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Section 809 Panel Recommends Major Changes to Department of Defense Acquisitions

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On January 15, 2019, the Section 809 Panel (the Panel) released the two-part Volume Three of its Final Report on streamlining acquisition by the Department of Defense (DOD or the Department). Volume Three contains 58 new recommendations for "reduc[ing] the burden and increase[ing] the functioning" of the DOD acquisition system. Several of these recommendations would drastically change the way the DOD acquires products and services, notably Recommendation 35, which calls for replacing commercial buying and the existing simplified acquisition procedures with a "Dynamic Marketplace." The Panel also makes several recommendations aimed at streamlining compliance requirements for DOD contractors, particularly for commercial suppliers and lower-dollar procurements.

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Section 809 Panel Recommends Bid Protest Reforms, Restricting Protests in Some Areas While Encouraging Transparency in Others

Kara M. Sacilotto and Lindy Bathurst

On January 15, 2019, the Section 809 Panel (the Panel) released Volume Three of its Final Report, featuring 58 new recommendations aimed at streamlining the Department of Defense's (DOD or the Department) acquisition system. Several recommendations focused on streamlining the bid protest process. Although some recommendations would increase transparency, others would establish limits on protests that may curtail contractors' protest rights. The Panel's recommendations span from limiting the types of protest actions contractors may bring to requiring enhanced debriefings for disappointed offerors. Contractors and trade associations concerned about the potential breadth and impact of these recommendations should have a plan for voicing their views to Congress, as each Section 809 panel recommendation is accompanied by draft legislation to implement it.

Restricting Protests for Procurements of "Readily Available" Items

One of the most drastic changes the Panel recommended relates to how the Department approaches commercial buying. The Panel's Marketplace Framework, Recommendation 35, upends the current commercial items procurement structure by streamlining procedures for buying products that are "readily available." The putative threshold for such purchases is $15 million, but the Panel anticipates that this threshold would be flexible, allowing the Department internally to approve the use of readily-available item procedures on procurements with a higher dollar value than $15 million.

The Panel also recommends extending streamlined procedures to bid protests in the context of readily-available product procurements. The new scheme proposes that commercial item protests be limited to agency-level protests only. This means protesters may protest readily-available procurements only at DOD and cannot take their grievances to the Government Accountability Office (GAO) or the Court of Federal Claims (COFC). In addition, although the contracting officer may issue "a short award decision document when a decision was based on factors other than low price," protesters would be allowed to protest the award under two grounds only: (1) "the product or service that was procured using the readily available procedures was not readily available" or (2) "the contracting officer did not conduct market research consistent with these procedures." Thus, a disappointed offeror apparently could not protest the reasonableness of a decision based on factors other than low price, except if that protest related to the two aforementioned grounds.

These recommendations, if adopted, would obviously limit a contractor's right to file protests relating to readily-available items and place a premium on monitoring contract award decisions. Readily-available item procurements under the $15 million threshold would not require public advertising. Rather, the DOD contracting official, like any private buyer, would conduct market research (e.g. conduct an internet search), select an awardee, and post the conclusions and award online. The Panel's protest recommendations would thus eliminate any pre-award protests

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where DOD uses these "market research" procedures and would severely limit what a potential protester can challenge post-award.

For items that are "readily available with customization," the Panel proposes a hybrid protest process. For procurements in which the contracting officer publicly posts an RFP or RFQ, GAO and COFC would have jurisdiction over any pre-award or post-award protest. The process for "readily-available" procurements would apply when the contracting officer uses market-based competition, which he or she may use for "readily available with customization" procurements under the $15 million threshold. The post-award publication of the contract award, the market research documentation, and a redacted source selection decision document would be required any time a solicitation is not publicly posted. Presumably, protesters would be able to raise the two protest grounds discussed above. The Panel also states, however, that procurement actions that are not adequately documented will "draw scrutiny" from industry, public interest groups, and Congress, although it is unclear what action could be taken based on that scrutiny.

The Marketplace Framework is plainly a new concept intending to mimic the commercial marketplace. Being untested, it may be better to pump the breaks and not simultaneously change purchasing processes fundamentally *and* curtail the transparency and accountability of those new processes by drastically restricting, or in many cases eliminating, the protest process. If DOD wants contractors to use the Marketplace, contractors need to trust it. Likewise, with such significant taxpayer resources at stake, the public needs to have confidence in the system and the decisions rendered as well. Especially if DOD can internally increase the $15 million threshold, Congress may wish to include more meaningful transparency, accountability, and oversight into the system, certainly at the outset at a minimum.

Establishing a Bid Protest Purpose Statement

In Recommendation 66, the Panel recommends adopting a purpose statement for bid protests. The recommended statement defines the purpose of bid protests as a tool to "enhance confidence in the Department of Defense contracting process by providing a means . . . for [raising and resolving] violations of procurement statutes and regulations in a timely, transparent, and effective manner."

The Panel reasoned that it is difficult to measure the effectiveness of protests because Congress has never defined their purpose. After surveying key stakeholders and conducting research on the history and development of protests, the Panel found that most stakeholders viewed the protest process as a compliance check, or tool to ensure the Government followed applicable laws and regulations and protect taxpayer money. Other stakeholders also raised concerns over protecting the rights of disappointed bidders and ensuring "the procurement process remains effective and efficient."

