor's employees**.

Definition of "Information Technology"

- Means any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly or is used by a contractor **under a contract with the executive agency that requires the use —**
  (i) Of that equipment; or
  (ii) Of that equipment to a significant extent in the performance of a service or the furnishing of a product
- Excludes equipment acquired by a federal contractor incidental to a Federal contract

Not limited to Government Owned Devices

- This prohibition applies to devices regardless of whether the device is owned by the Government, the contractor, or the contractor's employees (e.g., employee-owned devices that are used as part of an employer bring your own device (BYOD) program).

***Does not mean all devices used in performance of federal contracts.* The definition of Information Technology is narrow in scope – the use of the Information Technology must be "required" by Executive Agency:**

- Likely puts burden on exec agency to define in a Statement of Work what equipment is "required" (vs. optional/elective/voluntary, which would likely not be covered under the definition of the Information Technology subject to the Tik Tok prohibition.

Internal Compliance Notes:

- In-house compliance approach can be expansive or limited. Necessary for Contractors to review their contracts for which Prime Contracts identify "required" Information Technology.

POLSINELLI. What a law firm should be.℠

ACC Association of Corporate Counsel NATIONAL CAPITAL REGION

Safeguarding of Controlled Unclassified Information (June 21, 2023)

Effective July 21, 2023

POLSINELLI
What a law firm should be.™

Cybersecurity Rules – DHS Final Rule

DHS issued its own cybersecurity protection standards to meet "adequate security"

- *Does not rely on the NIST* – cites to DHS's own policies and procedures in effect at the time of award

Defines CUI more broadly than NARA and other agencies

- any information the Government creates or possesses
- or an entity creates or possesses for or on behalf of the Government
- that a law, regulation, or Governmentwide policy requires or permits an agency to handle using safeguarding or dissemination controls

"Rapid reporting"

- All known or suspected incidents involving Personally Identifiable Information (PII) or Sensitive Personally Identifiable Information (SPII) shall be reported within 1 hour of discovery.
- All other incidents shall be reported within 8 hours of discovery

Sanitization of Government Data

- Upon expiration, termination, cancellation of the contract, Contractor must return all CUI to DHS and/or destroy it physically and/or logically as identified in the contract unless the contract states that return and/or destruction of CUI is not required.

"The CUI Registry does not describe safeguarding and dissemination requirements in sufficient detail to allow for general users to properly protect information without supplemental guidance. In most instances, it is only a citation of a law, regulation, or Governmentwide policy."

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Cybersecurity Rules – FAR Proposed Rule

Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems, General Services Administration (Oct. 3, 2023)

- Applies to contractors that develop or operate a Federal Information System (FIS)

New clauses to be included in ALL solicitations and contracts

- FAR 52.239-XX, Federal Information System Using Cloud Computing Services
  - Requires FedRAMP authorization at specified level
  - Flow-down in all subcontracts for services involving a FIS using cloud
- FAR 52.239-YY, Federal Information System Using Non-Cloud Computing Services
  - Requirements include annual assessments, implementation of NIST controls, access management for Government data and Government-related data
  - Flow-down in all subcontracts for services involving a FIS using non-cloud computing services
- Both clauses include indemnification provisions for contractors to indemnify Government against loss and waive the government contractor defense

Cybersecurity Rules – FAR Proposed Rule

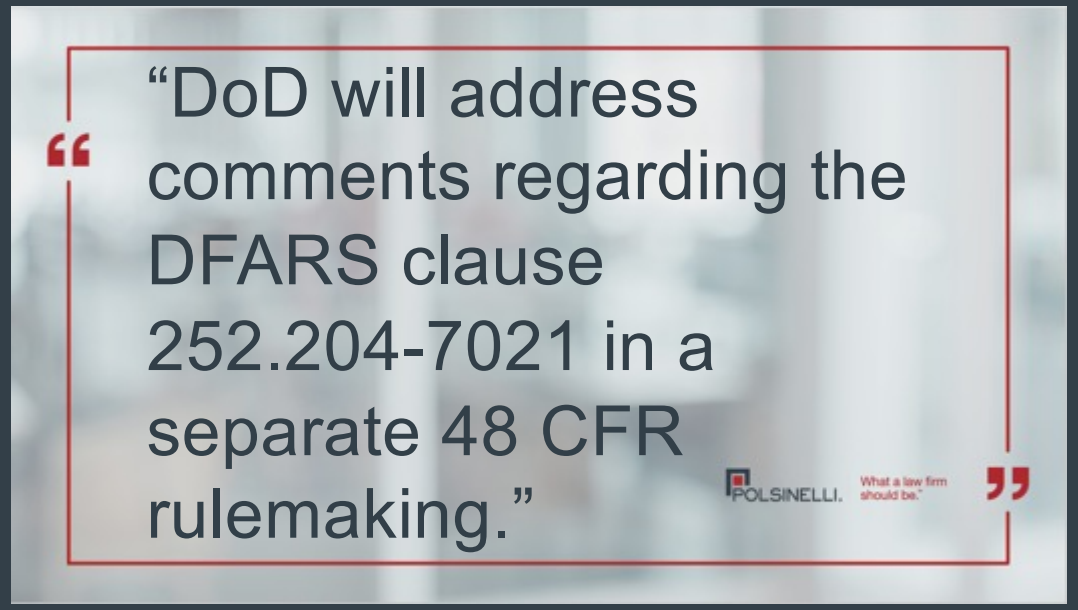
Cyber Threat and Incident Reporting and Information Sharing, General Services Administration (Oct. 3, 2023)

- Applies to contracts where information and communications technology (ICT) is used or provided in performance
- FAR Council projects that ~75% of all government contracts will include some form of ICT and will be required to comply with the proposed rule
- Contractor must certify the security incident report – risk that inadvertent errors due to deadline haste could result in exposure to liability

