Wiley Rein LLP

GOVERNMENT CONTRACTS ISSUE UPDATE

February 2017

Wiley Rein Named Government Contracts 'Practice Group of the Year' by *Law360* for Third Consecutive Year

Wiley Rein's prominent Government Contracts Practice has been named a 2016 "Practice Group of the Year" by *Law360* in one of the publication's hallmark annual awards. Selected for the honor for three years running, Wiley Rein was noted for its work on behalf of "more than 400 top federal and state contractors across a wide spectrum of industries." In the past year, that included a multivenue defense of a $100 million contract with the U.S. Department of State, and securing a favorable resolution to an unusual challenge to a $5 billion nuclear security contract.

Practice co-chair Scott M. McCaleb told *Law360* that clients are drawn to the group's "deep bench" of attorneys, who perform at "extraordinary high levels." The team's work includes handling about 150 bid protests each year, a work rate that is unmatched by few—if any—other firms, said Practice co-chair Paul F. Khoury. Many of the firm's lawyers also have security clearances that enable them to work for clients on classified matters.

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COST CLAIM CORNER

Recent Board Decisions Reign In Government Cost Claims

By Nicole J. Owren-Wiest

This article highlights key takeaways from several recent decisions issued by the Armed Services Board of Contract Appeals (ASBCA) involving government audits and cost claims.

A prime contractor's responsibility for managing subcontractors is not boundless. Over the past few years, typically in connection with contractor purchasing system reviews (CPSRs), we have observed an increase in the number of times DCMA (and DCAA) auditors have asserted that a company's purchasing system is "deficient" or otherwise "noncompliant" because of alleged failures to adequately supervise subcontractors'

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President Trump's Impact on Government Contractors

By John R. Prairie and Cara L. Lasley

It's been a whirlwind first few weeks in office for President Trump. From taking initial steps to dismantle the Affordable Care Act, to restricting immigration from seven predominantly Muslim countries, President Trump has moved swiftly to implement several of his key campaign pledges. Despite heavy criticism of many of these initial actions, President Trump clearly is not afraid to disrupt the status quo.

President Trump has not spared government contractors from this initial flurry of activity. Within hours of his inauguration, Trump ordered the Environmental Protection Agency (EPA) to temporarily suspend all contract and grant awards. Predicting what Trump may do next has proven to be a fool's errand. But based on his campaign promises and initial actions since taking office, here are a few areas where we expect President Trump to impact government contractors:

- **Pressure contractors to lower costs on major programs.** Although presidents traditionally have not weighed in on individual government contracts or programs, President Trump clearly is no traditionalist. Even before taking office, Trump tweeted his displeasure with the costs of several major programs and threatened to cancel orders and/or use alternative sources. These initial attacks were successful, according to Trump, who recently claimed that Lockheed Martin has agreed to cut $600 million from its next lot of F-35 Joint Strike Fighter planes. It is clear that Trump, who sees himself as the ultimate dealmaker, is not afraid to use the bully pulpit to pressure contractors to cut costs. If Trump sets his sights on contractors on other major programs, they too may need to be prepared to strike a "deal" with Trump to cut costs or otherwise demonstrate how they are saving U.S. taxpayer dollars.
- **Rescind executive orders and regulations.** Trump has pledged to overturn "unconstitutional" and "burdensome" executive orders and regulations issued by the Obama administration, several of which were targeted at government contractors. These include executive orders and regulations governing paid sick leave, minimum wage and disclosure of labor law violations. Although it was widely predicted that President Trump would swiftly rescind many of President Obama's executive orders in a single action as soon as he took office, he has not done so yet. He has, however, issued an executive order requiring that for every one new regulation, two must be revoked. Thus, it appears likely that many regulations issued under the Obama administration will yet be undone as new regulations are issued going forward. This would be universally welcomed by government contractors.
- **Increase defense spending.** Notwithstanding his attempts to cut costs on specific programs, it still seems a safe bet that overall defense spending will rise under President Trump. Trump has announced his intent to work with Congress to repeal federal sequester caps on defense spending without balancing increased defense spending with any offsets in non-defense spending. Trump may have difficulty finding support in Congress, however; historically, Republicans have been unwilling to pass budget-busting bills without offsets. Trump's planned increase in defense spending will support a larger Army and Navy and an increased focus on cybersecurity. Trump's plan involves building a 350-ship Navy, increasing the Air Force's active fighter inventory to 1,200, growing the Marine Corps from 27

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OGE Amends the Executive Branch Gift Regulations

By Robert L. Walker

Effective January 1, 2017, there are noteworthy changes to the portions of the Standards of Ethical Conduct for Executive Branch Employees that govern the solicitation and acceptance of gifts from outside sources. Of most interest are the changes to the executive branch gift regulations that:

- Prohibit executive branch employees from accepting alcoholic beverages under the exclusion for modest items of food and refreshment;
- Clarify the method of calculating the market value of a ticket to an event when that ticket lacks a face value;
- Require executive branch employees to obtain written authorization before accepting gifts of free attendance to widely-attended gatherings;
- Provide guidance on whether a social media contact may qualify as a personal friend for purposes of the exception for gifts based on a personal relationship; and
- Create a new exception permitting employees to accept gifts of informational materials.

Alcohol. Under a long-standing exclusion to the definition of what constitutes a "gift" under the executive branch Standards of Conduct, executive branch employees have been permitted to accept "modest items of food and refreshment, such as soft drinks, coffee and donuts, offered other than as part of a meal." The executive branch Office of Government Ethics (OGE) has stated that it "has long treated alcoholic beverages as not being part of the class of modest refreshments covered by this exclusion." Reflecting this interpretation, the relevant provision has been amended to exclude from the definition of "gift" "modest items of food and *non-alcoholic* refreshments, such as soft drinks, coffee, and donuts, offered other than as part of a meal."

Tickets with no face value. As part of an amended definition of "market value" as used in the gift regulations, OGE has now included a new example illustrating and clarifying how to determine the market value of a ticket to an event when the ticket lacks a face value. This approach requires including in the calculation the "face value of the most expensive publicly available ticket" to the event. New Example 4 to this provision reads:

> A company offers an employee of the Federal Communication Commission (FCC) free attendance for two to a private skybox at a ballpark to watch a major league baseball game. The skybox is leased annually by the company, which has business pending before the FCC. The skybox tickets provided to the employee do not have a face value. To determine the market value of the [two] tickets, the employee must add the face value of two of the most expensive publicly available tickets to the game and the market value of any food, parking or other tangible benefits provided in connection with the gift of attendance that are not already included in the cost of the most expensive publicly available tickets.

Written approval for widely attended events. Under the amended executive branch regulations, employees who wish to accept an offer of free attendance to an event under the "widely-attended gathering" exception must now—in all instances—obtain written authorization from their designated agency ethics official (DAEO) *before* attending the event. The amended provision on "widely-attended gatherings"—or "WAGs"—now also makes clear that

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OGE Amends the Executive Branch Gift Regulations
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a qualifying gathering must "include an opportunity to exchange ideas and views among invited persons."

Social media "friends." In a leap into the 21st century, the amended gift regulations now provide an example to illustrate when, and whether, a social media "friend" may be considered for purposes of the exception for "gifts based on a personal relationship." The kernel of this very long example appears to be that, by itself, a virtual relationship is unlikely to be a "personal relationship" under the rule. As provided in the example, an agency employee—who uses a social media site to keep in touch with friends, coworkers, and professional contacts—is offered via the site a pair of $30 concert tickets by a government contractor whom the employee met at a business meeting. Although they have granted access to each other's social media networks, they do not otherwise "communicate further in their personal capacities, carry on extensive personal interactions, or meet socially outside work." The example concludes: "Although the employee and the individual are connected through social media, the circumstances do not demonstrate that the gift was clearly motivated by a personal relationship, rather than the position of the employee, and therefore the employee may not accept the gift pursuant to" the exception.

Informational Materials. The new exception for "informational materials" permits an executive branch employee to accept "writings, recordings, documents, records, or other items" if the materials are "educational or instructive in nature" (they may not be primarily for entertainment, display, or decoration) and if the materials relate to the employees official duties, to a general subject matter within the purview of the employee's agency, or to another topic of interest to the agency. The aggregate value of such informational materials received by an employee from any one person may not exceed $100 in a calendar year, unless the DAEO makes a written determination permitting acceptance of materials exceeding this $100 limit.