Although defining an official purpose for protests may seem like an innocuous recommendation, the Panel states the reason for creating this purpose statement is to "to help guide adjudicative bodies in resolving protests consistent with said purpose." But GAO and the COFC have been deciding protests for decades against a well-established and consistent standard of review. Although some Government stakeholders

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may disagree with some of the current bid protest laws and processes, the Panel does not identify any disagreement or problem with the standards that have been in place for years. The Panel's recommendation also seems to exclude a protest that the Agency's decision was not consistent with the terms of the underlying solicitation or was otherwise arbitrary and capricious. These are valid grounds for bringing a protest and the concept that agency action should not be arbitrary and capricious is well-ingrained in our legal system. At bottom, standards for review have been working. If this part of the protest process is not "broken," should Congress try to "fix" it?

Requiring Contractors to Choose a Single Protest Forum

The Panel also recommends eliminating the opportunity for protesters to have "two bites at the apple," requiring protesters to choose one protest forum (GAO or COFC) (Recommendation 67). The Panel also recommends amending statutes governing COFC's jurisdiction to include timeliness of filing requirements and a 100-day decision date, modeled on GAO rules. The Panel explained it sought to reduce processing time of bid protests and prevent "extraordinary delays" in resolution.

Despite this recommendation, the Panel cites the RAND Corporation study on bid protests directed by Congress in Section 885 of the FY 2017 NDAA[1] (RAND Study", stating that the average time it takes COFC to resolve a protest is 133 days, with a few outliers. The RAND Study also found that there were far fewer protests filed at COFC than GAO, but the Study provided no accurate picture of the number of "pure" "second bite" cases, where a protester at GAO loses and then raises the same issues at COFC. In part to get better data on the perceived issues, Congress directed DOD to further study this issue in Section 822 of the FY19 NDAA. Regardless, the Panel concluded that such a study is "unnecessary."

There are several differences between GAO and COFC that counsel for letting DOD conduct and conclude its study.

- First, DOD may generate better data on how many GAO protests are actually relitigated at the Court and any differences in the results.
- Second, there are structural and systemic differences between GAO and COFC. GAO Procurement Law attorneys hear only bid protests; the judges on COFC hear a variety of cases, of which, according to the Panel, only 20 percent are protests. Moreover, unlike GAO, the President of the United States, upon the advice and consent of the U.S. Senate, appoints judges to the Court. The Court is already understaffed, and it cannot "automatically" adjust its bench to accommodate the potential for more protests being filed there and a hard deadline for deciding them—currently, there are only five active judges (in addition to ten senior judges), and the Senate has not confirmed any new judges since 2014.
- Third, GAO and the Court currently have different rules of procedure, as the Panel recognized. To accommodate the filing deadlines and 100-day decision deadline, the Court would have to substantially change its rules of procedure.

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- Fourth, and relatedly, GAO's rules provide that if a protest is filed at COFC, GAO will dismiss any protests of the same matter that are before it. *See* 4 C.F.R. 21.11(d). This rule typically comes into play when one offeror files a protest at the COFC after another offeror has already filed a protest involving the same procurement at GAO. Without carefully drafted rules, a protester in that situation who timely filed its protest at GAO could be foreclosed from re-filing at COFC and be left without any forum for review.
- Fifth, if this recommendation were adopted, agency attorneys and the Department of Justice would have to operate under stricter deadlines as well.
- Sixth, the Panel recommends that only those protests in which there is a stay be subject to the 100-day decisional deadline; those that are not stayed could take longer. If implemented, then, the Court and GAO would not operate similarly with respect to a stay, which is automatic if the protest is timely filed at GAO. As the Panel also notes, parties at the Court today often agree on a voluntary stay of performance. A change to how quickly a protest would be processed may change that dynamic.
- Finally, an important (not mentioned) reason why some protesters file their protest at COFC after receiving an unfavorable decision at GAO is that under current rules, the protester can obtain a more fulsome record at the COFC. In fact, the difference in the *Palantir* case identified by the Panel can, in part, be attributed to the more extensive record before COFC. If parties are going to be forced to choose between forums, then will the Panel also require GAO to provide the equivalent record that a protester would receive at the Court? (As an aside, the Federal Circuit affirmed COFC's *Palantir* decision, finding that the Army had not followed the relevant procurement statute requirements and that its decision was arbitrary and capricious. *Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018). Thus, this "second bite" protest was found to be meritorious.)

In the end, there is still not enough information to assess accurately the impact of "second bite" protests. DOD is still studying the issue. Thus, it may make more sense to find out if there is really a problem, and a problem that we would want to solve by eliminating a "second bite" protest, before undertaking the significant overhaul that would be required to implement the Panel's recommendation.

Limiting GAO and COFC Jurisdiction

In Recommendation 68, the Panel proposes limiting "the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000." The Panel reasoned that the costs of adjudicating protests valued under $100,000 in most instances exceeded the value of the procurement itself. The Panel chose a $75,000 jurisdictional threshold to comply with international agreements and ensure the protest process is consistent with other Panel recommendations. The Panel does discuss other solutions considered in the RAND Study, including creating an ADR process for low-dollar value procurements or restricting protests below the threshold to agency-level. Although the Panel makes no final recommendations on these solutions, the

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Panel noted that DOD could implement an agency-level protest requirement immediately.