New clauses to be included in ALL solicitations and contracts

- *FAR 52.239-AA, Security Incident Reporting Representation*:
  - Current, accurate, and complete security incident reports under existing contracts
  - Flow-down security incident reporting requirements in subcontracts
- *FAR 52.239-ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing ICT*. New requirements for:
  - **Reporting incidents within 8 hours with updates every 72 hours**
  - Security incident investigation and response
  - SBOMs and IPv6
  - Mandatory sharing of cyber threat indicators and defensive measures
  - Flow-down in all subcontracts where ICT is used or provided

Cybersecurity Rules – DFARS CMMC Proposed Rule



- Issued December 26, 2023
- Comments due February 26, 2024
- The Proposed Rule does not create any new FAR/DFARS clauses or flowdown provisions (yet)
  - *But* Proposed Rule acknowledges forthcoming likely changes to -7012 and mandatory changes to -7021
- Per DoD, DFARS Proposed Rule is expected in March 2024

POLSINELLI | What a law firm should be.™

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Cybersecurity Rules – DFARS CMMC Proposed Rule: The 4 Ws

WHO

…will the new rule(s) affect ?

- *all* DoD contractors and subcontractors at all tiers, unless selling exclusively COTS items

…determines a solicitation/contract's CMMC level?

- **Government Program Managers or requiring activities** will determine CMMC Level for a prime contract
- **Prime contractor** will identify for its subcontractor the required CMMC level

Prime Contract CMMC Rqmt	Subcontract Information Needs	Minimum CMMC Level
Any	Process, store, or transmit **FCI (but not CUI)** in performance of the contract	1
Level 2 (Self)	Process, store, or transmit **CUI** in performance of the subcontract	2 (Self)
Level 2 (Certification)	Process, store, or transmit **CUI** in performance of the subcontract	2 (Certification)
Level 3	Process, store, or transmit **CUI** in performance of the subcontract	2 (Certification)

Cybersecurity Rules – DFARS CMMC Proposed Rule: The 4 Ws

WHAT

… key changes does the new rule make to my current cybersecurity requirements?

- Compliance with the applicable CMMC level and affirmation requirements will be a condition of award

CMMC Level	Assessment Frequency	SPRS Score Submission Responsibility	Affirmation Requirement*	SPRS Affirmation Timing
1	Annual	Contractor	Continuing compliance with Level 1 requirements	• Annually
2 (Self)	Every 3 years (or as assessment scope changes)	Contractor	Continuing compliance with Level 2 requirements	• After every assessment (including POA&M closeout) and • Annually thereafter
2 (Certification)	Every 3 years (or as assessment scope changes)	C3PAO (via eMASS)	Continuing compliance with Level 2 requirements	• After every assessment (including POA&M closeout) and • Annually thereafter
3	Every 3 years (or as assessment scope changes)	DoD (via eMASS)	Continuing compliance with Level 3 requirements	• After every assessment (including POA&M closeout) and • Annually thereafter

Cybersecurity Rules – DFARS CMMC Proposed Rule: The 4 Ws

WHERE

… will these requirements appear?

- *all* DoD solicitations and contracts and subcontracts, except those exclusively for COTS, valued greater than the micro-purchase threshold (generally $10,000)

WHEN

… in the procurement process will I need to be certified and affirm compliance?

- Offerors will be required to attain CMMC certification and make the necessary affirmation at or above the level in the solicitation **by the time of award (or option period exercise)**
- Contractor must maintain CMMC status throughout the life of the contract (or task/delivery order)

… is the DoD implementing these new requirements?

- 4-phase, 2.5 year proposed implementation, beginning on the effective date of revision to DFARS 252.204-7021

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.™

FY2024 NDAA

NDAA Provisions

Section 812, Preventing Conflicts of Interest for Entities that Provide Certain Consulting Services to DoD

- Prohibits DoD from entering into contracts for consulting services unless the contractor certifies that
  - neither the entity nor any subsidiaries or affiliates of the entity hold a contract for consulting services with one or more covered foreign entities; or
  - the entity maintains a Conflict of Interest Mitigation plan that is auditable by a contract oversight entity

Section 824, Modification and Extension of Temporary Authority to Modify Certain Contracts and Options Based on Impacts of Inflation

- Amends FY2023 NDAA Section 822, which allowed DoD to increase the value of fixed-price contracts impacted by inflation
- Authority expired December 31, 2023 – FY2024 NDAA extends to December 31, 2024

Section 865, Considerations of the Past Performance of Affiliate Companies of Small Business Concerns

- Requires DoD agencies to consider relevant past performance of small business' affiliate companies in source selection
- Not later than July 1, 2024

SDVOSB – NDAA's Material Amendments

Section 863 amends the Small Business Act to increase the governmentwide SDVOSB participation goal to not less than 5% of the total value of all prime contract and subcontract awards for each fiscal year — up from 3%

Section 864 phases out the ability of small businesses to self-certify as SDVOSBs

- Currently, contractors are still able to self-certify as SDVOSBs for non-SDVOSB set-aside prime contracts and subcontracts
- Each prime and subcontract award counted toward meeting SDVOSB goals must be certified by the SBA as a SDVOSB
- SBA must issue regulations to implement this change Within 180 days of the NDAA's enactment
- The requirement for SBA-certification takes effect October 1 of the fiscal year after SBA promulgates the required regulations
- Section 864 contemplates a phased approach to eliminating self-certification, providing that if a small business seeks SBA certification as a SDVOSB before the end of the 1-year period measured from the NDAA's enactment, that small business will be able to maintain its self-certification until the SBA rules on its SDVOSB certification application

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.™

DoJ Strike Force Update

DOJ Strike Force as of October 1, 2023

- 31K+ agents and procurement officials trained
- 100+ investigations opened
- 50+ Guilty pleas and trial convictions
- $65M+ fines and restitutions
- New concern: Supplemental funding in response to the invasion of Ukraine

Strike Force's 2023 Track Record

Executives Charged with Bid Rigging, Territorial Allocation and Defrauding the U.S. Forest Service After a Wiretap Investigation (Dec. 2023)

United States, Mexico, and Canada Launch Joint Initiative to Detect Collusive Schemes Seeking to Exploit the 2026 FIFA World Cup (Sept. 2023)

