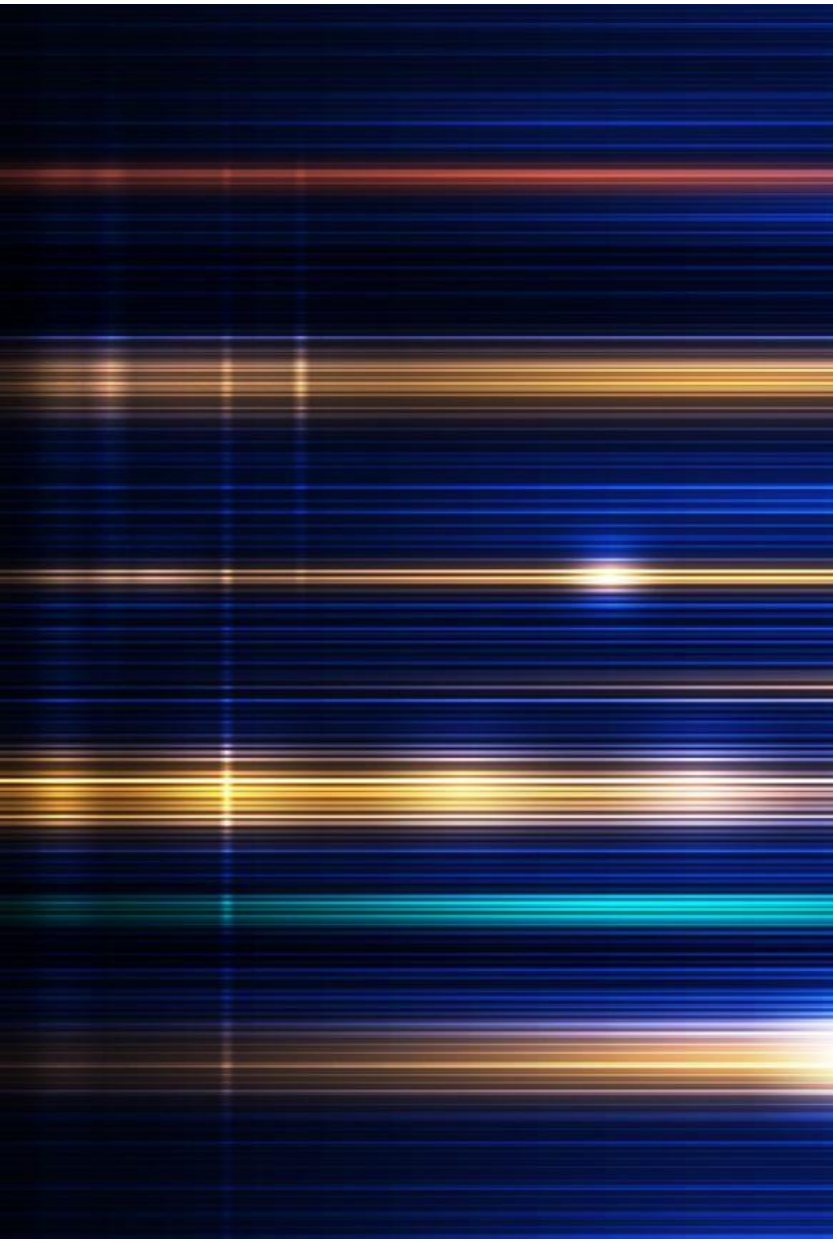

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# Recent Trends in Government Contracting

ACC Association of Corporate Counsel SAN DIEGO

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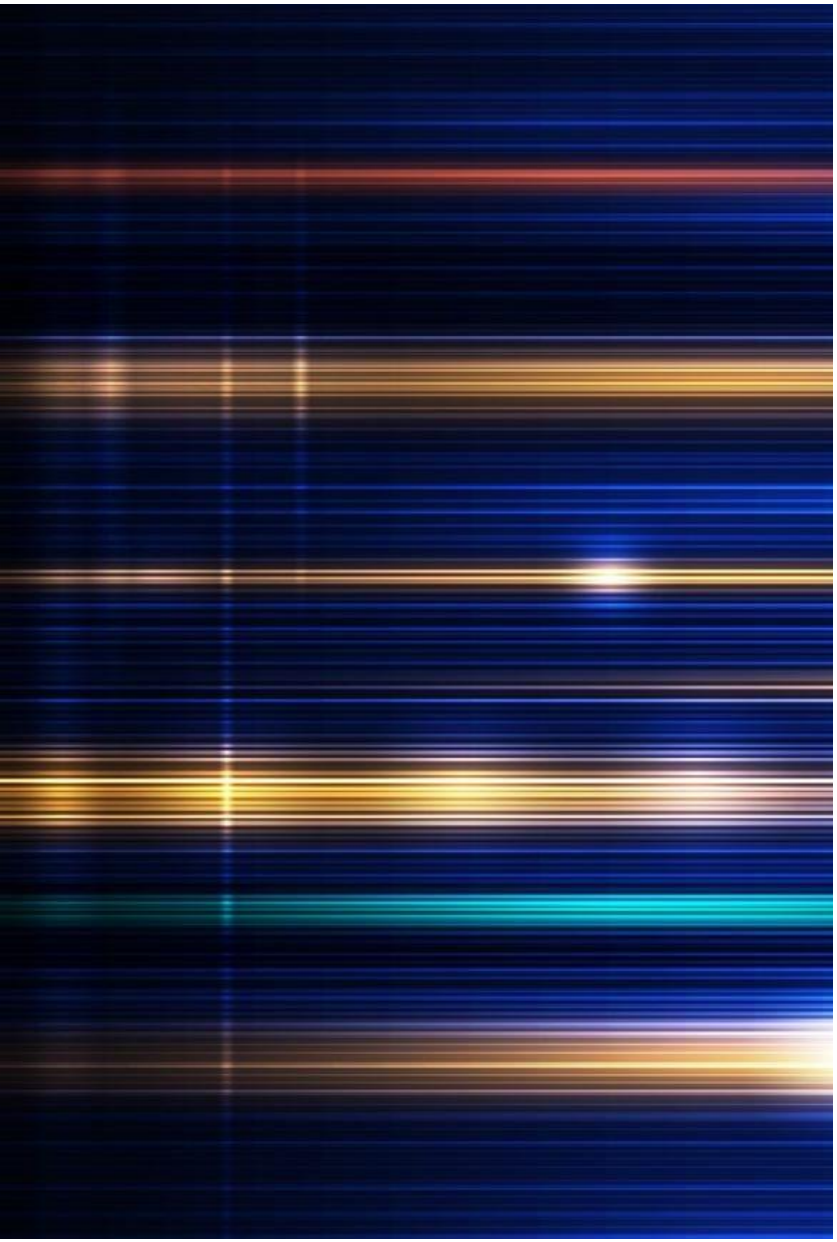
April 2024