This recommendation is unclear. According to the Panel's discussion of the RAND Study findings, a relatively small number of protests—less than 10% of protests filed at GAO and less than 4% filed at COFC—relate to awards under $100,000. But, recent NDAAs have raised the jurisdictional bar for GAO protests of DOD task orders from $10 million (the civilian agency limit today) to $25 million. Would the $75,000 limit apply to task order protests which, after all, are DOD procurements? And, if trade agreements counsel for a threshold of $75,000, wouldn't that threshold also need to apply to protests of civilian agency awards? Contractors may be substantially impacted by how, if it all, this recommendation is changed, refined, or implemented and again may want to offer their views to the appropriate legislative bodies.

Increasing Contractor Debriefing Rights

Finally, the Panel recommends increasing contractor debriefing rights in all procurements where a debriefing is required. Under Recommendation 69, the Panel proposes requiring DOD to produce a redacted source selection decision document and the offeror's technical evaluation during the debriefing. This recommendation builds on the requirement in Section 818 of the FY 2019 NDAA that contractors are entitled to "enhanced" post-award debriefings, including receiving a redacted version of the source selection decision document, for procurements valued above $100 million. If implemented, the Panel's recommendation would further increase transparency for significantly more procurements and provide contractors access to evaluation documents that DOD usually only releases under protective orders. Recommendation 69 will thus afford contractors the opportunity to review their own evaluation in detail, as well the source selection authority's rationale for the award. Because the Panel received feedback from many stakeholders suggesting that many protests are filed for informational purposes, the Panel hopes that the additional transparency will help decrease the number of protests filed.

Contractors should welcome this recommendation. Access to these important source selection documents can help contractors understand the reasoning behind source selection decisions and help contractors to understand the Government's needs in the future.

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1 Mark V. Arena et al., Assessing Bid Protests of U.S. Department of Defense Procurements, RAND Corporation, December 2017, accessed November 9, 2018, **https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.**

Altogether, these recommendations are designed to change the way the DOD acquisition system functions to make it more "responsive to 21st century market practices" and to value time more than the current system. The emphasis on valuing time is a theme throughout the recommendations; the Panel repeatedly stresses the need for the acquisition process to change so that meeting the mission and accessing innovation are prioritized over strict adherence to processes and procedures.

The recommendations, if implemented, would result in substantial changes to the way DOD does business. But the Panel's recommendations are just that. Most would require Congress to revise relevant statutes, and the remainder would have to be implemented through changes to the DFARS or other regulations. Whether and how Congress chooses to enact the Panel's recommendations remains to be seen. Although Congress has been focused on acquisition reform in recent years, the DOD oversight committees in both the House and Senate have new leadership who have not signaled whether such reforms will continue to be a priority. It is also worth noting that, consistent with the Panel's charter, the recommendations relate only to DOD procurements. As a result, any statutory changes are likely to apply only to the DOD procurement system—creating an ever-larger divergence between the rules for defense and civilian procurements and potentially increasing the compliance burden for contractors that choose to participate in both systems. Contractors that participate in public contracting are urged to stay informed about these potential changes and Congress's reaction to the Panel's recommendations.

We summarize here some of the recommendations with the most significant potential impacts on contractors.

The Dynamic Marketplace Framework

One of the more sweeping recommendations with far-reaching implications, Recommendation 35, would replace the current DOD commercial buying framework and the existing simplified acquisition procedures and thresholds with simplified procedures for buying "readily-available" products without issuing requests for proposals or holding competitions. The Panel estimates that approximately 80% of the goods and services DOD purchases could be acquired through these procedures.

According to the Panel, the current acquisition process is inefficient and does not allow DOD to take advantage of rapidly changing technologies or diverse markets. The Dynamic Marketplace Framework would change this by dividing DOD acquisitions into three categories and regulating how products and services are acquired based on which category they fall into. The goal is to allow DOD to acquire the most up-to-date products and services in the least amount of time possible from the open marketplace. Although the Panel introduced this marketplace concept in its Volume 1 and Volume 2 Reports, the Volume 3 Report provides much more detailed explanations and recommendations for implementation.

The first category in the new framework would be "Defense-unique Development," which would include products and services that are purchased or developed solely for DOD. These procurements would be the most similar to the current DOD acquisition procedures. Because the products and services are unique

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to DOD, the Department would be able to dictate terms, and there would be little or no competition. The Panel's recommendations build on previous recommendations for "incremental" improvements for acquisitions in the defense-unique market and propose more sweeping changes to simplify these types of acquisitions, including pulling back on compliance burdens and empowering contracting officers with more flexibility.