None of these amendments radically alters the circumstances of when an executive branch employee may accept a gift from a "prohibited source"—that is, from someone seeking official action by, doing (or seeking to do) business with, or regulated by the employee's agency, or who has interests that may be affected by the performance of the employee's official duties. But, as in all government ethics matters, the devil is in the detail of application of the gift regulations to particular cases and scenarios. When a question arises, attorneys in Wiley Rein's Election Law & Government Ethics Practice Groups are ready to assist you and your organization in understanding and complying with these rules. ■

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Warning for Public Company Defense Contractors: DCAA is Not the Only Accountant Examining Your Books

By Kevin B. Muhlendorf and Derrick Petit

It happens at the end of the fiscal year at many companies. In order to meet bonus targets, employees scramble to find innovative ways to recognize revenues before the end of the period. A recent Securities and Exchange Commission (SEC) settlement with L3 Technologies, Inc. (L3) offers a cautionary tale if these efforts are not appropriately policed and addressed. The settlement resolved an accounting issue that L3 self-reported to the SEC relating to its Army Sustainment Division (ASD).

Background

On January 11, 2017, In *In the Matter of L3 Techs., Inc.*, Rel. No. 3844 (Jan. 11, 2017) (Order Instituting Cease and Desist Proceedings) (Order), L3 agreed to pay a $1.6 million penalty to the SEC for violating Sections 13(b)(2)(A)-(B) of the of the Securities Exchange Act of 1934 (Exchange Act). Section 13(b)(2)(A) requires that publically held companies "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets." Section 13(b)(2)(B) requires publically held companies to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that . . . transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles [(GAAP)] . . . ."

According to the Order, ASD had a contract for the maintenance of 100 fixed-wing C-12 airplanes for the U.S. Army from June 2010 through January 2015 (C-12 Contract). Beginning in 2013, ASD's management team learned that the C-12 Contract was projected to lose money, putting their annual operating plan and incentive bonuses at risk. Hoping to address this shortfall, the ASD management team created a "Revenue Recovery Initiative" under which ASD employees identified work completed on the C-12 Contract, but not yet billed to the Army as of the end of 2013. The initiative identified approximately $50 million in unbilled work. Employees were then directed by a Vice-President of Finance to generate 69 invoices for that work, but were told not to send them to the Army.

Despite the fact that the invoices were not delivered to the Army in 2013, ASD recognized $17.9 million in revenue upon the generation of the invoices, which enabled ASD to "barely satisfy the target required in order to qualify for management incentive bonuses."

Consistent with GAAP, L3's revenue recognition policy set forth four standards that had to be met before revenue could be realized and earned: "(1) persuasive evidence of an arrangement exists; (2) delivery has occurred or services have been rendered; (3) the seller's price to the buyer is fixed or determinable; and (4) collectability is reasonably assured." Since the Army had not, as of the end of 2013, reviewed or agreed to pay the invoices, the SEC found the collectability of payment for those invoices was not reasonably assured, and therefore the revenue related to the C-12 Contract could not be recognized.

In addition to improperly recognizing revenue, L3 also failed to have adequate controls in place to detect and prevent the improper revenue recognition, which is a separate violation. Even though two employees filed internal ethics complaints about the C-12 Contract (one of which specifically mentioned the 69 invoices), "L3's internal ethics department" investigators "failed to identify

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the improper revenue recognition because they did not understand the billing process." When the undelivered invoices were later discovered, L3 commenced a second investigation utilizing outside advisors.

Based on the findings by the outside advisors, L3 was forced to issue a press release indicating it had improperly overstated sales; and ultimately amend its 2013 and 2014 SEC filings because it "identified material weaknesses in the company's ICFR (Internal Control Over Financial Reporting) . . . ." The amended filings specifically noted that "[c]ompany personnel did not perform reviews of certain employee concerns regarding violations of our accounting policies and ICFR in a sufficient and effective manner."

As a result of the accounting and internal control failures, the SEC found L3 in violation of §13(b)(2)(A) and §13(b)(2)(B). L3 settled the action, agreeing to pay $1.6 million in penalties.

Lessons All Government Contractors Should Take From the L3 Settlement

The SEC report is a cautionary tale for publicly traded government contractors, and highlights yet another potential regulatory and enforcement risk:

Having an ethics hotline is no defense if the subsequent investigation fails. All government contractors, regardless of public company status, must have sufficiently trained employees conducting internal investigations. As the Order notes, L3 had an ethics hotline into which a complaint was filed about the bogus invoices, but the initial investigation missed the issue completely. Using experienced in-house investigators is a first step to confront internal allegations of fraud but, in the long run where accounting or fraud issues arise, having experienced outside advisors conduct the investigation may prove to be more effective and efficient. Especially where sophisticated allegations may be at issue, in-house resources should recognize when they need to augment their expertise.

Serious remedial actions matter as a mitigating factor. The SEC's acceptance of L3's offer of settlement was based on the "extensive remedial acts promptly undertaken by [L3], which included an internal investigation, terminating a number of employees associated with the conduct in question, and self-reporting the matter to the Commission; and the cooperation afforded the Commission staff." Whether to self-report to the Government and how to remediate are some of the most critical decisions made in any internal investigation because they are factors both the Department of Justice (DOJ) and SEC consider when making charging and penalty determinations. The Order confirms that companies may receive valuable credit for making hard decisions about how to respond to wrongdoing.

Consider whistleblower risks and protections. Publically held government contractors need to be aware of the SEC's Dodd-Frank whistleblower program. Since 2012, the program has paid $149 million in awards to 41 whistleblowers. When an internal complaint like the one in the L3 case arises, it is critical that those complaints be addressed quickly and correctly. Employees that first report internally have 120 days during which time they keep their place in line for reporting to the SEC and a possible whistleblower award. Addressing internal whistleblower concerns in that time period is critical to both discouraging outside reporting and getting ahead of SEC and DOJ investigations. While there is no indication that an SEC whistleblower was involved here, L3's failed initial internal investigation put the company at a greater risk of receiving an SEC or DOJ subpoena, enduring a much costlier enforcement investigation, and receiving no credit for self-reporting.

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Complimentary Seminar

PLEASE JOIN US FOR THIS CO-SPONSORED EVENT

Government Contractor Labor Law Compliance: Trends, Trials and the New Regulatory Environment

San Diego, March 8, 2017 • Los Angeles, March 9, 2017

PSC, BDO USA, LLP and Wiley Rein, LLP are hosting two complimentary CPE-qualified programs on Government Contractor Labor Law Compliance under the new administration -- **March 8** in **San Diego** and **March 9** in **Los Angeles**. Hear from a panel of industry experts, including the former head of the DOL Wage and Hour Government Contracts Enforcement Branch, as they discuss the latest issues, trends and anticipated changes.

► PANELISTS

Aaron Raddock, Government Contracting Director, BDO

Alan Chvotkin, Executive Vice President & Counsel, Professional Services Council

Eric Leonard, Partner, Wiley Rein

Tim Helm, former Director of DOL Wage and Hour Division's Government Contracts Enforcement Branch and current BDO Government Contracting Director

► MODERATED BY:

Craig Smith, Associate, Wiley Rein

Agenda

8:00 AM to 8:30 AM	Registration and Breakfast
8:30 AM to 11:00 AM	Panel Discussion

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responsibilities related to their final indirect rate proposals (often referred to by the misnomer, "incurred cost submission"). Frequently, the Government has taken the position that the prime contractor has the same responsibilities as the government contracting officer with respect to subcontractors' final indirect cost rate proposals, including the responsibility to monitor whether or not its subcontractors have, in fact, timely submitted them. Yet, as the ASBCA recently confirmed in *Lockheed Martin Integrated Sys., Inc.*, ASBCA Nos. 59508, 59509 (*LMIS*), there is no such requirement, either express or implicit, in the FAR.