# Agenda

1. Recent procurement developments involving former federal employees
2. Trends in False Claims Act cases
3. Recent legal challenges to the scope of federal procurement authority



# Former Government Employees and FAR Part 3

# Former Government Employees and FAR Part 3

## FAR Part 3 Unfair Advantages

Under FAR 3.101-1, agencies have a duty to avoid even the **appearance** of impropriety.

- "The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships."
- "[W]here an offeror chooses to hire a former government official who has had recent access to non-public competitively useful information, and uses that official to help prepare the offeror's proposal, there is a **rebuttable presumption of prejudice**." *CACI, Inc*., B-421224.3, Jan. 23, 2023, 2023 CPD ¶ 35 at 17 (emphasis added). "[T]he firm can be disqualified from a competition based on the appearance of impropriety created by that situation." *Id.* at 22.
- This is separate from and in addition to Procurement Integrity Act, Organizational Conflict of Interest, and revolving-door requirements.

GAO analyzes the use of former government employees who had **access to non-public, competitively useful information** as an unfair competitive advantage under FAR subpart 3.1 rather than an OCI under FAR subpart 9.5, but the analysis mirrors an unequal access OCI.

# Former Government Employees and FAR Part 3

## Case Study: *Raytheon*

- *Raytheon Intelligence & Space, Electronic Warfare Self Protect Sys.*, B-421672.2, Aug. 17, 2023, 2023 WL 5447382
- Former Navy employee began working at Raytheon during pre-solicitation.
  - Had access to program information and competitor's proprietary information. Some had already been released, but some non-public information remained useful.
  - Helped Raytheon respond to RFI. Left Raytheon before Navy issued final solicitation.
  - Raytheon claimed his involvement was minor and brief.
- Two years later, Navy disqualified Raytheon based on an appearance of impropriety.
- GAO held disqualification was reasonable despite leaving only one competitor.
  - No need to identify improper information in Raytheon's proposal. Employee's assistance with proposal development is "presumed" to be influenced by information he learned as a federal employee.

# Former Government Employees and FAR Part 3

## Case Study: *CACI*

- CACI, Inc.—Federal, B-421224 et al., Jan. 23, 2023, 2023 CPD ¶ 35
- CACI hired consultant who served on agency SSAC for prior procurement.
  - Had access to competitor's pricing information on prior contract. Employee claimed he didn't actually access the information, but contemporaneous documentation showed otherwise.
  - CACI argued the information was no longer useful due to passage of time and difference in requirements. Agency disagreed.
  - CACI also argued the person was not involved in preparing proposal, but there was no firewall and contemporaneous documentation showed he at least advised the proposal team.
- Agency disqualified CACI.
- GAO found the disqualification was reasonable.
  - There is a **rebuttable presumption that information is shared** if the former employee had access to it and is involved in any way in proposal effort.
  - Irrelevant that the agency did not disqualify CACI until a year after it first knew the conflicted person was supporting CACI's proposal effort.