The second category of product and services would be "Readily Available," which is defined as "any product or service that requires no customization by the vendor and can be ordered directly by customers, to include products and services that only governments buy." This category would replace the current "commercial item" and simplified acquisition regimes, which the Panel believes is too focused on whether an item is "commercial," with a system that would allow DOD buyers to make purchases just as commercial buyers do. The Panel recommends using these procedures for all procurements under $15 million and allowing contracting officers to request authorization to use the procedures for procurements over that threshold when appropriate. The Panel recommends removing the current requirement for public advertising, and instead having DOD rely on market research and market-based competition (e.g., internet searches). Contracting officers could rely on standing price quotes and direct solicitations of specific vendors, and they would have the authority to waive many socioeconomic requirements, including mandatory small business set-asides and domestic sourcing restrictions such as the Buy American Act and Berry Amendment. Contract awards, but not solicitations, would be posted online, and only limited grounds of protest could be filed with the contracting agency. There would be no protests of Readily Available procurements to the Government Accountability Office or Court of Federal Claims. (See the **companion article** in this issue for a more detailed discussion of the Marketplace's potential effects on protests and the Panel's other protest-related recommendations.) All purchases would be firm fixed priced through individual contracts, purchase orders under a larger contract or government purchase card transactions.

The final category in the marketplace framework would be "Readily Available with Customization." This category would be used for acquisitions of more $15 million and include "the products and services that are sold in the private sector, including to other private-sector customers, for which customization or manufacturing that is consistent with existing private-sector practices is necessary to meet DOD's needs." For procurements below the $15 million threshold, contracting officers would have discretion to decide whether to issue a public solicitation or acquire the product or service through market-based competition as in the Readily Available category. Again, the Panel recommends removing the small business set-aside requirements, as well as Buy American Act and Berry Amendment restrictions. Pre- and post- award protests would be allowed for procurements in this category with publicly-posted solicitations.

In the Panel's own words, this marketplace recommendation would "revolutionize the existing procurement system." In addition to the impact on protests, the recommendation gives considerable discretion to contracting officers in deciding how to proceed in a

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procurement and opens the door to direct procurements without a public bidding process. These changes would diminish transparency and competition—the bedrock principles of the current DOD procurement system—in favor of speed, innovation and attracting new entrants to the DOD system. The Panel believes this tradeoff is worthwhile and necessary to keep pace with other nations, but Congress will have to decide where to strike the balance.

Portfolio Management and Portfolio Acquisition Executives

In the Panel's view, DOD's program-centric execution model (i.e. using specific funds and authority to purchase individual products and services) has led to a "compliance heavy culture driven by fear of failure" and long coordination processes that result in "unacceptable timelines, program delays, and administrative inefficiencies." The Panel instead proposed a portfolio execution model, as described in Recommendation 36. The Panel recommends creating "Portfolio Acquisition Executives" (PAEs) who would have substantial authority to make decisions about acquisitions, requirements, and the movement of funds within their organization.

This recommendation advocates that DOD gradually transfer to the PAEs a substantial amount of authority and discretion, at every step of the acquisition process from procurement into contract performance. PAEs could be empowered to make decisions that could alter an acquisition or reallocate resources very quickly and without many impediments to doing so.

Removing Administrative Burdens: Domestic Sourcing, Supply Chain and Socioeconomic Issues

As another innovation in streamlining the acquisition process, the Panel recommended that Congress exempt some DOD acquisitions from the requirements of the Buy American Act (BAA) and the Berry Amendment. The BAA and the Berry Amendment were enacted to give preference to domestic products to foster the American economy and to protect national security interests. Despite this noble purpose, the Panel concluded that these two statutes can undermine DOD's ability to field the most innovative technologies to the warfighter in a rapid, costly, and efficient manner.

In Recommendation 64, the Panel recommended that DOD have discretion to grant public interest exceptions to the Berry Amendment, identical to the current public interest exceptions and procedures in the BAA. The Panel also recommended that these domestic purchasing preference requirements not apply to Readily Available and Readily Available with Customization procurements.

The Panel also addressed the current FAR and DFARS requirements for supply chain security that must be flowed down from prime contractors to lower-tier subcontractors and concluded that these government-specific requirements created a barrier to entry for commercial companies interested in doing business with the Government. The Panel reiterated its previous recommendation to significantly limit the number of flow-down clauses in contracts with commercial suppliers to attract more nontraditional contractors.

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The panel nonetheless recognized the importance of mitigating supply chain risk and recommended that those risks be addressed in the requirements process rather than through contract clauses.

Like the domestic sourcing restrictions, the Panel found that labor and wage requirements in the Davis-Bacon Act, Walsh-Healey Act and Service Contract Act impose significant administrative and compliance burdens on contractors, increase the costs of federal contracts and ultimately lead to less competition for those contracts. The Panel recommended that Congress increase the acquisition thresholds for each of those laws to $2 million. According to the Panel, this change would exempt more than 90% of contract actions, but less than 20% of contract dollars, from these labor laws. Again, the goal is to encourage more companies to do business with DOD while maintaining socioeconomic policies for the largest procurements.

Expansion of Other Transaction Agreements

Finally, the Panel recommended, in Recommendation 81, that Congress expand DOD's authority to use Other Transaction Agreements (OTAs). Currently, DOD can use OTAs to carry out prototype projects and follow-on production, but only in limited circumstances. The Panel suggests removing barriers for OTA use for follow-on production transactions. The Panel further recommends giving Service acquisition executives discretion to authorize OTAs, rather than using standard procurement procedures, for follow-on production of prototypes built under a prior OTA. The Panel suggests reserving this authority for only exceptional circumstances.