Subcontractor Sentenced to Pay Nearly $9 Million in a Criminal Fine and Restitution for Rigging Bids and Defrauding the U.S. Military (Sept. 2023)

Owners of Military Contracting Companies Sentenced for Bid Rigging in Texas (Aug. 2023)

Former Public Official and California Contractor Sentenced for Bid Rigging and Bribery (Apr. 2023)

Construction Company Owner Sentenced for Fraud in Securing Millions of Dollars in Contracts Intended for Service-Disabled Veteran-Owned Small Businesses (Jan 2023)

POLSINELLI
What a law firm should be.™

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Takeaways for Government Contractors (Federal, State and Local)

1

Establish a comprehensive antitrust compliance policy including confidential reporting

2

Provide regular antitrust training for employees

3

Establish a program to monitor your company's procurement, teaming and contracting activities

POLSINELLI. What a law firm should be.℠

ACC Association of Corporate Counsel NATIONAL CAPITAL REGION

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.™

Protests – GAO

Protests – GAO Annual Report 2023

- Bid protests up by 22% from FY 2022 (Note: The bid protest activity includes the GAO's resolution of an unusually high number of protests challenging HHS's CIO-SP4 GWAC awards)
- Sustain rate 31% (608 protests resolved on the merits out of which 188 were sustained)
- GAO "Effectiveness Rate (where GAO sustains a protest or the agency takes corrective action) was 57% and an increase over 2022's rate of 51%
- GAO's most prevalent reasons for sustaining a protest
  - Unreasonable technical evaluations
  - Flawed selection decision
  - Unreasonable cost or price evaluations

	FY2023	FY2022	FY2021	FY2020	FY2019
Cases Filed[1]	2025 (increase of 22%)[2]	1658 (down 12%)	1897 (down 12%)	2149 (down 2%)	2198 (down 16%)
Cases Closed[3]	2041	1655	2017	2137	2200
Merit (Sustain + Deny) Decisions	608	455	581	545	587
Number of Sustains	188	59	85	84	77
Sustain Rate	31%	13%	15%	15%	13%
Effectiveness Rate[4]	57%	51%	48%	51%	44%
ADR[5] (cases used)	69	74	76	124	40
ADR Success Rate[6]	90%	92%	84%	82%	90%
Hearings[7]	2% (22 cases)	.27% (2 cases)	1% (13 cases)	1% (9 cases)	2% (21 cases)

GAO Task Order Jurisdiction – What Price Controls?
ELS, Inc., B-421989, December 21, 2023, 2023 CPD ¶ ___

- GAO has jurisdiction over task orders where (a) the value of the task order exceeds $25M (DoD/NASA) or $10M (civilian) and (b) the order increases the scope, period, or maximum value of the underlying IDIQ contract.
- The value of the awardee's proposed price was $24.8M and its evaluated price was $25.1M.
- The Navy, relying on GAO precedent, moved to dismiss the protest because the awardee's price was under the statutory threshold.
- Protester argued:
  - GAO's recognition, in other decisions, that the "proposed price is not the sole determinant of the value" and
  - The cost-reimbursable nature of the work, which would have obligated the Navy to pay the contractor for all actual and allowable costs.
- GAO dismissed the protest, concluding that the "determining factor in this protest is the amount of the contract award," not the total evaluated price.
- **Moral of the story**: GAO will likely dismiss a protest below the threshold AND if you can submit a proposal price below the threshold, that may be what the agency is hoping for.

Does a Former SDVOSB Remain An Interested Party for an FSS BPA Bid Protest, and Why Was OPM's Evaluation of the Awardee's Quote Deficient?
Washington Business Dynamics, B-421953, B-421953.2, Dec. 18, 2023 (Part 1a)

Agency issued RFQ for a BPA under FAR Subpart 8.4 as an SDVOSB set-aside under FSS professional services contracts for professional services. Of note, the RFQ did not request vendors to recertify their size or status in connection with the procurement.

WBD, an SDVOSB and incumbent, submitted its quote in response to the RFQ on February 1, 2023.

WBD was acquired by a non-SDVOSB firm 147 days after submission of its quote and timely notified OMB of its change in status under its incumbent BPA.

OPM documented that WBD was no longer an SDVOSB and awarded the new BPA to a vendor with a lower price and equal technical ratings.

WBD protested the award.

Does a Former SDVOSB Remain An Interested Party for an FSS BPA Bid Protest, and Why Was OPM's Evaluation of the Awardee's Quote Deficient?
Washington Business Dynamics, B-421953, B-421953.2, Dec. 18, 2023 (Part 1b)

GAO disagreed with both the Agency's AND SBA's interpretations of 13 C.F.R. §§ 121.404(a)(1)(ii)(A), 121.404(a)(2) and held their interpretations were unreasonable.

- GAO found that the recertification and ineligibility provisions do not apply to quotations for orders and BPAs under an FSS contract citing:
  - *Odyssey Systems Consulting Group, Ltd*., B-419731 et al., July 15, 2021, 2021 CPD ¶ 260; and
  - *Size Appeal of Odyssey Systems Consulting Group, Ltd*., SBA No. SIZ-6135 (2021).
- It advised that set-aside orders 13 C.F.R. §§ 121.404(a)(1)(ii)(A), 121.404(a)(2).and BPAs issued against the FSS are expressly exempt from recertification requirements.
- The GAO found the transaction had no effect on the protester's eligibility for award of the BPA consistent with *Size Appeal of EBA Ernest Bland Assocs. PC*, SBA SIZ No. 6139 (2022), 2022 WL 529352 at *4.