The appeal in *LMIS* involved a government claim for the recovery of over $100 million in direct subcontract costs on the theory, "originated by an auditor," that LMIS breached its duty "to retain documentation showing it had caused its subcontractors to make incurred cost submissions and either audited those submissions or called on DCAA to audit those who refused to submit" them to LMIS and to "retain documentation substantiating its 2007 invoices for subcontract direct labor hours." DCAA claimed that "without proof of [the subcontractor] submissions or proof of requests for audit of any of the subcontractors we determined did not submit incurred cost submissions" it is unable to audit the costs, and without an audit, it is unable to determine whether the costs are allowable, reasonable, and allocable. Adopting this rationale, the contracting officer asserted a claim against LMIS to recover all of the subcontract costs on the ground that the alleged failure of LMIS to provide the demanded proof was a breach of LMIS' duty to manage its subcontractors entitling the Government to reimbursement.

After examining the Subcontracts clause at FAR 52.244-2, and the provisions of FAR Parts 42 and 44 relied upon by the Government as support for its allegation, the ASBCA concluded that no such duty exists. The Government conceded, and the ASBCA agreed, that FAR 42.202(e)(2), which provides generally that the "prime contractor is responsible for managing its subcontracts," is not a contract clause. But even if it had been incorporated into the contract, by its plain terms it does not require a prime contractor to maintain documents to substantiate that it had reviewed resumes and timesheets to ensure the subcontractors' compliance with contract terms, and certainly does not require the prime contractor to "maintain these kinds of substantiating records until DCAA is finished conducting incurred cost audits seven or so years after the costs were first billed and paid." Nor does the "Subcontracts" contract clause at FAR 52.244-2, which generally describes the circumstances in which a contractor is required to obtain the contracting officer's consent to subcontract and other requirements not relevant to the issue, "impose any express responsibility on the prime contractor to manage subcontracts after they are awarded."

In dismissing the Government's claim, the ASBCA noted that the Government did "not allege that LMIS did not adequately substantiate its billings during performance of the contract, or that the subcontract services were not provided to its satisfaction, or that the costs billed were not incurred by LMIS. Rather, it has gone forward with a claim for over $100,000,000 that is based on nothing more than a plainly invalid theory." Thus, notwithstanding a prime contractor's general responsibility for administration of its subcontracts, the ASBCA's decision affirms that prime contractors are not *de facto* government contracting officers responsible for all aspects of enforcing applicable federal regulations, such as the submission and audit of a subcontractor's indirect cost

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rate proposals pursuant to FAR 52.216-7. The "receipt [and] review of incurred cost submissions" are duties "reserved to DCAA or other cognizant audit agency . . . ."

Contracting officers are responsible for ensuring government claims are factually and legally supported. The ASBCA's decision in *LMIS* (discussed above) also serves as a cogent reminder that contracting officers—not auditors—are ultimately responsible for ensuring that any claims the Government decides to assert against a contractor must be adequately supported by facts and a valid legal theory. DCAA auditors, as other advisors to the contracting officer, are just that—advisors. While they serve an important function, they are not vested with the authority to decide whether the Government has a viable claim against a contractor. That decision rests with the contracting officer. A government claim, like any other, must be supported by facts and legal theories that, if true, would support a valid claim for relief. If an audit finding or recommendation does not provide adequate factual and/or legal grounds to assert a claim, as was the case in *LMIS*, contracting officers would be well served to either take additional steps to develop those grounds, or exercise their authority to not pursue it. This is an issue that arose not only in the *LMIS* case, where the claim was "originated by an auditor" even though it presented a "plainly invalid legal theory," but also in the ASBCA's recent decision in *J.F. Taylor, Inc.*, ASBCA Nos. 56105, 56322, where the Board rejected a government claim that was based solely on a "fatally flawed" DCAA methodology.

The Government's right to audit under the allowable cost and payment clause does not toll the Contract Disputes Act statute of limitations. In Sparton DeLeon Springs, LLC, ASBCA No. 60416 (Sparton), the ASBCA held that the Government's claim for direct labor costs was barred by the Contract Disputes Act's (CDA) six-year statute of limitations, and rejected the Government's argument that its right to audit under FAR 52.216-7 "provides more than six years after accrual to assert an overpayment claim as long as final payment has not been made[.]"

The Government asserted a claim in 2015 demanding repayment of direct labor costs that had been invoiced and paid by January 10, 2007. After the contracting officer settled the contractor's indirect rates for Fiscal Years 2006 and 2007 and received final vouchers for those years that included the direct costs at issue, the contracting officer observed that the costs had not been included in the contractor's Cumulative Allowable Cost Worksheets (CACW) included in the final indirect cost rate proposals. The contracting officer thereafter issued a final decision demanding repayment of the costs. Sparton moved for judgment on the pleadings for failure to state a claim for which relief can be granted, or, in the alternative, for summary judgment on the theory that the claim was time-barred under the CDA statute of limitations. The ASBCA granted Sparton's motion for summary judgment and, therefore, did not address Sparton's alternative argument.

The ASBCA found that the undisputed material facts of the case demonstrated there was no genuine dispute that (a) the Government knew or should have known of the costs as early as January 10, 2007, by when it had paid those costs pursuant to interim vouchers that included information related to the costs at issue, and (b) that the Government knew or should have known by January 29, 2008, that the contractor had not included the costs at issue in its indirect cost rate proposals because that is the date by when the proposals had been submitted (which did not include the costs in the CACWs). Thus, the ASBCA held that the Government's claim accrued no later than January 29, 2008, more than seven years before the Government asserted its claim. The ASBCA noted

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that, among other reasons, if, as the Government asserted, the costs were in fact "insufficiently supported"—the stated basis of the Government's claim—that was no less true in 2015 as it was in 2007 when the contractor "submitted vouchers for costs that allegedly lacked support for those costs." The ASBCA explained that if it was the case that the "interim vouchers lacked support such as certified time cards [as the Government alleged], the Government knew or should have known that no later than 10 January 2007, by when it paid those interim vouchers."

In so holding, the ASBCA rejected the Government's argument that its right to audit under the Allowable Cost and Payment Clause at FAR 52.216-7(g) limits the applicability or availability of the CDA's six-year statute of limitations in appeals from government overpayment claims. On January 27, 2017, the Government filed a Motion for Reconsideration and Request for Referral to the Senior Deciding Group. Wiley Rein attorneys Nicole J. Owren-Wiest and Gary Ward represent Sparton.

FAR 31.205-33 does not condition allowability of costs for professional and consultant services on the provision of "work product." Have you ever been pressed to provide copies of "work product," engagement letters, and other documentation—in addition to detailed invoices already provided that generally describe the nature of the work performed (legal/consulting services), the time spent (often in minutes), and the associated rates and fees (often by individual timekeeper)—as a condition to the allowability of costs for legal or other professional services under FAR 31.205-33? Notwithstanding the lack of such rigid requirements in the cost principle itself, even the DCAA Contract Audit Manual cautions auditors not to condition allowability on the provision of a specific set of documents. *See*, e.g., DCAM 7-2015(c) (2015); DCAA Cost Guidebook, Chapter 58 at 58-2 (noting that the "type of evidence satisfying the documentation requirements [of FAR 31.205-33] will vary significantly based on the type of consulting effort and from contractor to contractor" and that the auditor should be "looking for evidence [of what the consultant will be doing for the contractor, the time expended by the consultant and nature of services rendered, and what the consultant accomplished for the fees paid] and not a specific set of documents."). In *Technology Sys. Inc.*, ASBCA No. 59577, the ASBCA agreed.

Although a relatively minor aspect of the ASBCA's decision, the ASBCA confirmed that FAR 31.205-33 does not impose such a rigid requirement and that invoices alone may be adequate support. As the ASBCA explained, "the government labors under the false impression that the FAR requires a consultant to create 'work product' merely for the purposes of proving its costs," and noted that the Government's interpretation "does not account for the case in which such documents were never created by the consultant," or where, as in this case, "the invoices include the data the FAR defines as work product, such as persons visited and subjects discussed." The ASBCA concluded that "[a]s with most things, the proper amount of documentation and work product to be expected will largely depend on the scope of work performed, and we do not include that the FAR intended to impose 'make work' upon consultants that would only lead to higher costs to the contractor which would then be imposed upon the taxpayer." ■

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to 36 battalions, and growing the Army from 490,000 soldiers to 540,000.

- **Impose a federal hiring freeze.** In his first week in office, President Trump instituted a federal hiring freeze and instructed the Office of Personnel and Management (OPM) to recommend a long-term plan to reduce the size of the federal workforce. In the short-term, the hiring freeze will mean increased opportunities for service contractors. In the long-run, Trump's plan to reduce the federal workforce could lead to increased reliance on the private sector, particularly for commercial functions, and a removal of constraints on public-private competition.