# Former Government Employees and FAR Part 3

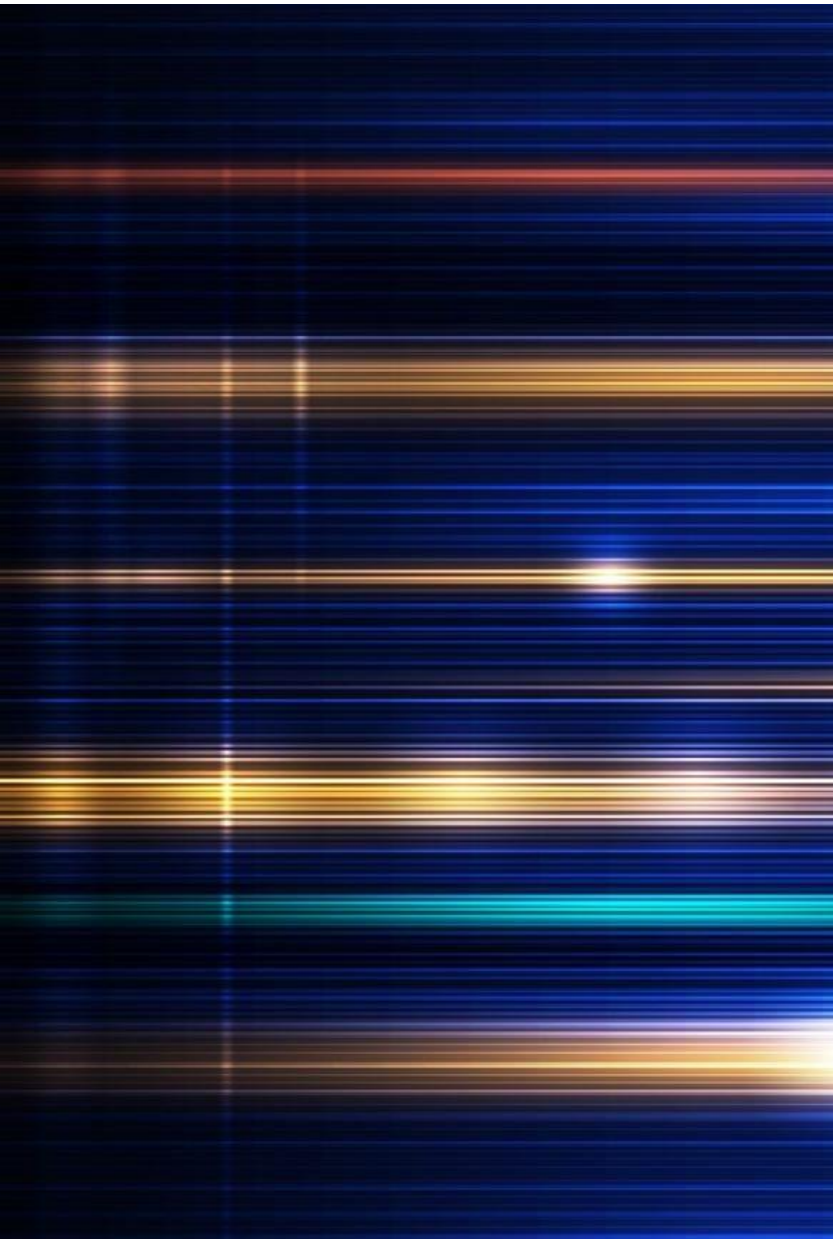
## Avoiding Unfair Competitive Advantage

- Unlike OCIs under FAR part 9, agencies **cannot waive** unfair advantages under FAR part 3. *Northrop Grumman Sys. Corp.*, B-412278.8 *et al*., Oct. 4, 2017, 2017 CPD ¶ 312.
- Thus, it is key to avoid these problems prospectively.
  - A sound firewall around the proposal effort can avoid an unfair competitive advantage due to former federal employees with potentially useful nonpublic information.
  - Former federal employees must be firewalled **before** they begin supporting a proposal effort. Once they have begun supporting, even only minimally, it may be too late (*see Raytheon*).
  - There **may** be legal defenses, and agencies **may** have after-the-fact mitigation solutions, but offerors cannot count on those.
- Former government employees should receive special scrutiny as part of new employee hiring/consultant engagement due diligence.
  - A "clean" post-government-employment ethics letter does not necessarily mean a candidate carries no FAR part 3 risk.

# Former Government Employees and FAR Part 3

## Practical Tips

- ✓ **Before** hiring a former government employee as an employee or engaging as a consultant, analyze any potential appearance of unfair competitive advantage *vis-à-vis* the work the person will perform for the company.
- ✓ Do not blindly rely on ethics letters: Unfair competitive advantage concerns are broader than the focus of revolving-door ethics letters. They are more akin to unequal access OCIs.
- ✓ Unfair advantage analysis, like OCI analysis, is fact-specific and not easily reduced to bright-line rules. Attorneys should be involved in close cases.
- ✓ Tackle potential issues **prospectively**. Like unequal access OCIs, once a proposal team is infected, it may be too late to mitigate.



# False Claims Act

# False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733

**Creates liability against any person or company who:**

- Knowingly
  - Actual Knowledge
  - Reckless Disregard
  - Deliberate Indifference
- Submits a
- Material
- False Claim

**Implied Certification Doctrine**

Requesting payment from the government without disclosing a known material breach can violate the FCA