Moral of the story with respect to WBD's interested party status:

The SBA's regulations are both complicated and ever changing – don't assume

Does a Former SDVOSB Remain An Interested Party for an FSS BPA Bid Protest, and Why Was OPM's Evaluation of the Awardee's Quote Deficient?
Washington Business Dynamics, B-421953, B-421953.2, Dec. 18, 2023 (Part 2a)

WBD's protest challenged OPM's evaluation and tradeoff decision contending that OPM's evaluation under the technical and past performance factors was flawed and unreasonable as follows:

- the evaluations were inconsistent with the stated terms of the solicitation;
- OPM's assignment of a rating of high confidence to the awardee's quotation under those evaluation factors was unreasonable; and
- the evaluation record was insufficiently documented

GAO stated its standard position with respect to reviewing an agency's evaluation and source selection decision in procurements conducted under FSS procedures – "we do not conduct a new evaluation or substitute our judgment for that of the agency. Rather we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation."

Does a Former SDVOSB Remain An Interested Party for an FSS BPA Bid Protest, and Why Was OPM's Evaluation of the Awardee's Quote Deficient?
Washington Business Dynamics, B-421953, B-421953.2, Dec. 18, 2023 (Part 2a)

GAO sustained WBD's protest

- Awardee's quote failed to meaningfully address aspects identified in the evaluation criteria
- A plain reading of the RFQ required OPM to evaluate an offeror's technical capability under Factor 1
- OPM's evaluation did not support a conclusion that it evaluated the awardee's quote in a manner consistent with the terms of the RFQ
- OPM's evaluation failed to demonstrate an examination of how, or to what degree, the awardee's approach demonstrates an understanding of the tasks to be performed or the feasibility of the approach
- The record did not document OPM's evaluation of the awardee's technical capabilities
- OPM deviated from the RFQ's criteria, which called for a qualitative analysis, and, instead, conducted a pass/fail analysis.

While agreeing with OPM's argument that it was not required to document "every aspect of a proposal point-for-point," the GAO held that it will, in a FAR subpart 8.4 procurement, review the agency's record, as initially provided and supplemented, to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

Moral of the story:

Offerors:

Quotation content/ compliance matters in a FAR subpart 8.4 procurement

Agency:

The terms of your solicitation must be adhered to and (minimally, at least) documented … even in a FAR subpart 8.4 procurement.

POLSINELLI. should be.

ACC Association of Corporate Counsel NATIONAL CAPITAL REGION

Improper Lease Award – Is It Worth It to Protest to the GAO? *BOF GA Lenox Park, LLC*, B-421522 (June 20, 2023)

GSA issues a request for lease proposal (RLP) seeking a 20-year lease of office space in Atlanta,

The RLP required that a subway, light rail, or bus rapid transit stop shall be located within the immediate vicinity of the Building, but generally not exceeding a safely accessible, walkable 5,280 feet from the principal functional entrance of the building, as determined by the LCO [lease contracting officer]

The protester contended that the agency improperly found FDS Vegas's proposal technically acceptable where the property proposed did not meet the proximity to the rapid transit stop required by the RLP.

GAO sustained the above basis of protest

Moral of the Story – Probably not worth it to protest a lease **award** to the GAO.

The lease here has been awarded and signed by the agency and awardee, and **the lease does not contain a termination for convenience clause**. **In the absence of a termination for convenience of the government clause, we ordinarily do not recommend termination of an awarded lease, even if we sustain the protest and find the award improper. Here, we do not find any basis to recommend termination**. Consequently, we recommend that the protester be reimbursed its proposal preparation costs, as well as the costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision.

(Emphasis added) (Internal citations omitted)

A Successful Challenge to Corrective Action?: Kupono Government Services, LLC; Akima Systems Engineering, LLC, B-421392.9 (June 5, 2023)

Three disappointed offerors protested the DOE's award of Eagle Harbor hybrid indefinite delivery, indefinite quantity (IDIQ) contract for the management and operation of the agency's national training center, which included cost-plus-award-fee, labor-hours, and fixed-price contract line items, challenging the agency's evaluation of cost and non-cost proposals, the adequacy of discussions, and the reasonableness of the agency's source selection decision

DOE issued a notice of corrective action and Kupono objected to the dismissal, however GAO dismissed that any challenge to the corrective action would constitute a new protest and dismissed all three protests as academic

Kupono protested the corrective action on February 23, 2023 based on the DOE's dismissal request

March 10, 2023, DOE sent letters to offerors with additional information on its corrective action establishing a March 29 due date for cost proposal revisions

Akima filed a protest on March 29, shortly before the cost proposal submission deadline, and Kupono supplemented its bid protest. They argued:

- corrective action was improperly limited to the submission of revised cost proposals;
- that their respective cost and technical proposals are inextricably intertwined, and that,
- offerors should be permitted to revise both portions of their proposals

A Successful Challenge to Corrective Action?: Kupono Government Services, LLC; Akima Systems Engineering, LLC, B-421392.9 (June 5, 2023) Holding

GAO Decision: Sustain

GAO acknowledged that agencies have broad discretion to limit the revisions offerors may make to their proposals during corrective action. However, the agency may not prohibit offerors from revising related areas of their proposals that are materially impacted by the agency's corrective action.

Next, GAO found that the DOE had failed to explain what procurement flaws it was attempting to remedy during corrective action.

"[W]e cannot tell from the record what concern or concerns prompted the agency to take corrective action. It necessarily follows that, if we cannot tell what the concerns were that gave rise to the agency's decision to take corrective action, we also cannot tell whether the proposed corrective action is appropriate to remedy the unidentified concerns . . ."