- **Invest in infrastructure.** Trump has pledged to invest $1 trillion over 10 years on a variety of infrastructure projects. Trump has announced that he will develop a legislative package in his first 100 days that will focus on infrastructure investments, such as transportation, clean water, electricity grid upgrades, telecommunications, security infrastructure, and domestic infrastructure. Trump is also expected to use his executive authority to advance infrastructure goals by eliminating regulations and streamlining the administrative appeal process for infrastructure development. While there is bipartisan support for infrastructure investment—Senate Democrats recently unveiled their own $1 trillion infrastructure plan—there will likely be disagreement over how to pay for an infrastructure plan. A large infrastructure program would undeniably be a boon for government contractors, particularly those in the construction industry

- **Enhance border security.** Just days after taking office, President Trump followed through on his signature campaign promise by issuing an executive order calling for the construction of a wall along the U.S.-Mexico border. The executive order is scant on key details about the wall, such as how the construction will be funded, but it allows the Department of Homeland Security (DHS) to start planning for the project. Trump has also called for increasing the U.S. Customs and Border Protection (CBP) budget to enhance border security. One of his immigration-related executive orders calls for the hiring of 5,000 new border agents and 10,000 new immigration officials. Since CBP is currently struggling to fill its existing border patrol positions, and in light of the federal hiring freeze, at least in the short term it seems CBP will have no choice but to increase its reliance on contractors for border security.

- **Change trade rules.** Trump's rejection of U.S. trade deals could make it harder for foreign companies to bid on U.S. government work. Trump has already signed an executive order ending the United States' involvement in the Trans-Pacific Partnership (TPP), and has promised to take steps to begin renegotiating the North American Free Trade Agreement (NAFTA). This could have a significant impact: in FY2016, $13.6 billion of a total $441.2 billion in obligations were to foreign companies. Trump's "America first" policy could also lead to enhanced requirements on the use of American-made products, equipment, and raw materials.

If anything is certain at this point, it is that President Trump will be unpredictable and unafraid to challenge the conventional notions of how government should work. Government contractors should pay close attention to the actions of his administration, even in areas that do not directly implicate government contracting, to ensure that their interests are protected and that they can take advantage of procurement opportunities under the Trump administration. ■

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Better Debriefings, Fewer Protests, Better Proposals: OFPP Myth-Busting Provides Good Advice for All

By Craig Smith and Richard B. O'Keeffe, Jr.

Last month, the Office of Federal Procurement Policy (OFPP) issued a memorandum intended to help agencies improve their debriefings of federal contractors. It was the third in a series of "myth-busting" memos focusing on improved communications between agencies and industry, an ongoing effort facilitated by industry groups such as the Professional Services Council. The overall theme of the latest memo focuses on the benefits of more expansive debriefings with contractors, to both improve the quality of future proposals, and to quell the risk of bid protests filed in response to inadequate debriefings.

Woven throughout the memo is criticism of poor debriefing practices that many a contractor has experienced. Some debriefings can be downright confrontational, with the atmosphere more appropriate for the OK Corral than a collaborative business discussion. Other debriefings can be uninformative, with agency personnel treating their views of the contractor's proposal as state secrets. And virtually all debriefings spend too much time reading boilerplate slides.

OFPP's memo recognizes that neither contractors nor agencies benefit in these scenarios. OFPP identified eight "misconceptions" about debriefings, offered countervailing "facts," and encouraged agencies to consider adopting better practices in these areas. This article focuses on the "facts" and how contractors can avail themselves of the opportunities:

Debriefings provide business opportunity, not just fodder for protests. OFPP recognized that contractors often seek debriefings to understand the weaknesses in their proposals and to identify opportunities to improve in future competitions, not always to gather information for protests. OFPP also emphasized that contractors are less likely to protest when they understand how and why agencies reached their source-selection decisions. To maximize the future business benefits of thoughtful debriefings where the agency makes an effort to provide areas for improvement, contractors should have processes to record in real time, assess and then share lessons learned so that future capture efforts can benefit from these insights. To these ends, each debriefing team should include, if possible, a "designated note-taker" qualified and dedicated to documenting exchanges with the agency as they happen. Following the debriefing, the team should convene immediately to confirm recollections and take-aways from the meeting while still fresh.

Better debriefings lead to fewer protests. Speaking of protests, OFPP emphasized that debriefings do not lead inevitably to protests. To the contrary, OFPP confirmed what has largely been our experience as outside counsel in dozens of debriefings—that contractors are *less* likely to protest if they receive a briefing that shows the agency evaluated proposals "with fairness, consistency, objectivity, and in accordance with evaluation criteria described in the solicitation." Offerors should seek out opportunities to ask probing questions about where their unsuccessful offer fell short, and attempt to gather as much objective information as an agency will share regarding the points of distinction or discrimination with the awardee. And, as part of its post mortem process, contractors should include time to "debrief the debrief": to objectively consider the agency's analysis, ideally with the help of objective advisors (either in-house business leaders or counsel) who were not part of the

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Better Debriefings, Fewer Protests, Better Proposals: OFPP Myth-Busting Provides Good Advice for All *continued from page 11*

capture effort and may be able to provide a useful sounding board.

Preparation improves debriefings. OFPP explained that agencies can prepare organized and orderly debriefings, even if they don't know every contractor question in advance. OFPP explained that contractors generally have the same motivations for debriefings (ensuring fairness and preparing for the next competition), such that preparation generally involves the same categories of information. OFPP also encouraged agencies to have technical and program personnel attend the debriefing—presumably to offer more nuanced information as needed. Contractors should be prepared to reciprocate, by preparing for the debriefing and ensuring competent personnel, such as technical and cost proposal leads, participate. Contractors should consult with executives and in-house or outside counsel early to identify the best questions for both general competition issues and specific areas of attention, focus, and concern, as well as to best understand the strategic importance of the particular award and the overall client.

FSS and Simplified Acquisitions. OFPP encouraged agencies to offer more than the minimal debriefing required for acquisitions under the Federal Supply Schedules or simplified acquisition procedures. To be sure, OFPP wrote, the FAR requires only limited information in these situations (*see* FAR 8.405-2(d) and 13.106-3(d)). But the limited debriefing requirements do "not mean that an offeror can more easily infer the reason for non-selection." For these awards, contractors should therefore seek as much information as possible. When an agency offers only limited information, contractors should consider asking for more and sharing their genuine desire to learn where their proposals missed the agency's needs. Of course, that can be a fine line in the event that the debriefing turns up information that the contractor determines to warrant a protest.

Role of Attorneys. OFPP debunked the myth that when a contractor brings an attorney to the debriefing, it means that the offeror will protest. OFPP indicated that contractors have varied reasons for an attorney to attend, so agencies should not limit information shared during the debriefing just because counsel is present. On the other side of the coin, contractors should consider in advance how their attorneys will participate during a debriefing, and the potential chilling effect that having an attorney attend could have on the amount of information disclosed and the tone of the interaction. Experience with the procuring agency's personnel may provide insight into the best role for in-house/outside counsel, whether as a lead, active participant, or silent observer.

More expansive debriefing approach. OFPP encouraged agencies to provide more than just the adjectival ratings and other information needed to satisfy the FAR. Ultimately, OFPP explained, the point of the debriefing is to help contractors identify how they can improve their proposals for future procurements. OFPP did note the limits on what can be shared during debriefings. For example, agencies cannot provide page-by-page analyses of proposals. But agencies *can* offer a robust discussion that treats contractors as ongoing business partners intent on proposing a more responsive solution in the next procurement. To encourage such a presentation, questions should be framed (where possible) in a way that emphasizes the desire to learn, and avoids any implied critique of agency actions.

Awardee debriefings. OFPP highlighted the value in debriefing the winning offeror(s). Awardee debriefings are perhaps the hidden gems of the federal procurement system. Even though a contractor may have won a particular award, often the contractor's proposal still had room for improvement—and thus there is information that can be applied

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Better Debriefings, Fewer Protests, Better Proposals: OFPP Myth-Busting Provides Good Advice for All *continued from page 13*

to future proposals for these contractors, too. Contractors celebrating proposal wins should be wise to request these learning opportunities and take as many lessons as possible.