**Reverse False Claim**

Failure to Return Overpayments

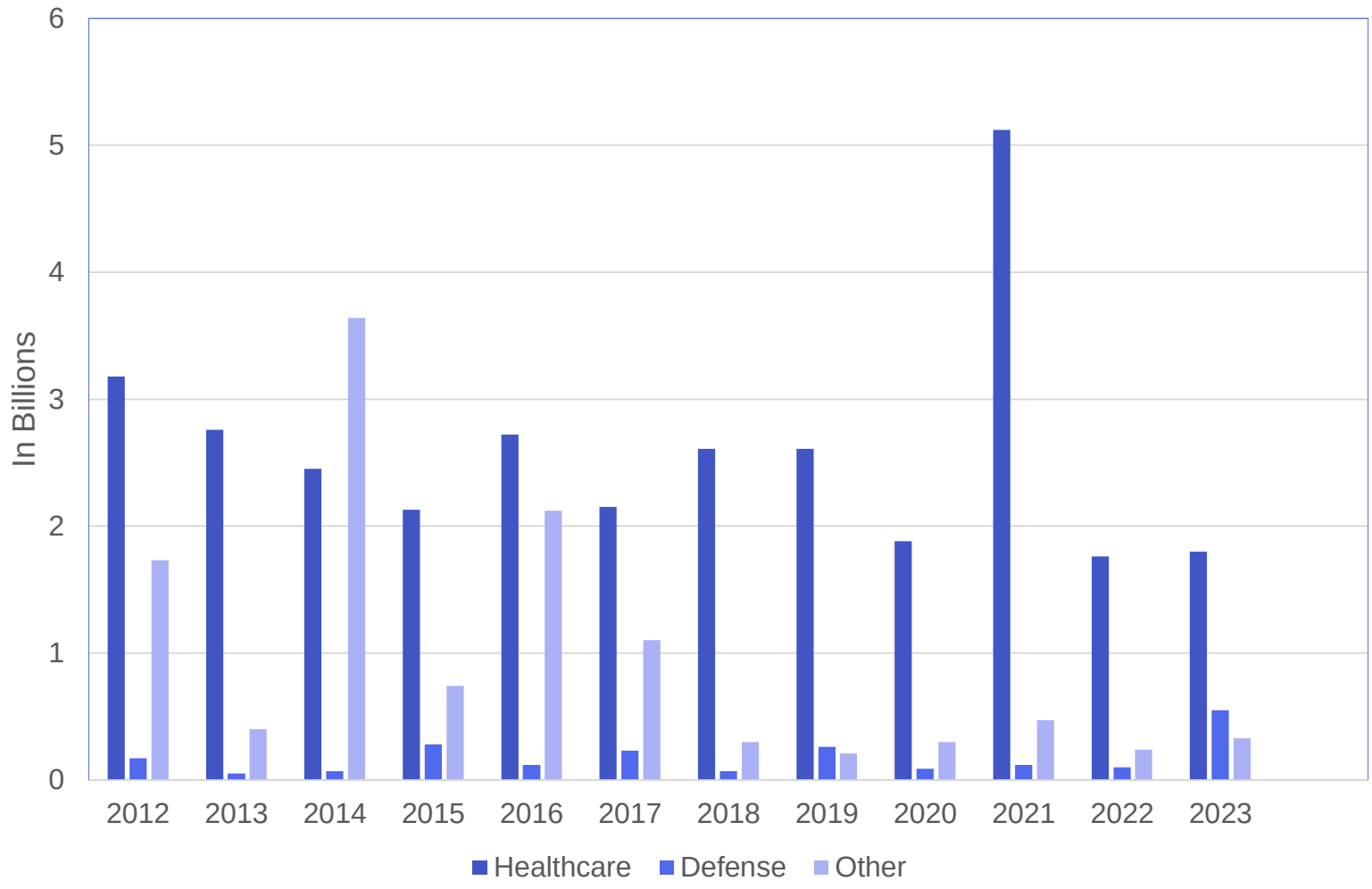
# False Claims Act: Enforcement by U.S. Department of Justice in 2023

DOJ obtained the highest number of settlements and judgments in FCA history – representing a 50% increase from 2022

DOJ collected more than $2.68 billion in FCA settlements and judgments – up from $2.2 billion in 2022

DOJ initiated the highest number of new FCA matters in history – representing a 60% increase from 2022

# False Claims Act: Enforcement is Expensive (Federal)



# False Claims Act Across Industries (2023)

## Government Contractors:

DOJ recovered $550 million in procurement fraud – the highest amount in more than a decade and a 400% increase from 2022

Whistleblowers recovered $110 million in private recoveries where DOJ did not intervene – representing 30% of the total recovered in non-intervention cases since the enactment of the FCA

- In 2022, recovery was $28 million, which was nearly a 20-year high

## Civil Cyber Fraud Initiative:

In October 2021, DOJ announced it would hold accountable entities and individuals who knowingly:

- Provide deficient cybersecurity products or services;
- Misrepresent their cybersecurity practices or protocols; or
- Fail to monitor and report cybersecurity incidents or breaches.

DOJ and qui tam relators have pursued multiple cyber-fraud case settlements:

- In an ongoing case. Penn State's CIO alleged the university did not conduct a NIST SP 800-171 assessment as required by DFARS 252.204-7012, uploaded inaccurate scores to the Supplier Performance Risk System (SPRS), and failed to use FedRAMP Moderate authorized cloud-based systems for storing CUI. DOJ declined to intervene but reserved the right to become involved later.
- Aerojet Rocketdyne (7/22 for $9m), Jelly Bean Communications (3/23 for $300k), and Verizon Business Network (9/23 for $4m) settlements also demonstrate the risks of inaccurate cyber representations and security measures.