GAO also noted the protesters, for their part, had shown that, because the agency is soliciting for a cost-reimbursement type contract, their respective cost and technical proposals are inextricably intertwined. GAO stated that the record revealed that the agency's own discussions with offerors demonstrated the agency was aware of intertwined nature of the firms' cost and technical proposals

A Successful Challenge to Corrective Action?: Kupono Government Services, LLC; Akima Systems Engineering, LLC, B-421392.9 (June 5, 2023)

Moral of the story:

Agency's broad discretion to take corrective action is not without limits. It must remedy concerns that cause the agency to take the corrective action

Offerors cannot be prohibited from revising aspects of their proposals that are materially impacted by corrective action

Don't wait for the corrective action to play out to protest the corrective action

Meaningful Discussion and Corrective Action - *Life Science Logistics, LLC, B-421018.2, .3* (April 19, 2023) Part 1

LSL was one of two offerors for a GSA solicitation seeking a contractor to provide storage, management of medical products, monitoring, logistics, reporting, and emergency staging for delivery of government-provided medical supplies for a national emergency

GSA engaged in discussions with offerors where its discussions with LSL were limited to concerns regarding potential contamination of LSL's proposed site, schedule slippage related to possible excavation, and the rates for two labor categories

GSA awarded the contract to a technically superior, higher priced offeror and LSL filed a protest challenging GSA's evaluation and discussions

GSA rated LSL "good" overall

GSA took corrective action by amending the solicitation, requesting revised proposals, and conducting a new evaluation

LSI submitted a new proposal, which did not materially revise its original proposal

GSA did not engage in post-corrective action discussions, and again awarded the contract to the original awardee as it found LSL's proposal to be technically unacceptable because certain drawings gave rise to four significant weaknesses – none of which had been assigned or raised to LSL during the original discussions

Meaningful Discussion and Corrective Action - *Life Science Logistics, LLC, B-421018.2, .3* (April 19, 2023) Part 2

- LSL filed another protest, asserting that because it submitted a materially unchanged proposal during corrective action—and GSA failed to raise, in discussions during the initial evaluation, the significant weaknesses that resulted in LSL being deemed technically unacceptable—GSA did not engage in meaningful discussions
- GAO concluded that because the evaluated concerns were reasonably apparent to GSA when it evaluated LSL's initial proposal, those significant weaknesses should have been disclosed during GSA's discussions
- Because GSA did not identify those concerns until corrective action, it was required to reopen discussions and disclose its concerns, thereby giving all offerors similar opportunities to revise their proposals
- By failing to do so, the agency failed to engage in meaningful discussions
- Consequently, GAO sustained the protest and recommended that GSA reopen the procurement and conduct appropriate and meaningful discussions with LSL and IQS, request and evaluate revised proposals, and make a new source selection decision
- ***Moral of the Story***: Decision to take corrective action does not eliminate the agency's obligation to ensure that discussions are meaningful

Open Market Items – A Pox On Both Your Houses? - RELX Inc., B-421597.2, Nov. 17, 2023

In a FAR Subpart 8.5 procurement, RELX, Inc., d/b/a LexisNexis, of Washington, D.C., protested the issuance of a task order to West Publishing Company, of St. Paul, Minnesota, under request for quotations (RFQ) No. 1609916, issued by the Department of the Air Force for an electronic search and data tool license. RELX argues that the quotation submitted by West does not meet the requirements of the RFQ and should have been rejected.

The RFQ contemplated the issuance, on an LPTA basis, of a fixed-price task order under the successful vendor's FSS) contract, for a software license for a base year and four 1-year options, to be used by the agency to enable its employees to perform access and search capabilities relating to law enforcement, and legal and legislative content.

The agency conceded that, at the time it issued the task order to West, certain items were not available on its FSS contract. Nonetheless, the agency points out that RELX also included both FSS items and open market items in its quotation. The agency therefore argues that its issuance of the task order to West was unobjectionable because issuing the task order to RELX would similarly involve issuing a task order to a firm that included open market items with its quotation.

The record established that both West's and RELX's quotations included open market items, and therefore both were ineligible for the issuance of an FSS task order based on the RFQ as currently issued.

Open Market Items – A Pox On Both Your Houses? - RELX Inc., B-421597.2, Nov. 17, 2023

GAO Decision

Ordinarily under the circumstances, we would simply recommend that the agency terminate the task order issued to West and issue the task order to RELX, if otherwise proper. However, as noted, neither firm submitted a quotation that properly could form the basis for issuance of the task order. In addition, the agency's acceptance of the West quotation suggests that the solicitation as currently written may not reflect the agency's actual requirements.

Under these circumstances, we recommend that the agency terminate the task order issued to West; amend the underlying solicitation as appropriate; obtain and evaluate revised quotations; and issue the task order to the firm identified as the successful contractor under the revised solicitation. We also recommend that RELX be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees

Moral of the Story – Quotes submitted in response to an RFQ issued under an FSS Contract may not contain open market items.

POLSINELLI®
What a law firm should be.℠

Court of Federal Claims Protests

PredictiveIQ LLC v. USA, No. 1:23-cv-00545

Plaintiff filed a GAO protest of 30 awards made by the Air Force under a Commercial Solutions Opening for award of SBIR contracts for innovative defense-related technologies. The Air Force initially paused the awards, but later moved ahead with certain awards that it said would not be impacted if PredictiveIQ received an award. Plaintiff filed at the COFC seeking a preliminary injunction for failure to comply with the automatic stay.

The Court quoted a previous decision to state that: "Under the SBIR program's broad discretion, agencies have unfettered ability to avoid the constraints of a bid protest."

Given the broad discretion that agencies must have to make SBIR awards, the speculative nature of Plaintiff's alleged harm (which was based on the rapidly-changing nature of technologies), and the public interest in moving the SBIR awards forward, the Court denied the preliminary injunction.

J.E. McAmis Inc. v. United States, No. 23-794

- Trade West Construction was the low bidder for a small business set-aside jetty repair project in Oregon. The Army Corps of Engineers found Trade West's pricing to be unbalanced and awarded to McAmis. Trade West protested to GAO and the Corps took corrective action to reevaluate proposals. The Corps then sought a Certificate of Competency ("COC") from SBA regarding Trade West.
- SBA granted a COC regarding Trade West. Following the COC, SBA canceled the Solicitation and the award to McAmis. SBA thereafter rescinded the cancellation and made award to Trade West based upon the COC.
- McAmis protested to GAO and Trade West later filed at COFC seeking an injunction to require the Corps to move ahead with the award to Trade West under the solicitation. McAmis then filed at COFC.
- The Court found that McAmis' protest, though creatively brought as a challenge to the resurrection of the solicitation, was actually a challenge to SBA's issuance of the COC, over which the COFC does not have jurisdiction.