Constraints of written debriefings. OFPP discouraged agencies from offering only written debriefings. Although such debriefings are permissible, OFPP acknowledged, they don't lend to the same "open, flexible space" for agency and contractor personnel to "communicate in a productive manner and foster a positive rapport." OFPP wrote that if in-person debriefings are not feasible, agencies *can* offer live debriefings by phone or videoconferencing. Contractors should keep these considerations in mind. Even when agencies provide written debriefings, contractors can request live follow-up sessions, explaining that they want to better understand how their proposals can improve. But keep in mind that if the agency agrees, the initial written debriefing may still serve as the date triggering applicable protest deadlines.

Of course, the memo recognized that protests may be unavoidable even with the most transparent and informative of debriefings. But what OFPP's memo emphasizes is that both the Government and industry will benefit over the long term if agencies treat these sessions as cooperative efforts instead of negotiations with the enemy.

This memo also should remind contractors that debriefings do (or at least should) offer valuable information about the immediate procurement and for use in future competitions. Although issued in the final weeks of the Obama administration, nothing yet suggests that this memo's guidance will not have staying power in the Trump administration. The memo focuses on nuts-and-bolts communications issues, offering little likely to generate controversy or significant disagreement on Capitol Hill or at the White House. There's no recommendation to provide debriefings via Twitter, for example (e.g., "#bestvalue. You. Lose.").

Finally, although this memo encourages better communication from agencies, contractors should remain vigilant in protecting their interests and meeting all deadlines when the circumstances show protests to be appropriate considerations. Because even the friendliest and most collaborative of agencies won't hesitate to seek dismissal of an untimely protest. ■

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Got Grants? Public and Private Sector Federal Grant Recipients Not Immune to False Claims Act Liability

By Kendra P. Norwood and Dylan Hix

As Wiley Rein continues to cover in depth, recipients of federal grants are increasingly facing investigations and lawsuits under the federal False Claims Act (FCA), 31 U.S.C. §§ 3729 – 3733. A range of entities—including public and private research universities, private companies, and even municipalities—have recently been targeted with FCA claims alleging violations in connection with obtaining or performing federal grants. With the United States Department of Justice (DOJ) and agency Inspectors General using the FCA's heavy hammer to enforce compliance with terms and conditions of federal grants, grantees should ensure that their training and internal controls are strong enough to deter and address any concerns about potential FCA violations. This article addresses the FCA in the context of two recent FCA cases against federal grantees, and provides practical tips for improving compliance and avoiding FCA exposure.

The FCA's Hammer: Potential Damages Equaling *Triple all Grant Funding*

The FCA is the primary tool for combatting fraud against the federal government. In FY 2016, DOJ recovered over $4.7 billion under the statute. The FCA prohibits a wide range of false and fraudulent representations that lead to improper receipt or retention of federal money. Courts have taken a broad view of what constitutes a "claim" and what it means for a claim to be "false." They have held that submissions to the Government which merely seek payment constitute "claims," even absent evidence that the Government was formally billed in connection with the submission. They have also held that the FCA prohibits not only claims for payment that are factually false, but also those that are "legally false" in that the presenter, either expressly or impliedly represents false compliance with an obligation on which payment is conditioned. For this reason, FCA liability can stem from noncompliance with a host of contractual and regulatory provisions, and may not require conduct that approaches traditional notions of fraud. Moreover, the FCA implicates not only entities that receive federal money, but also those that do business with federal contractors and grantees; notably, downstream recipients of federal funds have recently been targeted with FCA suits where they submit false claims to a grantee or cause the grantee to submit false claims.

FCA exposure can be crippling. The statute provides for treble damages—triple the Government's loss—plus a penalty of up to $21,563 for each false claim. Courts have generally taken a broad view of the Government's "loss" in FCA cases, creating the potential for staggering financial liability that may bear little relation to the Government's actual loss. For example, in cases where the Government receives primarily "intangible" benefits rather than goods or services—which may frequently be the case under grant programs—the Government can seek as damages triple *the entire amount of the grant or contract funding*, in addition to penalties for each alleged false statement submission. And because the statute incentivizes whistleblowers to bring forward FCA claims, permitting private citizens and companies with nonpublic information about FCA violations to bring a case on behalf of the Government and receive between 15 and 30 percent of the Government's recovery, insiders are effectively deputized to root out perceived fraud or to make difficult allegations for settlement purposes.

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Got Grants? Public and Private Sector Federal Grant Recipients Not Immune to False Claims Act Liability *continued from page 15*

Recent FCA Cases against Federal Grant Recipients

Recent FCA lawsuits and settlements announced in the past six months give a glimpse of the variety of entities and factual circumstances that are implicated by the FCA. Research universities, in particular, have been targeted. For instance, in September 2016, a former employee of Duke University's pulmonary division filed a whistleblower suit alleging that the University and former colleagues falsified data in research funded by the National Institutes of Health (NIH) and the Environmental Protection Agency. The complaint alleged that the defendants ignored red flags concerning the validity of the research and withheld knowledge of potential fraud in applying for further grants. Because the whistleblower alleges that the research funds were "ill-gotten," in that the defendants procured them through fraudulent representations in grant applications and other submissions, he sought damages based on more than $200 million in total grant funding, trebled, plus penalties.

Private companies that receive federal grants can also be FCA targets. In July 2016, two medical device companies and their owner faced a $4.5 million judgment for purported false statements in applications for NIH grants worth millions of dollars over eight years, along with false statements in grant reports concerning compliance with requirements on how the grant funds could be spent. In announcing the judgment, DOJ emphasized the Government's commitment to prosecuting FCA violations, including by grant recipients, stating that the U.S. Attorney's Office "will continue to vigorously pursue fraud against the Government, and will work to ensure that companies and their leaders who receive taxpayer dollars are truthful and accurate in their dealings with federal agencies like NIH."

Practical Tips for Monitoring Grant Compliance and Avoiding FCA Exposure

The Government's increased scrutiny of compliance with federal grant requirements demands that grant recipients or entities that do business with grantees have robust controls for monitoring expenditures and ensuring compliance with all grant conditions. Employees should be thoroughly trained on the risks and importance of compliance. Grantees should consider conducting regular audits in order to get ahead of any issues. Given how the FCA incentivizes whistleblowers, grantees should have fulsome procedures for internal reporting, including a hotline, and fully investigating concerns that emerge. Training and compliance can make the difference in preventing noncompliance, while fulsome investigations and remedial measures can help prevent compliance problems from turning into potential FCA allegations. ■

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The False Claims Act: Leveling the Playing Field

By Roderick L. Thomas and Brandon J. Moss

In December, the U.S. Department of Justice (DOJ) announced that it recovered over $4.7 billion from False Claims Act (FCA) cases in 2016. This was DOJ's third-highest annual revenue from FCA recoveries, and pushed the seven-year-average recovery to just over $4 billion. More and more often, however, those recoveries reflect settlements from likely blameless companies who make a business decision to choose settlement as a way to avoid the high costs, potential treble damages, and collateral consequences flowing from defending the allegations.

While it is not hard to argue that actual government "waste, fraud and abuse" must be addressed, too often that policy objective is invoked to justify the imbalance in FCA litigation that strongly favors the Government and relators. Yet, the Government effectively acts as a *private* civil litigant in this space—frequently threatening treble damages and expensive discovery to extract settlements from companies who did not knowingly submit false claims for payment. This tilts the settlement calculus for defendants, who must consider not only questions of right or wrong, guilt or innocence, but also the significant cost of trying to win when many cards in the deck are already stacked against the defendant.

This article addresses potential FCA reform from the perspective of FCA defense counsel versed in the imbalance built into the FCA that creates this uneven playing field. It focuses on three overarching areas for improvement: discovery practices, bars to recovery, and damage relief.