This recommendation will potentially give DOD more leeway and discretion in deciding to use OTA procedures for follow-on production and after prototype projects. As the Panel hints in the Report, more and more of these types of products will be acquired in the future as technology changes rapidly. Indeed, DOD's use of OTAs has already increased in recent years following congressional encouragement and statutory changes. In light of these changes, combined with the Panel's recommendations and predictions about expanded OTA use, contractors should continue to learn more about OTAs to be better prepared to meet future DOD needs.

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Acquisition Councils Broadly Define Human Trafficking Prohibited Recruitment Fees: A Good Time for a Compliance Program Check-up

Richard B. O'Keeffe, Jr. and Mark B. Sweet

The Trafficking in Persons (TIP) regulations recently celebrated their fourth birthday. When the Civilian and Defense Acquisition Councils (Councils) published them as final rules in January 2015, the TIP regulations attracted widespread attention and launched myriad compliance program upgrades for Government contractors. (***See* our previous article on the topic**). While most sophisticated Government contractors now have put in place TIP procedures, a recent change to the definition of prohibited "recruitment fees" requires them to revisit those practices to assure continued compliance.

Allegations of human trafficking violations can blot a contractor's reputation. The media are much more likely to report on any allegation including the words "human trafficking" than they are to cover, for example, disputes about cost or pricing data. Additionally, with their requirements for due diligence and certifications, the TIP regulations create a risk under the False Claims Act, as well as contractual and administrative remedies for violations, which include debarment. With the **December 20, 2018 publication of a final rule** "clarifying" (or perhaps broadening) the scope of the prohibition against charging recruitment fees to employees, contractors should not only make appropriate changes, they should also take stock of how well their overall TIP compliance programs are running.

Prohibited Recruitment Fees

The prohibition against charging recruitment fees to employees is designed to protect vulnerable persons in high-risk environments from being forced to incur significant debt to the employer at the start of the relationship. The reasoning for the prohibition is that such debt may skew the balance of power against the employee, thereby setting the stage for abuse and coercion based on debt bondage. Even before the 2015 TIP regulations went final, the Government Accountability (GAO) recognized that the rule was ambiguous and recommended developing "**a more precise definition of recruitment fees**." The December 2018 changes amends the definition of recruitment fee in FAR 22.1702 to respond to the GAO recommendation with a broad new definition:

> Recruitment fees means *fees of any type*, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, *regardless of the time, manner, or location* of imposition or collection of the fee.

For the first time, the rule will include specific types of prohibited recruitment fees. Recruitment fees can be improper regardless of whether the payment is in cash, property, deducted from wages, through wage concessions, or as a "kickback, bribe, in-kind payment, free labor, tip or tribute." Recruitment fees can be improper regardless of who does the collecting, including "an employer or a third party."

The apparent common element for all prohibited fees is that they cannot be charged if they are "associated with the recruiting process." When this amorphous principle combines with the unlimited time, manner and place element of the recruitment fee definition, the takeaway for contractors is to carefully

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examine any demands for money or things of value from your employees.

Certifications and Disclosure

Although the new definitions provide more clarity about what types of fees are prohibited, they do not change the expansive certifications and disclosure obligations in the regulations. The regulations require certifications, both before contract award and annually during performance, that the contractor has implemented a compliance plan and procedures to prevent activities prohibited by the TIP regulations and to monitor, detect, and terminate contracts with any subcontractors or agents engaging in such activities. Additionally, the contractor must certify, after engaging in due diligence, that either (i) to the best of its knowledge and belief, neither it nor any of its agents or subcontractors (or their agents) has engaged in such activities; or (ii) that it has found and appropriately remedied and referred such activities. Subcontractors must provide similar certifications.

If a contractor discovers prohibited trafficking activities, the regulations require disclosure to the contracting officer and Inspector General of information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct. Contractors must also cooperate with any government investigations and protect any employees suspected of being victims or witnesses.

As with any certification requirement, the trafficking regulations create a risk of False Claims Act liability if the certification turns out to be false—even if there was no specific intent to defraud the government. However, because these certifications extend beyond the company to include the conduct of its subcontractors and agents, they are especially high risk. And with the disclosure obligations for any discoveries of violations, there is an increased likelihood of a government investigation if violations do occur.

Compliance Program Check-up

The approach evidenced in this change strongly suggests that the TIP rules are an important enforcement priority, and that any serious violations may drive severe penalties. For TIP violations, that risk is higher because the prime contractor has to certify compliance for actors over whom they may have less ability to control. Add to this the fact that the greatest compliance risks often arise for projects heavily staffed by third-country nationals and executed overseas, thousands of miles from senior management oversight. It's an enormous compliance risk but this rulemaking notice provides contractors a timely reminder to see how their TIP programs are doing. Here are some questions to ask:

- ***Compliance begins at home***. How well do key managers and support personnel (e.g., HR, legal, payroll) know the program? Do appropriate personnel receive refresher training; are new personnel properly trained? Is TIP compliance a well-known and ongoing senior management priority?
- ***Change is inevitable***. Has compliance risk changed: does the company perform more work in higher-risk contracts/projects/geographical areas? Is the company more dependent on outside staffing support from foreign entities?
- ***All systems go***. Are systems for detecting compliance risks and violations working well? Is the due diligence process documented? Have allegations

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Roundup: Recent Changes for Small Business Contractors

By John R. Prairie and George E. Petel

This article addresses several recent statutory and regulatory changes that impact small business contractors and their large business partners. Some changes have been on the small business contracting community's wish list for years, including long-awaited updates to the Federal Acquisition Regulation (FAR) that the Small Business Administration (SBA) implemented years ago. The impacts of these changes should, on the whole, be positive—easing administrative burdens and mitigating some unintended consequences—but other changes may be disproportionality negative for some contractors.