Percipient.ai, Inc. v. United States, No. 23-28C

Protest of the National Geospatial-Intelligence Agency's issuance of a task order to CACI for development of a computer vision system. The Plaintiff, which has already-developed commercial vision software, alleged that NGA violated 10 U.S.C. § 3453, which requires DOD to use commercial products and services "to the maximum extent practicable."

Percipient did not actually bid on the task order at issue. At the Court, it argued that it was not protesting the issuance of the task order to CACI, but instead the higher-level procurement decision to violate 10 U.S.C. § 3453 by not using a commercially developed technology.

The Court initially ruled that it had jurisdiction to hear the challenge under § 3453, even though Percipient did not submit a proposal. However, the following month it vacated that decision and dismissed the protest under the bar on task order protests at the Court. The Court found that the decision not to utilize commercial products could not be separated from the issuance of the task order.

The jurisdictional question is currently on appeal at the Federal Circuit.

Unison Software, Inc. v. United States, No. 23-335C

- Plaintiff alleged that the Department of Defense had improperly made an agency-wide decision to only purchase Appian Corp.'s contract writing software. Unison cited three task order awards and a memo from then-Undersecretary of Defense Ellen Lord stating that certain DOD components should leverage the Air Force's contract writing solution (which relies on Appian's software).
- The Court found that it lacked jurisdiction under FASA's task order protest bar. It also found that public statements by DOD officials are not procurements that would trigger the Court's jurisdiction.
- The Court distinguished this case from prior decisions in the *McAfee, Savantage,* and, *Tolliver* cases, where plaintiffs were able to avoid the task order bar by challenging agency standardization decisions. In this case, the Court found that there was no evidence of a formal standardization determination and that it would not allow the plaintiff to go on a "fishing expedition" looking for such a document with no evidence.
  - Notably: the Court also states that the Federal Circuit has never endorsed the reasoning in *McAfee, Savantage, and Tolliver*, and instead has viewed the task order bar broadly.

Consolidated Safety Services Inc. v. United States, No. 23-521C

- The National Centers for Coastal Ocean Science, a division of NOAA, assigned NAICS code 541620 (Environmental Consulting Services) to a procurement. The Plaintiff believed the correct classification was NAICS code 541715 (R&D in the Physical, Engineering, and Life Sciences). The decision between the two classifications determined whether the Plaintiff would be eligible to compete for the set-aside award.
- Consolidated first appealed the NAICS code to the SBA Office of Hearings and Appeals (OHA), which affirmed the agency's choice.
- The Court stated that the case "illustrates the limits of the government's oft-deployed deference defense." In reviewing the work, the Court determined that was primarily for R&D services and that the consulting work was minimal. If further found that OHA's "sparse and unpersuasive" decision was "objectively unreasonable" and was not entitled to deference due to its contracting earlier OHA precedent.
- The Court enjoined the agency from proceeding with the procurement under NAICS code 541620.

POLSINELLI®
What a law firm should be.℠

Appeals

ECC International Constructors LLC v. Secretary of the Army, No. 22-1368

- ECC filed a claim against the Army Corps of Engineers in 2014. The parties engaged in settlement negotiations for six years that were ultimately unsuccessful. The ASBCA held a nine-day hearing in 2020. Three months after that hearing, the Corps moved to dismiss, arguing that the ASBCA lacked subject matter jurisdiction because ECC's 2014 claim did not state a sum certain for each element. The Board agreed and dismissed the case.

- The Federal Circuit reversed and remanded the dismissal. Although the Federal Circuit had found in previous cases – including as recently as 2021 – that the sum certain requirement was jurisdictional, it determined that the unique circumstances of the *ECC* case warrant reconsideration of that rule.

- The Federal Circuit found that the Contract Disputes Act does not provide that a claim must include a sum certain in order for a Board or the COFC to exercise jurisdiction. Instead, the sum certain requirement is only contained in the FAR.

ECC International Constructors LLC v. Secretary of the Army, No. 22-1368 (cont'd)

- The Federal Circuit also revisited the nature of the sum certain rule in light of recent decisions by the Supreme Court and federal courts that various analogous claims processing requirements are not jurisdictional.
- Although the FAR-based sum certain rule can be applied to claims in most cases as mandatory, because it is non-jurisdictional the Federal Circuit found that it is subject to forfeiture if the government delays too long in asserting it. The Federal Circuit remanded to the ASBCA to determine if the Corps waited too long in this case.

4DD Holdings, Inc. v. United States, No. 15-945C

4DD sold its medical records management software to the Department of Defense through Immix's SEWP contract. The contract between DOD and Immix incorporated 4DD's EULA, which prohibited unauthorized copying of the software.

DOD ultimately made tens of thousands of unauthorized copies. 4DD brought suit under the Copyright Act.

The COFC found that DOD had violated 4DD's copyright and that a prior release signed by Immix did not prevent 4DD's recovery of damages. The COFC had previously determined that DOD engaged in spoliation of evidence and awarded significant sanctions on that basis.

In a decision released in December, the Court awarded 4DD almost $12M in damages.

- It is worth noting the different result in *Avue Technologies Corp. v. HHS & GSA*, CBCA 6360, 6627, in which the existence of a EULA was found insufficient to permit the software manufacturer to sue directly under the CDA (*Avue* is currently on appeal at the Federal Circuit)

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.™

False Claims Act and Other Cases

Does the government have the authority to dismiss a *qui tam* False Claims Act suit after initially declining to intervene, and what standard applies if the government has that authority? *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023)

Prior to the *Polansky* decision, there was a circuit split as to whether the Government had the authority to dismiss an action after declining to intervene and if so, what standard the district court should use in ruling on that motion to dismiss

- The Government argued that a motion to dismiss is always permissible even if the Government never intervened
- Polansky contended that the Government may only make a motion to dismiss when it has intervened during the initial seal period

SCOTUS ruled 8-1 that the government maintains authority to dismiss a qui tam False Claims Act (FCA) action after initially declining to intervene so long as the government intervenes before moving to dismiss

- The government's interest in a qui tam action is "the predominant one“ and it may intervene at any point in the case upon a showing of good cause