Problems in FCA Discovery

- **Extended CID/Investigative Process:** Using Civil Investigative Demands (CID), which allow the Government to collect information from potential defendants through documents, testimony, and interrogatories, the Government can obtain all of the information it needs to build a case against a contractor before traditional discovery commences. Not only can responding to CIDs be costly, without a reciprocal exchange of information from the Government, it can be difficult for contractors to make their case as to why the matter should not move forward. This is compounded by the disparity between the lengthy period in which a relator has to put together a case and convince the Government to intervene (including the Government's investigation) and the comparatively short period a contractor has to convince the Government not to intervene.
- **Risk of Spoliation:** Given the long statute of limitations and slow pace at which the Government typically investigates FCA allegations while a complaint remains under seal, it becomes less and less likely that key government documents—often located at the agency with which the contractor was dealing—will be available when discovery commences. Indeed, presently, the Government typically does not issue preservation notices to affected agencies until after it decides to intervene, rather than while the investigation is ongoing, which increases the spoliation risk for relevant information.
- **Discovery Against the Government:** Once discovery begins, defendants must frequently jump through unnecessary hoops to obtain the evidence they need to defend themselves. Especially in cases where the Government declines to intervene, *Touhy* requests and Rule 45 subpoenas are burdensome and costly discovery tools for the defense.

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Potential Discovery Reforms

- ***"Brady"*-like Disclosure Obligations:** Given the punitive element of FCA damages and penalties, which the U.S. Supreme Court has recognized, the Government should be subject to the same "*Brady*" discovery obligations that it has in criminal cases, including obligations to make early disclosure of evidence that tends to negate intent, bears favorably on other elements of liability, or mitigates or eliminates damages. For example, in the Supreme Court's ruling in *United Health Services v. U.S. ex rel. Escobar*, the Court expressly recognized that materiality may be negated by evidence that the Government would have paid (or did pay) the invoices knowing certain requirements were not met. That evidence often resides solely with the Government, which unilaterally can withhold it before discovery (assuming they even preserve it). There are other examples where the Government should have an affirmative burden to disclose – for example, information supporting a breach of the seal, public disclosure, earlier filed cases still under seal, among others. Especially if there is a *qui tam* complaint under seal, the Government should have an obligation to disclose such material to the defendant before making its intervention decision.

- **Immediate Duty to Preserve:** When DOJ is notified of a *qui tam* action, it should be required to issue a preservation notice to all government departments and agencies that could have materials relevant to the proceeding. That notice would require the preservation of all potentially relevant materials, and trigger the automatic duplication and preservation of all relevant government employee email accounts. In the event such a preservation notice is not issued to relevant persons and agencies, the defendant should have the opportunity to pursue adverse inferences or jury instructions regarding relevant information the Government fails to preserve.

- **Lower the Threshold for Obtaining Key Evidence (and in a Timely Manner):** The Government should consider streamlining processes to facilitate early exchanges of information and to provide companies facing potential "whistleblower" FCA allegations an opportunity to investigate and self-report:

  - *Allow the defense access to sealed materials:* While there may be policy arguments favoring maintaining the *ex parte* seal period in whistleblower-driven actions, reform is needed to ensure that defendants eventually have access to key information before the case gets too far down the road. Specifically, it makes sense for the *ex parte* seal to expire at the end of the sealing period enumerated in the statute—60 days. This means that, while the Government could request extensions to its intervention deadline, the defendants would have access to the *qui tam* complaint and any other materials the relator chooses to share with the Government, including the required written disclosure of all material evidence and information the relator possesses regarding the allegation, during the extension period. Far from obstructing the Government's investigation, our experience shows that companies are typically able to facilitate the investigation if they have a meaningful opportunity to address the underlying *qui tam* allegations.

  - *Require a relator to notify the company of his or her allegation at least 180 days before filing a qui tam complaint:* Pre-complaint notice of a potential FCA violation would enable a contractor to conduct its own internal investigation and determine whether a voluntary disclosure to the Government is warranted. While such an approach was considered and rejected by the U.S.

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Securities and Exchange Commission when designing its whistleblower program, the process could streamline the Government's ultimate objective of preventing fraud, waste and abuse and facilitate the resolution of potential problems in a cooperative setting, rather than an adversarial one.

- *Recognize that the Government is the real party in interest in declined qui tam actions:* Because the Government is ultimately the real party in interest, as well as the entity most likely to have highly-relevant information subject to discovery, the FCA's discovery process for "third party" discovery against the Government should be streamlined in cases where the Government declines to intervene but the relator prosecutes the case on the Government's behalf. This would prevent defendants from pursuing time consuming and often-litigated *Touhy* requests to obtain the materials necessary for a defense. It could also compel the Government to seek dismissal of frivolous *qui tam* complaints.

The Need for Higher Bars to Recovery

- *Disclosures Can Lead to Qui Tam Actions:* As it stands, a relator who files suit after a defendant has disclosed improper conduct to a relevant agency is entitled to proceed. To that end, voluntary disclosures of wrongdoing to agencies and contracting officers could spur *qui tam* actions by flagging improper conduct for opportunist employees, creating incentives for companies not to voluntarily disclose.
- *Low "Preponderance of the Evidence" Standard Counsels in Favor of Settlement:* Because the standard for civil liability is only preponderance of the evidence, defendants are wary of taking their chances in front of a jury, who may have an interest in bringing money into the Government fisc.

Potential Solutions for Improved Standards

- *Make Inspector General (IG) Disclosure a Bar to Future Qui Tam Actions:* Both to prevent unnecessary *qui tam* actions and to incentivize responsible contractor conduct, relator complaints based on allegations substantively similar to prior IG disclosures by the company should be barred, much like the current public disclosure bar.
- *Adopt a "Clear and Convincing Evidence" Standard:* Again, given the possibility of treble damages, a non-strictly disinterested jury, the fact that the Supreme Court has labeled the FCA a punitive statute, and the fuzziness surrounding the "knowledge" standard all mitigate in favor of adopting a higher burden of proof to prevent defendants from feeling that they must settle meritless strike suits.

Challenges with FCA Damages

- *Well-Meaning Contractors Can Be Liable Despite Best Efforts at Compliance:* Despite having well-designed compliance programs, it is almost impossible for a contractor, especially large organizations, to prevent every mistake or detect every bad actor. As such, these truly well-intentioned contractors may find themselves facing expensive litigation (or costly settlements) in an attempt to avoid massive damages.
- *Contractors Can Lose Everything, Despite the Government Receiving the Benefit of the Bargain:* In certain situations, contractors face damages amounting to three times the value of the contract even though the goods or services they provided the Government are valuable. Contractors also face statutory penalties over and above actual damages. Such

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steep penalties mitigate in favor of settling FCA actions—even when such actions are meritless.

- *Double Damages Provision in Statue is Toothless:* Presently, the FCA has a provision that caps damages upon a court finding that the person committing the violation furnished government officials responsible for investigating false claims violations with all information known to that person about the violation within 30 days of the defendant first obtaining the information, if at the time of the disclosure, a case had not yet been filed and the violator was not aware of an ongoing investigation. *See* 31 U.S.C. § 3729. However, this provision is widely viewed by the defense bar to be too restrictive and incongruent with the complexities of government contracting and sophisticated internal investigations.

Potential Alternative Damages Approaches

- *Compliance Program Safe Harbor:* To protect well-meaning contractors from steep liability associated with bad actors, a safe harbor should be established for those with pre-cleared compliance programs. If a contractor has its compliance program certified by a government or third-party body charged with analyzing and certifying compliance programs, damages should not exceed the Government's actual loss plus statutory penalties. This could easily be accompanied by a program akin to the DOJ's "Pilot Program" in the Foreign Corrupt Practices Act (FCPA) space. There, companies receive significant credit for voluntary disclosure and cooperating with a subsequent investigation.
- *Only Actual Damages Should be Trebled:* When assessing damages, only the net loss suffered by the Government should be trebled. This limitation on trebling meets the purpose of the law, discouraging fraud, prevents inappropriate government windfall, and counsels against the settlement of bogus strike suits.
- *Redefine Application of Statutory Penalties:* Statutory penalties could apply only when there was no loss to the Government. Similarly, the statutory penalties could be used as a cap that is both equal to the sum sought in the claim plus the costs the Government incurred reviewing the claim.
- *Clarify Double-Damages Limitation:* To be meaningful, Congress should clarify what is required and allow a more meaningful period for potential violators to perform a meaningful internal investigation, much as occurs in the FCPA space.

Fraud against the Government certainly is unwanted. However, that moral imperative should not justify an unbalanced discovery and litigation standard that stacks the deck against defendants and impairs their ability to fully and fairly defend FCA allegations. These suggested reforms highlight some of the basic areas in which reform would help streamline the FCA discovery process and help mitigate some of the undue burden that too often forces contractors to prioritize settlement, even when they have not committed any wrongdoing. ■

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FCPA Year In Review

2016 was an eventful year for Foreign Corrupt Practices Act (FCPA) enforcement, with over $2 billion in corporate fines and multiple individual prosecutions. 2016, moreover, was followed by a record-breaking January 2017, as the Obama Administration drew to a close.