# False Claims Act Across Industries (2023)

## COVID-19 Related Fraud:

- DOJ resolved 270 FCA matters involving fraud in federal pandemic relief programs – up from 35 matters in 2022
- DOJ recovered $48 million in connection with fraudulent PPP loans – up from $6.8 million in 2022
- DOJ entered new territory – filing claims against a FinTech company for miscalculating PPP loans and causing the SBA to guarantee loans in inflated amounts that exceeded the amounts borrowers were eligible to receive

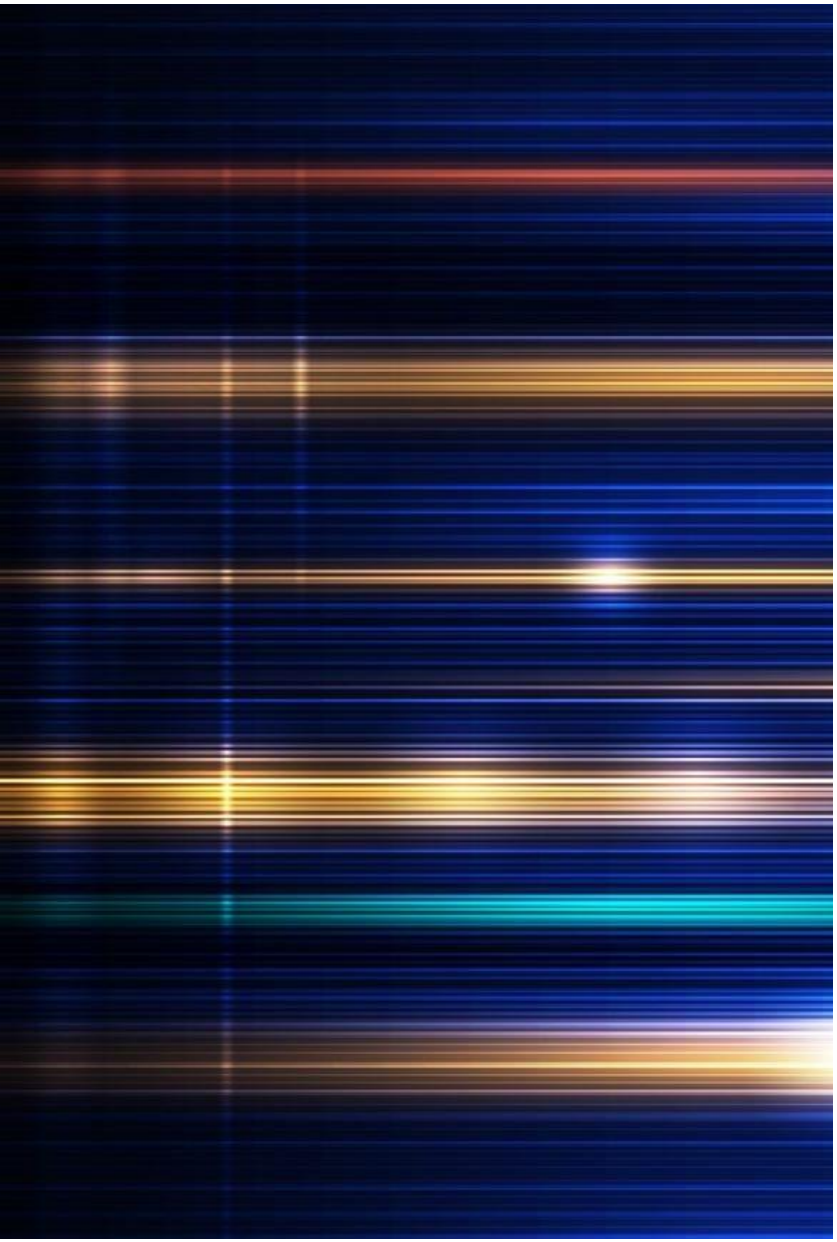
## Whistleblowers:

- Whistleblowers in *qui tam* suits accounted for $2.3 billion of the $2.68 billion recovered – up from $1.9 billion in 2022
- Whistleblowers filed 712 *qui tam* suits, the third-highest in history, and were paid more than $349 million for their share of recoveries
- Average of 13 new FCA cases brought by whistleblowers each week

# False Claims Act

## Other Areas of FCA Enforcement for Contractors

- Antitrust
  - DOJ continues to view the FCA as a tool to pursue anti-competitive conduct, including allegedly improper teaming arrangements, no-poach agreements, and prime-sub conduct.
- Cost Accounting
  - In April 2023, L3 agreed to a $21.8M settlement. Allegations were based on double-counting of procurement costs for common-stock items used on two different contracts for battlefield video devices.
  - In July 2023, Booz Allen Hamilton agreed to a $377.5M settlement. Allegations related to improper billing of commercial and international transaction fees to BAH's government contracts.
- Non-Conforming Parts
  - In November 2023, GE Aerospace agreed to a $9.4M settlement. Allegations were based on missing or deficient inspections of parts for aircraft engines.



# Legal Challenges to Executive Procurement Authorities

# Legal Challenges to Executive Procurement Authorities

## Federal Property and Administrative Services Act (Procurement Act)

"[P]rovide[s] the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services," among other things. 40 U.S.C. § 101.

Long viewed as empowering the Government to impose wide-ranging requirements on contractors.