Justice Thomas dissented and revived a dormant argument about the constitutionality of the FCA’s qui tam provisions allowing whistleblowers to bring FCA suits on behalf of the federal Government

- Justices Kavanaugh and Barret also want to see this issue addressed
- Subsequently, several qui tam defendants have made constitutionality arguments when seeking dismissal of their cases

Is the standard for scienter under the False Claims Act objective or subjective?
U.S. ex rel. Schutte v. SuperValu Inc., 598 U.S. 739 (2023)

- To prevail in a *qui tam* action, a relator must prove the defendant acted knowingly
  - i.e., that the defendant has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information. (31 U.S.C. § 3729(b).)
- In *SuperValu*, the defendant pharmacies argued that the requisite scienter was not present because their lawyers could point to an "objectively reasonable" interpretation of an ambiguous regulation supporting their approach, even if the pharmacies did not believe their approach was valid at the time.
- SCOTUS unanimously held that courts should look to an FCA defendant's subjective belief only "at the time they submitted their claims," not "post hoc interpretations that might have rendered their claims accurate."
  - The decision removes a defense that defendants could use to move for dismissal of the action or when requesting summary judgment.
  - The decision also expands the discovery plaintiffs may seek into a defendant's belief at the time the claims were submitted.

POLSINELLI
What a law firm should be.™

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Does the use of a "rebuttable presumption" of social disadvantage for certain minority groups to qualify for inclusion in the SBA's 8(a) Program violate the Fifth Amendment's Due Process Clause?
Ultima Servs. Corp. v. U.S. Dep't of Agric., Case No. 2:20-cv-0041, 2023 WL 4633481 (E.D. Tenn. July 19, 2023)

The SBA's 8(a) program provides certain socially-disadvantaged contractors access to preferential federal government procurement opportunities, including certain sole-source and set-aside contracts

- The SBA 8(a) program has historically operated under a presumption that members of certain racial and ethnic groups were socially disadvantaged.

Ultima is a small business ineligible for the 8(a) program that provided support services to the USDA

- In 2018, the USDA decided not to exercise further options on Ultima's four indefinite-delivery, indefinite-quantity contracts with the USDA, setting the contracts aside for 8(a) program participants.
- Ultima brought a lawsuit challenging its exclusion from competition on equal protection grounds.

The District Court enjoined the SBA from using the rebuttable presumption of social disadvantage in administering the 8(a) program, ruling that the SBA's use of the rebuttable presumption violated Ultima's Fifth Amendment right to equal protection of the law

This decision came right after the U.S. Supreme Court's ruling in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, in which SCOTUS struck down race-based affirmative action in the college admissions process

Despite the injunction, the court upheld Congress' overall statutory grant of authority to SBA to award federal contracts to small, disadvantaged businesses

Does the use of a "rebuttable presumption" of social disadvantage for certain minority groups to qualify for inclusion in the SBA's 8(a) Program violate the Fifth Amendment's Due Process Clause?
Ultima Servs. Corp. v. U.S. Dep't of Agric., Case No. 2:20-cv-0041, 2023 WL 4633481 (E.D. Tenn. July 19, 2023)

Takeaway: Contractors must monitor the progress of the *Ultima* case and the SBA's response

SBA is requiring all 8(a) participants who originally relied upon the presumption of social disadvantage in their application to re-establish their 8(a) Program eligibility by completing a social disadvantage narrative

- For 8(a) participants who have multiple disadvantaged individuals, each disadvantaged individual is required to submit an individual social disadvantage narrative

Ultima has requested additional relief and there will certainly be other challenges to government contracting programs that rely on racial classifications

Did the President exceed his authority under the Procurement Act by unilaterally raising the minimum wage required to paid to federal contractor employees?
Texas v. Biden, Case No. 6:22-cv-0004, 2023 WL 6281319 (S.D. Tex. Sept. 26, 2023)

- In 2021, President Biden issued EO 14026, Increasing the Minimum Wage for Federal Contractors, which established an escalating $15/hour minimum wage for federal contractor employees
- Texas, Louisiana, and Mississippi brought an action under the Administrative Procedure Act (APA) for injunctive relief, arguing that the Department of Labor's final rule implementing the EO was unconstitutional as a wrongful transfer of legislative power and a violation of the Spending Clause
- The District Court found that the Procurement Act does not grant authority to the President to set a minimum wage for contractor employees
  - Because two other district courts outside the Fifth Circuit have found Executive Order 14026 to be a lawful exercise of executive power, the court barred enforcement of the EO only against the plaintiff states, which routinely contract with the federal government directly and as subcontractors
- The ruling is on appeal to the Fifth Circuit

Questions?

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.™

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

POLSINELLI
What a law firm should be.™

Additional Reference Materials

E.O. 14099, Moving Beyond COVID-19 Vaccination Requirements for Federal Workers

- In 2021, more than a dozen states enacted laws prohibiting companies from requiring their employees to be COVID-19 vaccinated or even show proof of COVID-19 vaccination as a condition of employment.
- Yet, federal government contracts were subject to mandatory employee vaccination requirements in the FAR and DFARS. (i.e., FAR 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION) and DFARS 252.223-7999 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009) (OCT 2021).
- On May 9, 2023, President Biden signed E.O. 14099 revoked E.O. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors,
- E.O. 14099 directed agencies to rescind any policies that were adopted to implement E.O. 14042 and, as a result the conflict between inconsistent federal and state laws concerning COVID-19 vaccinations was mooted.
- The E.O. advised that Federal Government will not take any steps to require covered contractors and subcontractors to come into compliance with previously issued Task Force guidance implementing Executive Order 14042 and will not enforce any existing contract clauses implementing Executive Order 14042.
- Corporations who still have COVID-19 policies should assess whether those policies make sense for their workplace in light of the current COVID-19 circumstances.