In April 2016, the U.S. Department of Justice (DOJ) introduced a one-year FCPA pilot program. Under the program, which is designed to encourage self-reporting, cooperation (including identifying individuals responsible for alleged misconduct), and remediation, a company that undertakes such measures may be eligible for declination or up to a 50% reduction off the bottom of the applicable Sentencing Guidelines fine range. Even if entitled to such credit, a company that is determined to have violated the FCPA is required to disgorge the gains from its misconduct.

International anti-corruption cooperation also deepened, with several cross-border enforcement actions resulting in hundreds of millions and even billions of dollars in combined penalties.

The DOJ and the U.S. Securities Exchange Commission (SEC) continued to advance aggressive enforcement stances, for example, holding parent companies liable for the actions of their subsidiaries on an agency theory despite the absence of an allegation that the parent knew of, or participated in, the allegedly improper payments.

We believe that these annual updates are useful snapshots for compliance professionals and practitioners. But we would like to add a caution. A great deal of the FCPA commentary focuses on metrics and the ebbs and flows of enforcement activity based on the latest 6- or 12-month period. Although these data are informative (at least for FCPA junkies), they should not mask the more fundamental points that the last 15 years or so have demonstrated. The FCPA is, and likely will remain, an enforcement priority. U.S. officials continue to interpret the statute and their jurisdiction expansively. And the consequences of non-compliance — financial and otherwise — can be enormous.

At this stage, for U.S. companies doing business abroad and for international companies potentially subject to U.S. jurisdiction, anti-bribery measures should constitute a critical component of compliance policies, procedures, and practices and of corporate culture more generally.

The relevant question should be how to balance the potential exposure and the sometimes substantial resources required for compliance, i.e., how to assess risk appropriately, how to direct time and energy at those activities that present the greatest concern, and when to use outside counsel or forensic accountants, which provide important expertise and an independent voice, but can be costly.

Despite some commentary to the contrary, we believe it would be misguided to conclude that the incoming Trump Administration changes that calculus, at least at this stage. First, it is too soon to determine exactly what the Trump Administration's priorities will be. Second, FCPA violations and serious investigations have long life-spans, creating exposure for a significantly greater period than four years. Thus, although the advent of the new administration clearly has relevance to FCPA enforcement, it would be short-sighted to curtail anti-corruption compliance measures dramatically.

Read more here: http://bit.ly/2koY2r3.

Smart Cities: A Look at Risks and Opportunities for Technology Companies

By Matthew J. Gardner, George E. Petel, and Megan L. Brown

Smart Cities transformation is one of the next major municipal infrastructure investments. The federal government's grant investments in Smart Cities technologies will create dynamic opportunities for both emerging and established technology companies. But companies need to enter this market with their eyes open, and consider the unique compliance obligations that come with federal grant funding. This article explores just a few of the unique privacy concerns and contract-related compliance issues that companies developing and deploying Smart Cities technologies could face, which may be foreign to commercial technology companies who do not have experience performing work under public contracts or grants, and which highlight the need for a multi-disciplinary approach and counsel.

What is a Smart City?

A "Smart City" employs information and communications technology to enhance its livability, workability, and sustainability. Smart Cities is a facet of the "Internet of Things," a ubiquitous interconnected network of computing devices, software, smart sensors, and "big data" analytics. According to the Smart Cities Council, "in simplest terms, there are three parts to that job: collecting, communicating and crunching." First, interconnected devices and sensors are used to collect information. Next, that information is communicated in real time using wired or wireless networks. Third, the Smart City "crunches" or analyzes that data to understand what's happening now and what's likely to happen next.

Examples of Smart City solutions are already being proposed. Smart meters can measure utilities usage for planning and maintenance purposes. Smart traffic sensors can report road conditions and traffic congestion to direct traffic control resources, snow plowing, and first responders where they are needed. Smart GPS gear can pinpoint the exact locations of the city's buses and develop metrics to optimize routes based on demand, or to enable greater tactical visibility for police and firefighting activities. In addition to these types of sensors, citizens' mobile devices can be used to collect data on population movements, positions, speeds, where people gather at different times of the day, and the environmental conditions around them. All of this data can be used to more readily target local challenges and improve city services.

In September 2015, the Obama Administration announced its "Smart Cities" initiative, including federal research grants for Smart Cities solutions to municipal problems. Federal agencies including the Departments of Transportation and Homeland Security have announced grant programs focused on Smart Cities. The federal effort is designed to promote research and development via collaborative "test beds." Meanwhile, state and local governments have begun exploring the possibilities of existing and emerging Smart Cities solutions. Although there has been a great deal of effort and excitement on the technical aspects of Smart Cities, including a National Institute of Standards and Technology (NIST) International Technical Working Group on IoT-Enabled Smart City Framework, little attention has been paid to the legal implications for both cities and solution-providers.

Companies Supporting Smart Cities May Confront Unique Privacy Issues

There are many unique issues a Smart City project will face. One is privacy. Collecting and analyzing vast amounts of data is at the heart of Smart Cities, and companies should be aware of the unique privacy issues and obligations that may be implicated. To

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understand these privacy concerns, Smart City providers can look to the experiences of technology companies, like Google, Apple, and Facebook, who have faced a host of privacy challenges over the past decade based on their collection and use of personal data through social media, email services, and smart phones. Privacy concerns exist—and may be amplified—in the context of Smart Cities. Cities and service providers may have access to, handle and manage a variety of data: some truly aggregated and de-identified, some personally-identifiable, and some in a gray area.

For example, many Smart City solutions rely on location monitoring. In order for a Smart City solution to direct you to the last free parking space near your doctor's office, for example, it will need to know where you are and where you are headed. While nothing prohibits the Government or any private individual from observing people in public, analysis of continuous location monitoring data over a longer period of time can reveal private patterns: where people live and work, who their friends are, what medical issues they face, or what their hobbies may be, for example. Courts and regulators like the Federal Trade Commission (FTC) have become increasingly sensitive to the privacy implications of continuous location monitoring technology that will be central to Smart City solutions. Current user consent models may be tested by novel and ubiquitous deployments that depend on location information and interact with devices and users.

Future Smart City models may push boundaries. Smart Cities are designed to facilitate communication in a given area by increasing connectivity between city government, devices, and people on the street. There could easily expand to include local businesses. For example, a future Smart City could detect a user in a particular area at a certain time (like the lunch hour) and send content to that user's smart phone about specials at the sandwich shop on the corner. Facilitating that communication may implicate certain privacy laws and the FTC's sensibilities.

Social media companies that have collected and used user data have often addressed these privacy concerns by obtaining the consent of their users at the same time users opt in to the application or service. Consent in a Smart City environment may not be as straightforward, however, since the environment will be more dynamic and a person walking down the street may not have any direct or solicited interaction with particular entities' websites or apps—be it traffic light operations assessing foot traffic, a parking lot operator alerting drivers to nearby spots, or a business that seeks to interact with nearby potential patrons. Creative thinking will be needed if a Smart City solution wants to obtain consent to enable interactive communications and the offering of services.

There are also privacy implications for how law enforcement will be able to access data collected by Smart Cities to solve crime and protect national security. Smart Cities may have the capability, for example, to use facial recognition software and location monitoring to track in real time a robbery suspect as he flees or to passively monitor people in a given area in order to look for fugitives. These sorts of scenarios are far from fanciful. But they raise hard questions that companies need to consider, and which current municipal and state managers may not be ready to address.

Who will "own" data collected in Smart City deployments? Will cities have the capability to set appropriate policies and expectations for contractors, vendors, and users? How will companies manage and store information they process and collect? How will they respond to law enforcement requests to collect this data? And what assurances will companies provide to the public about the

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safeguarding of their data? These questions are at the cutting edge of how we interact with our government in an era of increasingly powerful technology. Resolution may be driven by, or influence, contractual vehicles and compliance challenges.