Challenges to the 2021 vaccine mandate (EO 14042) changed the landscape.

> Contractors argued regulation of contractor employees' health decisions was outside the authority conferred by the Procurement Act. Multiple district courts agreed and issued injunctions.
>
> The Fifth, Sixth, and Eleventh Circuits upheld the injunctions. *Kentucky v. Biden*, 57 F.4th 545 (6th Cir. 2023); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022); *Georgia v. President*, 46 F.4th 1283 (11th Cir. 2022). The Ninth Circuit found the mandate was sufficiently related to the Procurement Act's authorization to promote economical and efficient procurement. *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023).

# Legal Challenges to Executive Procurement Authorities

## Case Study: *Contractor Minimum Wage*

- E.O. 14026 (Apr. 27, 2021): Order invokes the Procurement Act "to promote economy and efficiency in procurement by contracting with sources that adequately compensate their workers." For this purpose, the President ordered a clause to be included in "contracts and contract-like instruments," requiring covered contractors to pay covered "workers employed in the performance of the contract or any covered subcontract thereunder" at least $15 per hour, with increases to be determined annually.
- This order had precedent in President Obama's similar contractor minimum wage order (E.O. 13658).

# Legal Challenges to Executive Procurement Authorities

## Case Study: *Contractor Minimum Wage*, cont'd

- States of Arizona, Idaho, Indiana, Nebraska and South Carolina argued the Procurement Act did not empower the President to dictate a federal minimum wage. The district court disagreed, finding the President "rationally determined that increasing the minimum wages of contractors' employees will lead to improvements in their productivity and the quality of their work, and thereby benefit the government's contracting operations," which the court found within the scope of the Act. *Arizona v. Walsh*, No. 3:22-CV-00213 (D. Ariz. Jan. 6, 2023).
- States of Texas, Louisiana, and Mississippi raised similar challenges, and a different court sided with the plaintiffs and enjoined the order: "The Procurement Act's text, history, and purpose do not offer the President broad policy-making authority to set the minimum wage of certain employees of federal contractors and subcontractors." *Texas v. Biden*, No. 6:22-cv-00004 (S.D. Tex. Sept. 26, 2023).
- Both decisions have been appealed, to the Ninth and Tenth Circuits, respectively.

# Legal Challenges to Executive Procurement Authorities

## Case Study: *Small Business Administration 8(a) Program*

- Section 8(a) of the Small Business Act grants SBA the authority to award or arrange for performance of contracts by small businesses "whenever [SBA] determines such action is necessary[.]" 15 U.S.C. § 637(a)(1). Congress authorized SBA "to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns[.]" *Id.* § 637(a)(1)(B). The statute states many socially and economically disadvantaged individuals are socially disadvantaged "because of their identification as members of certain groups that suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control[.]" *Id.* 631(f)(1)(B).
- The statute notes "that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities[.]" *Id.* § 631(f)(1)(C).

# Legal Challenges to Executive Procurement Authorities

## Case Study: *Small Business Administration 8(a) Program*, cont'd

- The modern 8(a) program derives from that statutory authority. Individuals can establish social disadvantage by presenting evidence to the SBA of one objective distinguishing feature, such as race or ethnic origin, which has contributed to their social disadvantage. 13 C.F.R. § 124.103(c)(2)(i).
- SBA has historically not required evidence from individuals who hold themselves out as belonging to certain minorities. This is treated as a "rebuttable presumption" of disadvantage. Individuals not belonging to those particular minorities must demonstrate social disadvantage.