Small Business Runway Extension Act of 2018

On December 17, 2018, the Small Business Runway Extension Act of 2018 was signed into law. Under the Small Business Act, a concern's average annual receipts are used to determine if the concern is considered small under a revenue-based size standard. The Runway Extension Act instructs SBA to calculate size based on a concern's average annual receipts for the past ***five*** years to determine its size status, extending the prior three-year average. The change does not impact the calculation of size status based on the number of employees, which remains the preceding twelve-month average. On December 21 the SBA issued an internal Information Notice stating its position that, because the Runway Extension Act has no effective date, the three-year rule still applies until the SBA changes its regulations.

According to the House Committee on Small Business, the purpose of the Act is to "allow small businesses at every level more time to grow and develop their competitiveness and infrastructure, before entering the open marketplace." Many small business contractors experience sudden and rapid growth (sometimes through a single contract award) leading to a pernicious business cycle where they are no longer "small" under the SBA's rules, but still lack the infrastructure and experience to compete large, well-established companies in full and open competitions. Extending the size calculation to five years will enable small businesses to pursue larger opportunities for growth with less fear that those opportunities may harm the business's future.

On the other hand, companies with declining revenues (such as those with multiple-year contracts coming to an end or requiring recertification), and which would otherwise have been small again under the prior three-year calculation, would now find themselves saddled with their past success and forced to remain for a longer period of time in a full and open environment in which they may not be able to effectively compete.

Limitations on Subcontracting

The FAR Council issued a proposed rule updating FAR 52.219-14, Limitations on Subcontracting. The proposed rule would align the FAR with SBA regulations changed in 2016 to implement provisions of the FY13 National Defense Authorization Act (NDAA). The conflict between the FAR and SBA rules have been a source of frustration for both large and small businesses trying to form effective teams and to issue proper reports to the Government.

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Under the limitations on subcontracting, the prime contractor must generally perform at least fifty percent of the work under the contract. The current FAR clause measures compliance through a complicated calculation of the cost incurred for personnel for services, or the cost of manufacturing for supplies. Under the proposed rule, as in the SBA's current regulations, the "fifty-percent calculation" will simply be based on the percentage of contract revenues spent on subcontractors. The rule would likewise conform to the SBA's regulations by permitting prime contractors to count subcontracts issued to "similarly situated" entities (small, 8(a), women-owned, veteran-owned, Historically Underutilized Business (HUBZone), etc.) towards meeting the fifty-percent requirement.

Changes to Veterans' Preference Programs

Veteran-owned and service-disabled veteran-owned small businesses (VOSB/SDVOSB) have long chaffed under the competing demands of the Department of Veterans Affairs (VA) and the SBA's differing set-aside rules. In the FY2017 NDAA, Congress placed responsibility for the ownership and control eligibility requirements squarely under SBA. Accordingly, on September 24, 2018, the VA issued a final rule relating to its VOSB/SDVOSB Veterans' First Verification Program, by incorporating by reference the SBA's regulations governing ownership and control of VOSBs. For now, the VA will still be responsible for managing the VOSB/SDVOSB verification process, but contractors will be able to appeal the VA's eligibility determinations to the SBA.

In parallel, the SBA issued a corresponding final rule to implement the FY2017 NDAA's mandate to bring more clarity and uniformity to the VOSB/SDVOSB eligibility requirements. Notably, SBA adopted many of the VA's prior rules, particularly where SBA's rules were considered "draconian," and where the SBA's rules differed from other SBA small business contracting programs. Most importantly, the final rule relaxes the SBA's prior "unconditional ownership" requirement, which SBA interpreted to mean that any restrictions on the veteran-owner by other company stakeholders rendered the company ineligible, no matter how customary. The new rules instead allow "extraordinary actions" for which non-veteran stakeholders (investors, other directors, etc.) may have input. By including a list of commercially routine minority investor rights as exceptions to the unconditional ownership requirement, the new rules should enable VOSB and SDVOSB concerns to more easily attract capital and other forms of assistance.

There is, however, some concern about unintended consequences from the SBA's new rules. The final rule makes changes to the day-to-day management requirements for the veteran-owner to demonstrate control. For example, the veteran is presumed to lack control if he or she does not work at the company during normal business hours, or if he or she is not located within a reasonable commute to headquarters or job site locations. Although these presumptions are rebuttable, they are inconsistent with the way many businesses operate, and may unfairly penalize disabled veterans who, for example, rely on remote work technology to manage their company.