Companies Using Federal Funds to Develop and Deploy Smart Cities Technologies Face Unique Compliance Risks

Government contracting at the federal, state, and local level involves competing in a regulated marketplace and creates compliance obligations and potential liabilities that generally do not exist in the commercial technology marketplace. The source of Smart Cities' funding—often federal grants administered by state and local governments, who in turn typically issue contracts using those funds—establishes regulatory and contractual obligations that will require companies to establish appropriate compliance mechanisms. These compliance programs should be tailored to the size of the company, the scope of the company's government business, and the specifics of the contractual or grant requirements.

Many state and local governments model their procurement processes on the federal marketplace, although there are nuances and distinctions among the states. Some state and local governments have highly developed procurement processes and policies, while others rely on generalized statutory authority, internal agency guidelines, and the courts. Companies interested in selling Smart Cities technology and solutions must be aware of these processes and policies and how they may differ from one state or locality to the next. There will likely be significant differences between the business development and capture process in the state and local government market versus the commercial marketplace for technologies, which can include limits on customer communication and interaction; price justification and audits; unique intellectual property rules; and potential criminalization of business disputes. Contractors will also likely have to navigate socioeconomic requirements that require contractors to utilize small and historically disadvantaged companies to perform a material portion of the work; and, under some state and municipal rules, contractors may need to utilize local companies.

During performance, a contractor's costs may be subject to audit pursuant to guidelines in the Uniform Grant Guidance that governs federal grant funds. Such an audit can result in a recovery of costs by the Government if the contractor's costs are found to be unreasonable, unallowable, or insufficiently supported.

With regard to intellectual property, contractors must diligently protect their intellectual property rights in technical data and computer software, and this will be a unique concern in a technology-driven field like Smart Cities development. Under the federal rules, contractors must comply with stringent mandatory markings or risk losing some of those rights to the Government. Many states lack robust regulations or guidance in this area, and contractors need to protect themselves through careful contract negotiations, including diligent reviews of both solicitations and contract documents.

Lastly, and perhaps most importantly, Smart Cities contractors need to be aware of the threat of the criminalization of contract disputes with the Government. State and local governments across the county have adopted false claims act laws, many modeled off the federal Act, and have begun applying those laws to government procurement (traditionally states focused on the healthcare industry). Adopting the

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Smart Cities: A Primer on Risks and Opportunities for Technology Companies *continued from page 24*

federal government's increased use of the False Claims Act and False Statements Act to fight purported contractor fraud and collect large judgements for the Treasury, there is always the risk that business disputes arising from differing interpretations of contract requirements or contract negotiation tactics may generate either or both criminal and civil investigations and steep monetary penalties. Even if the outcome is ultimately favorable to the contractor, investigations are inherently negative and unpleasant and are often very costly to defend.

Conclusion

Providing Smart Cities solutions to governments can have many benefits. Special socio-economic preferences afford opportunities to new and small business contractors that do not exist in the commercial marketplace and the comfort of dealing with a generally reliable customer. But there also exist many potential pitfalls that do not generally exist in the commercial realm, including the Government's right to terminate the contract at its convenience and the possible criminalization of business disputes. Partnering with the Government in cutting edge, complex endeavors like Smart Cities will be exciting and challenging. It will present novel issues, such as the foregoing privacy and security challenges, some of which add layers to already-complex commercial relationships. In sum, while there are many promising opportunities in contracting with the Government, a company must do its homework to ensure that it knows, and complies with, the myriad unique rules that apply in this environment. ■

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Warning for Public Company Defense Contractors: DCAA is Not the Only Accountant Examining Your Books *continued from page 6*

Investigations must be structured to preserve cooperation opportunities. Finally, the SEC's press release notes that the investigation is continuing, which suggests there could be further action against the involved individuals. In an era when both the DOJ and SEC are focused on charging individuals, entities have an incentive to identify bad actors to the Government in order to receive cooperation credit. Now more than ever, internal investigations need to be properly structured to present the best possible case to the Government and to preserve the ability to obtain cooperation credit, as L3 was able to receive here. ■

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SPEECHES & PUBLICATIONS

Free Lunch Often Tastes Terrible: Dealing With Inappropriate Use of Firm Fixed-Price Contracts
Richard B. O'Keeffe, Jr.
Bloomberg BNA Federal Contracts Report
December 20, 2016

What Major Actual and Proposed Legislative Changes Mean for Complying Firms' Positions
Roderick L. Thomas, Speaker
ACI's 4th Advanced Forum on False Claims & Qui Tam Enforcement
January 31, 2017 | New York, NY

Litigating CDA Claims Involving Protected, Proprietary or Sensitive Information
John R. Prairie, Panelist
ABA Section of Public Contract, Contract Claims and Disputes Resolution Committee
February 8, 2017 | Washington, DC

SBA Expands Mentor-Protégé Program to All Small Businesses
George E. Petel, Moderator; John R. Prairie, Panelist
ABA Section of Public Contract Law Webinar
February 9, 2017 | Online

Statutes & Regulations
Rand L. Allen, Speaker
West's Government Contracts Year in Review Conference
February 15, 2017 | Washington, DC

Government Contracts Forum: International Compliance Challenges in 2017 – What Government Contractors Need to Know
Ralph J. Caccia and John R. Shane, Speakers
Association of Corporate Counsel
February 28, 2017 | McLean, VA

Bad Things Happen to Good Employees: Sound Planning is the Best Way to Mitigate the Risks of Unexpected Key Personnel Attrition
Tara L. Ward and Richard B. O'Keeffe, Jr.
Bloomberg BNA Federal Contracts Report
February 2017

Government Contractors Deal with the Uncertain Shadow of *Universal Health Services, Inc. v. United States ex rel. Escobar*
Paul F. Khoury, Ralph J. Caccia, and Shane B. Kelly
Procurement Lawyer
Winter 2017

Government Contractor Labor Law Compliance: Trends, Trials and the New Regulatory Environment
Eric W. Leonard, Panelist; Craig Smith, Moderator
BDO USA, LLP, Wiley Rein, LLP, and PSC
March 8, 2017 | San Diego, CA
March 9, 2017 | Los Angeles, CA

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Wiley Rein Named Government Contracts 'Practice Group of the Year' by Law360 for Third Consecutive Year *continued from page 1*

"We're really problem solvers," Mr. Khoury said. "We understand [our clients'] business and … try to put together the team that is going to be able to get the best results. We're often—and we're very happy about this—approached by clients not only with the standard kinds of cases that they'll go to others for, but also unusual cases that require thinking differently and maybe putting different expertise on it."

Among the cases featured is Wiley Rein's defense of a $107 million small business set-aside contract awarded to TSymmetry Inc., according to *Law360*. The firm successfully defended the company against multiple bid protests in the U.S. Government Accountability Office and the U.S. Court of Federal Claims, as well as the U.S. Small Business Administration. The case "was a kind of multiheaded monster, a perfect example of the different ways a contract, particularly a small business contract, can be challenged," said Government Contracts partner John R. Prairie.

Wiley Rein's Government Contracts Team was selected by a panel of *Law360* editors who reviewed more than 600 submissions across numerous practice areas from around the nation. In addition to Government Contracts, the firm received honors for its International Trade Practice this year. ■

To read the full article, please visit *Law360*: https://www.law360.com/articles/890325/govt-contracts-group-of-the-year-wiley-rein.

SPEECHES & PUBLICATIONS *CONTINUED*

23rd Annual Federal Procurement Institute—Riding the Next Wave: Bid Protests
Brian Walsh, Moderator
American Bar Association Public Contract Law Section
March 17, 2017 | Annapolis, MD

Orlando Government Contracts Week—Grants Accounting & Compliance
Brian Walsh and Kendra P. Norwood, Panelists
Federal Publications Seminars
March 22, 2017

A Data-Driven Look at the GAO Protest System
Paul F. Khoury, Brian Walsh, and Gary S. Ward
Pratt's Government Contracting Law Report Vol. 3 No. 3
March 2017

FAR Council Issues Interim Rule Implementing Paid Sick Leave Executive Order
Eric W. Leonard, Craig Smith, and Nina Rustgi
Pratt's Government Contracting Law Report Vol. 3 No. 3
March 2017

Current Enforcement Environment for Federal Grantees
John R. Prairie and Brian Walsh
NGMA's 2017 Annual Grants Training
April 20, 2017

Forum on Government Procurement Law
Rand L. Allen
May 10 -12, 2017 | Leesburg, VA

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