# Legal Challenges to Executive Procurement Authorities

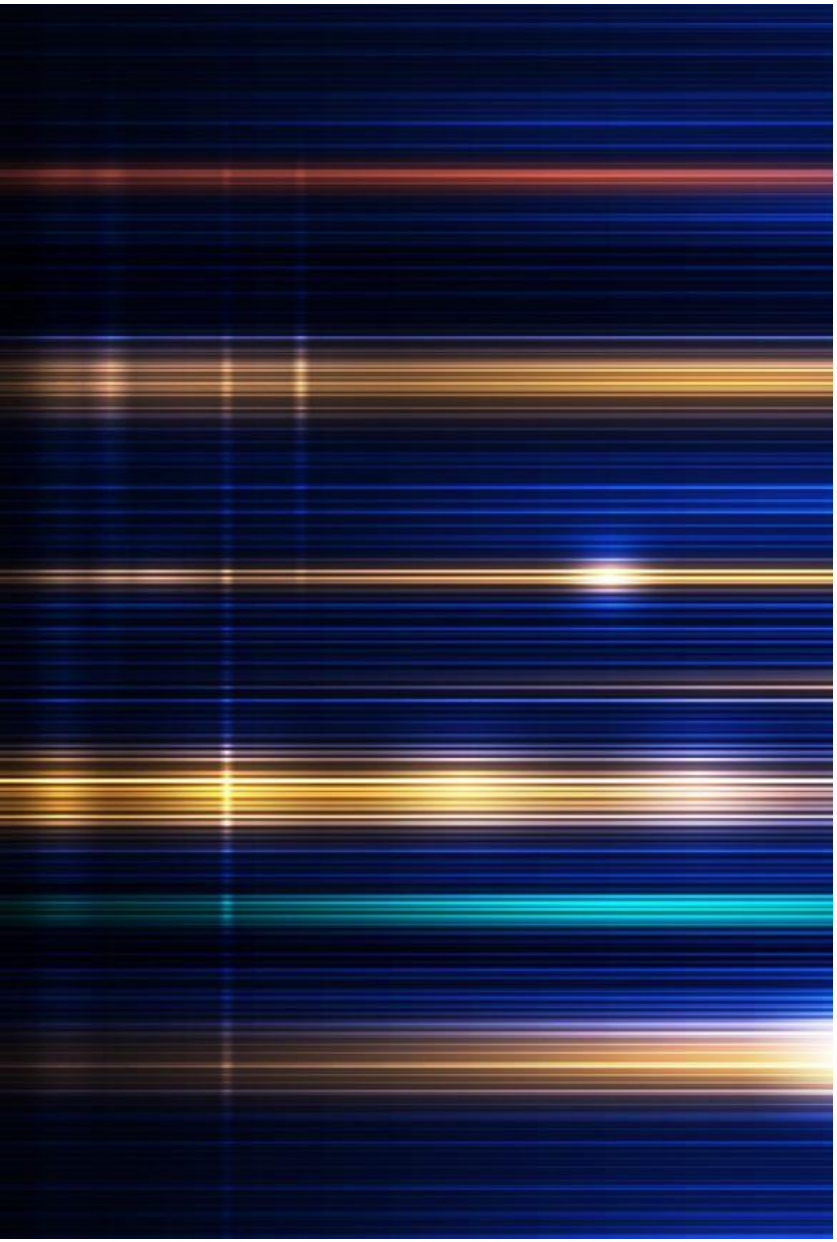
## Case Study: *Small Business Administration 8(a) Program*, cont'd

- A Tennessee business filed suit, arguing that the "rebuttable presumption" in favor of certain minority racial groups was improper. Plaintiff argued that the rebuttable presumption exceeded SBA's statutory authority and also violated the Constitution's equal protection clause. *Ultima Servs. Corp. v. Dep't of Agriculture*, 2:20-CV-00041 (E.D. Tenn. Jul. 19, 2023).
- Court agreed that Congress did not direct SBA to use a rebuttable presumption, but held that use of a presumption was within the general grant of authority to make "determinations . . . with respect to whether a group [had] been subjected to prejudice or bias[.]" 15 U.S.C. § 637(a)(8).
- Court nevertheless enjoined further use of the rebuttable presumption on equal protection grounds under the 5th Amendment.

# Legal Challenges to Executive Procurement Authorities

## What Do These Challenges Mean?

- Courts are becoming more receptive to claims that the Executive branch has overstepped its statutory authority in the procurement sphere.
- These suits are in harmony with the Supreme Court's apparent skepticism about *Chevron* deference and with other recent suits challenging the regulation of industry – *e.g.*, the recent holding that the Corporate Transparency Act's beneficial ownership reporting regime is unconstitutional, or the new suits challenging the Labor Department's recent worker classification rule as exceeding the agency's authority under the Fair Labor Standards Act.
- We can expect similar challenges when the Executive branch attempts to flex its procurement muscle with respect to areas that are not clearly authorized by statute, particularly when the connection to procurement is attenuated.
- Current composition of the U.S. Supreme Court is more skeptical of potential administrative overreach than it has been in many decades.



# Questions?

# Ted Bonanno

Ted Bonanno is a versatile in-house attorney with deep experience in the aerospace and defense industry. He is currently serving as Senior Counsel at Relativity Space, where he oversees regulatory compliance pertaining to exports, cybersecurity, FAA, defense acquisition, environmental regulations, and other federal, state, and local laws.

He previously served as General Counsel of the Defense business segment for UK Defense company, Meggitt PLC, where he negotiated some of the company's largest contracts. He also managed major investigations and business restructuring projects. While at Meggitt PLC, Ted held executive roles as VP, Commercial Operations and VP, Contracts and Compliance. He also held senior roles at Crane Aerospace and United Technologies Corporation.

Prior to entering the aerospace industry, Ted worked as an Associate at DLA Piper LLP in the Corporate practice group. He began his legal career as a Marine Corps Officer (Judge Advocate), with service in Iraq in 2003 as an advisor to the Commanding General of the 1st Marine Division. Ted continues to serve in the Marine Corps Reserve as a Colonel. He is currently the Staff Judge Advocate for the Marine Innovation Unit – a Reserve unit created to identify civilian technology solutions for complex Marine Corps problems.

Ted holds a B.A. from Florida International University, J.D. from University of Miami, and an MBA from Florida State University. He also completed Marine Corps Command and Staff College, Joint and Combined Warfighting School at National Defense University and the U.S. Air Force's Air War College. He enjoys sailing and coaching his daughter's flag football team.

# Adam L. Braverman

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Adam L. Braverman is a partner in Morrison Foerster's Investigations + White Collar Defense group who formerly served as Associate Deputy Attorney General for the U.S. Department of Justice (DOJ) and as the U.S. Attorney for the Southern District of California.