VOSB and SDVOSB Certification

- As discussed last year, the 2021 National Defense Authorization Act phased out the ability of small businesses to self-certify as Veteran-Owned Small Business Concerns (VOSBs) and Service-Disabled Veteran-Owned Small Business Concerns (SDVOSBs). VOSBs and SDVOSBs are now required to obtain a certification from SBA to participate in any sole source or set-aside prime contracts.
- Previously, a VOSB and SDVOSB could self-certify to perform set-aside and sole source projects on non-U.S. Department of Veteran Affairs (VA) procurements. The 2021 National Defense Authorization Act transferred the certification function from the VA to the SBA.
- Pursuant to 13 C.F.R. § 128, entities must now apply to the SBA for certification as a VOSB or SDVOSB and submit evidence that they are a small business owned and controlled by one or more qualifying veterans.
- SDVOSB and VOSBs certified by the VA prior to January 1, 2023, do not need to re-certify with the SBA. The SBA will deem these firms certified for the remainder of their three-year eligibility term.
- If a SDVOSB or VOSB was self-certified, there was a one-year grace period, which ended on December 31, 2023, to file an application for certification.

DoD Proposed 4-Phase CMMC Implementation

Phase 1 (begins on effective date of revision to DFARS 252.204-7021)

Level 1/2 self-assessment (and affirmation) as a condition of award included in all applicable DoD solicitations & contracts

Phase 3

Level 2/3 certification assessment as a condition of award and, for Level 2, as a condition to exercise an option period on a contract awarded prior to the effective date included in all applicable DoD solicitations & contracts

"DoD intends to include CMMC requirements for Levels 1-3 in all solicitations issued on or after October 1, 2026 …"

Phase 2

Level 2 certification assessment as a condition of award included in all applicable DoD solicitations & contracts

Phase 4 (Full Implementation: 2026 or after)

CMMC Program requirements in all applicable DoD solicitations and contracts, including option periods on contracts awarded prior to the beginning of Phase 4

POLSINELLI. What a law firm should be.™

ACC Association of Corporate Counsel NATIONAL CAPITAL REGION

FY2024 NDAA- Restrictions on Contractor's use of foreign-made products considered to be national security risks

NDAA FY24 prohibits the acquiring of certain goods and services from companies with ties to US adversaries, including Chinese military companies

American Security Drone Act of 2023

- Prohibits US Government from procuring drones ("unmanned aircraft systems" or "UAS") from "covered foreign entities" and extends to UAS services provided to government by Contractors.
- Agencies required to account for any existing inventory of UASs manufactured or assembled by a covered foreign entity.

Covered Logistics Software

- DoD is prohibited from obtaining logistics software or entering into contracts with entities that provide data to "covered logistics software" sponsored by certain adversaries (with a focus on China)

Fossil Fuel

- DoD is prohibited from entering into a contract with any person or entity that has fossil fuel business operations with an entity greater than 50% owned by an authority of the Russian Government or operates in Russia.

DOJ Procurement Collusion Strike Force ("Strike Force") - 2023

- Joint law enforcement effort founded in 2019 to combat antitrust crimes and related fraudulent schemes (federal, state and local) that impact:
  - Government procurement
  - Grants, and
  - Program funding

DoD Strike Force

2021 Composition	2022 Composition (added)
Antitrust division of the DOJ U.S. Attorneys General FBI Inspectors General for multiple federal agencies	OIGs from DOE, DOI, DoT and EPA
Provides training to federal, state and local agency procurement and grant officers and auditors and investigators to identify the red flags of collusion	Responsible for: Infrastructure Investment and Jobs Act, Inflation Reduction Act of 2022 and Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act of 2022

GAO Annual Report

- Excluding the numerous CIO-SP4 protests, GAO saw only a slight increase in the number of protests from FY2022
- Similarly, the sustain rate increase is also up due to the fact that the GAO sustained 119 protests relating to the CIO-SP4 procurement
- Also, the 57% effectiveness rate was also skewed by the CIO-SP4 protests, but it is overall good news as it indicates that the GAO's bid protest process works and that procuring agencies are willing to take corrective action to fix errors identified in a bid protest

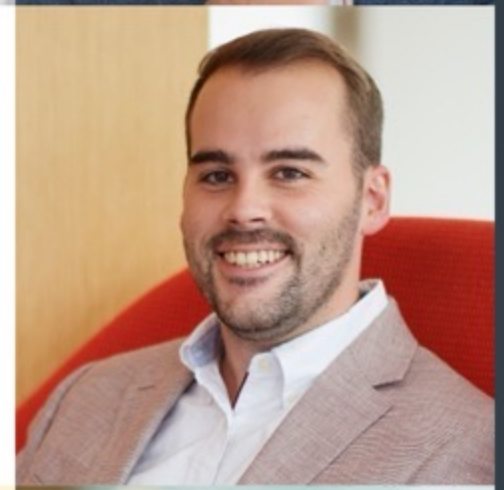
POLSINELLI
What a law firm should be.™

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Goodloe Marine, Inc., ASBCA No. 61960

- In 2012, Goodloe was performing a dredging contract for the Army Corps of Engineers. The Corps suspended the work due to migratory bird activity, causing the contractor to overrun its schedule by 52 days. Goodloe told the Corps in 2013 that it intended to submit a claim for delay damages, but did not do so until it submitted its $1.88M claim in 2018 (just within the CDA statute of limitations).
- At the ASBCA, the Corps moved for summary judgment, arguing that Goodloe failed to comply with the requirement of FAR 52.242-14, Suspension of Work to submit its claim “as soon as practicable” after the delay occurs.
- Even with the significant delay in this case, the Board upheld the precedent that claims filed within the CDA SoL are timely, even if exceeding FAR timing requirements, as long as the government is not prejudiced by the delay. Because Goodloe informed the Corps that it planned to submit a claim for delay and had not accepted final payment to close out the contract, the Board found that the Corps was not prejudiced.

Where great work and great people come together.



POLSINELLI®

What a law firm should be.™

Am Law 100 firm with
1,000 attorneys nationwide
22 offices from LA to NY
170+ services/industries

polsinelli.com

POLSINELLI®

What a law firm should be.™

polsinelli.com