Proposed Changes to the HUBZone Program

As testimony from multiple Congressional hearings and GAO reports confirms, the SBA's HUBZone program is one its most complicated, for both the agency and contractors. The purpose of the program is

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to bring economic benefits to underutilized areas of the country, but that purpose is often stymied by ambiguous and administratively burdensome regulations. Accordingly, in October 2018, the SBA issued proposed rules that will reduce the regulatory burdens on HUBZone firms, implement new statutory requirements, and eliminate ambiguities that have long frustrated HUBZone firms' compliance efforts and SBA's oversight. The proposed rule is intended to be a complete overhaul of the HUBZone rules, to make it easier for small business concerns to understand and comply with the program's requirements, and to make the HUBZone program more attractive for procuring agencies to utilize.

The proposed rule would change compliance timing for HUBZone firms. Under the current rules, a HUBZone firm must demonstrate that it meets the HUBZone requirements both at the time of offer and award, and must undergo certification every three years. The proposed rule would require a new annual certifications, but eliminate the burdensome requirement for a HUBZone firm to also demonstrate compliance at the time of offer and award.

Many of the proposed changes involve the current requirement that thirty-five percent of the firm's employees live in a HUBZone after award. The current rule requires HUBZone firms to "attempt to maintain" thirty-five percent of their employees as HUBZone residents during performance. Recognizing the difficulty HUBZone firms have with this specific requirement (and in light of the change to an annual certification process), the proposed rule would lower the "attempt to maintain" threshold to twenty percent, but still require good faith efforts to meet the thirty-five percent requirement.

The rule would also allow for situations where an employee can continue to be be counted as a HUBZone resident even if the area where the individual lives no longer qualifies as a HUBZone. It would also allow the firm to continue to count an individual who has moved to a non-HUBZone area, as long as that individual worked for the firm (and continues to work for the same firm) and resided in a HUBZone at the time the concern was certified or recertified as a HUBZone small business concern.

The rule would also eliminate other ambiguities in the regulations, which the SBA found to result in frequent inquiries. The rule, for example, clarifies that all employees count when determining the concern's "principal office," and not just the subset of HUBZone resident employees.

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False Claims Act: State of the Union

Roderick L. Thomas, Brandon J. Moss, Michelle B. Bradshaw

The False Claims Act (FCA) remains one of the Government's most powerful tools to fight fraud, and its dual threat of treble damages and statutory penalties puts it front and center as a business risk for those who regularly do business with the Government. This article summarizes major developments from 2018. Wiley Rein has a more detailed analysis of these statistics and developments available **here**.

I. Statistics

In FY 2018, the Department of Justice (DOJ) recovered over \$2.8B in settlements and judgments under the FCA. While this is the first year since 2009 that recoveries did not exceed \$3B, 2018 was tenth on the all-time annual list. As usual, most of the money came from *qui tam* cases (\$2.1B), but only \$119M came from non-intervened cases, a decline from last year. Notably, health care comprised 89% of total recoveries, continuing a nine-year trend of those recoveries exceeding \$2B. Total new cases filed in 2018 exceeded 750, and 645 of those were *qui tam* actions—which was a slight decline from 2017 but within the recent average and part of an overall upward trend since 2008. One thing remains clear, FCA actions are not going away any time soon.

II. Legislative Branch Developments

The recent tax reform legislation forces parties in FCA settlement negotiations to directly confront the extent to which FCA settlements constitute "restitution" that may be claimed as a deductible business expense. This will likely impede negotiations and has already pressured DOJ to consider changing its standard policy, which is to avoid characterizing settlement payments. Meanwhile, a proposed bipartisan bill that did not gain passage, the Fixing Housing Access Act of 2018 (H.R. 5993), had an unusual mix of pro-plaintiff and pro-defense provisions, potentially signaling odd compromises in future litigation as Congress tries to combat fraud.

Fierce FCA supporter Senator Chuck Grassley (R-IA) stepped down as Chairman of the Senate Judiciary Committee after holding the position for four years. Known for authoring the 1986 FCA amendments allowing whistleblowers to share in FCA recoveries, Grassley remains committed to protect the FCA. He continues to serve on the Committee, but new Chairman Senator Lindsey Graham (R-SC) could reshape the FCA as part of his efforts to repeal and replace the Affordable Care Act. The defense bar would welcome repeal of the ACA's pro-plaintiff amendments expanding FCA liability and exposure by relaxing the public disclosure bar and making overpayments a basis for penalties.

III. Executive Branch Developments

DOJ was prolific in communicating its approach to enforcement, articulating several new or modified polices that may help level the FCA playing field for defendants. ***First***, DOJ released the **Granston Memo** directing attorneys to examine several factors and consider the merits of filing a motion to dismiss *qui tam* actions when the Government declines to intervene. It appears to have embraced this doctrine, based on a slight uptick in these filings. While defendants may welcome this doctrine, DOJ can also wield it as a shield to protect pro-Government precedent from being revisited in other cases that could reach different outcomes. In *Gilead Sciences Inc. v. United States ex*