Adam represents companies and their executives in internal and government investigations, white collar criminal defense matters, and parallel civil litigation related to allegations of bribery, government procurement fraud, COVID-19 and CARES Act fraud, anti-money laundering violations, and matters involving organized crime. He has particular experience representing individuals and government contractors in internal and government-facing investigations related to allegations of False Claims Act (FCA) violations, procurement fraud, and bribery, among other issues.

Before joining MoFo, Adam spent 13 years at the U.S. Department of Justice (DOJ) where he served in senior level leadership positions in multiple administrations. As Associate Deputy Attorney General, he advised the Deputy Attorney General on litigation and policy matters and was designated to coordinate DOJ's efforts to investigate and prosecute fraud in connection with COVID-19 and CARES Act relief funds.

# Alex Ward

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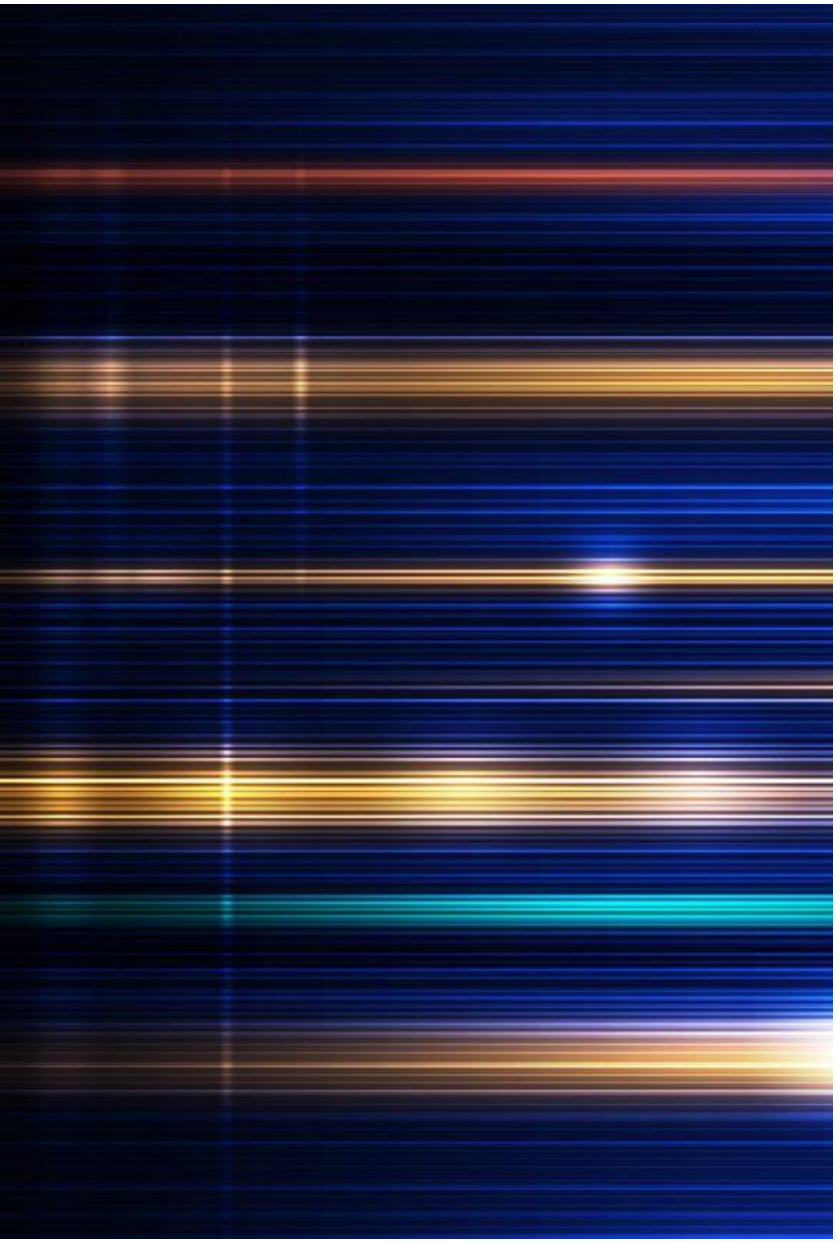
Alex Ward is co-chair of Morrison Foerster's Government Contracts and Public Procurement practice. His practice covers a full range of government contracts matters, including bid protests, claims, investigations, corporate transactions, and counseling.

Alex represents contractors in internal and external investigations, disclosures to the government, and *qui tam* litigation, with a great deal of success in reducing or eliminating his clients' exposure through active engagement with the relevant government bodies. Alex has handled all aspects of the claims process, from the initial assessment and drafting of requests for equitable adjustment through litigation in the Boards of Contract Appeals and the Court of Federal Claims. Alex's practice also covers the full gamut of other controversies confronting government contractors, including prime-sub, teaming partner, employer-employee, competitor, and indemnification disputes. His litigation work also includes a wide variety of pro bono engagements, in which he has represented both individual and institutional clients in matters ranging from immigration and criminal defense to sustainable procurement and protection of the environment.

Prior to joining the firm, Alex served in the U.S. Army as a commissioned officer and an Assistant to the General Counsel of the Army, and as a clerk for judges on the U.S. Courts of Appeals for the Armed Forces and the D.C. Circuit. He currently serves on the Boards of the Morrison & Foerster Foundation and the Chesapeake Bay Foundation and Law360's Government Contracts Editorial Board.



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