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rel. Campie, DOJ told the Supreme Court it would move to dismiss the case on remand, boldly **revealing the protective nature** of this doctrine: dismissal would preserve the Ninth Circuit's ruling, one of the most pro-plaintiff post-*Escobar* materiality rulings. At the same time, DOJ's dismissal rationale highlighted the tension between Granston's agency interference concern and *Escobar's* discovery implications for agency knowledge. ***Second***, DOJ prohibited the use of agency guidance documents to create *de facto* obligations, standards, or rights with the **Brand Memo** and Justice Manual § 1-20.100. A word of caution: Justice Manual § 1-20.201 allows use of the *awareness* of such guidance to establish "scienter, notice, or knowledge of the law." ***Third***, new DOJ policy encourages cooperation and coordination between parallel and joint investigations to avoid "**piling on**" penalties for related conduct. ***Lastly***, DOJ redefined its **cooperation credit** policy, lowering the Yates standard to a more attainable bar and abolishing its "all or nothing" approach to credit in civil cases. While it is helpful for corporations to have more certainty as to the "costs" of cooperation, the metrics for "credit" in FCA cases remain somewhat undefined. Recognizing as much, in January 2019 Deputy Associate AG Stephen Cox **hinted at possible forthcoming guidance**, telling an audience to "[s]tay tuned on this front."

The quantity of DOJ communication in 2018 highlights the critical nature of DOJ leadership, and shines a brighter light on how AG nominee Bill Barr's confirmation might alter DOJ's policies and practices. Mr. Barr received a great deal of attention for his past views on the FCA (which he has characterized as "an abomination" that "violates separation of powers and establishes a basis for governance by tyranny") in his recent confirmation process (pledging that he "will diligently enforce the False Claims Act.").

IV. Judiciary Branch

This term the Supreme Court **may resolve a three-way circuit split** about the application of the statute of limitations when the Government declines to intervene. *See Cochise Consultancy Inc. et al. v. United States ex rel. Hunt*. Although courts continue to grapple with the materiality standard post-*Escobar*, the Supreme Court denied *certiorari* for two landmark cases on January 7, 2019: *Gilead Sciences Inc. v. United States ex rel. Jeffrey Campie* and ***United States, ex rel. Harman v. Trinity Industries, Inc***. The Court may provide more clarity next term, as a *cert*. petition is pending in *Brookdale Senior Living Communities, Inc. v. United States ex rel. Prather*.

Next term could also include new cases on the FCA's constitutionality and Rule 9(b)'s heightened pleading standard. *See Intermountain Health Care Inc. v. United States ex rel. Polukoff*. There are a range of potential issues involving the application of Rule 9(b) that could be reviewed by the Supreme Court. The Ninth Circuit held if defendants have "the exact same role in a fraud," Rule 9(b) does not require distinguishing among them in the Complaint. *United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667 (9th Cir. 2018). The Second Circuit joined two circuit splits by holding (1) a Rule 9(b) deficient complaint *can* bar a later-filed complaint under the first-to-file bar despite the pleading deficiency and (2) relators *cannot* circumvent the first-to-file bar by filing an amended complaint after a case barring the original complaint is no longer pending. *United States ex rel. Wood v. Allergan Inc.*, 899 F.3d 163 (2d Cir. 2018). The Sixth Circuit

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New Executive Order Drives Federal AI Strategy

Duane C. Pozza

On Monday, February 11, President Trump issued an **Executive Order** launching the American AI Initiative, a coordinated strategy across the government to promote artificial intelligence research, development, and deployment. The Executive Order follows **initiatives** by the White House Office of Science and Technology Policy (OSTP) to focus on benefits AI has to offer, encourage its development, and seek to maintain U.S. leadership in a rapidly developing area. AI promises to bring enormous benefits in a variety of fields, including connected and autonomous cars, personalized assistants, network and logistics management, public health, and many other areas.

Much of the Order's impact will be determined by how agencies implement it over the coming months, but there are a few key components:

- First, the Order directs agencies that perform or fund research and development to consider AI as a R&D priority, and allocate existing resources towards AI R&D. These agencies are encouraged to increase their focus on AI this year and must identify AI R&D programs in budgets in coming years. Agencies are directed to explore collaboration with non-federal entities including the private sector, non-profits, academia, and state and local governments.
- Second, the Order directs agencies to enhance access to federal data and computing resources for AI R&D purposes. Within 90 days, the OMB Director must publish a federal register notice inviting comment on additional requests for access or quality improvements to federal data that can be used for AI R&D and testing. OMB is also directed to investigate barriers to access or quality limitations of federal data. Agencies must provide this enhanced access while also taking account of any confidentiality or privacy restrictions on individuals' data and any safety and security concerns. Additionally, a range of government departments must prioritize the allocation of high-performance computing resources for AI-related applications.
- Third, the Order directs the National Institute of Standards and Technology (NIST) to lead the development of technical standards for secure, reliable, and robust AI systems, including by issuing a plan for federal engagement on technical standards within six months. In outlining this approach, the Order notes that the federal government must "drive development of appropriate technical standards and reduce barriers to the safe testing and deployment of AI technologies." It also requires NIST to assess ways in which the United States can maintain its leadership in international standard-setting in the area of AI technologies.
- Fourth, the Order outlines a regulatory approach on AI that is focused on removing unnecessary barriers to deployment and encouraging innovation. The Order directs the OMB, in consultation with other agencies and stakeholders, to issue a memorandum to the heads of all agencies on "regulatory and non-regulatory approaches by such agencies regarding technologies and industrial sectors that are either empowered or enabled by AI," and to

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New Executive Order Drives Federal AI Strategy *continued from page 18*

> "consider ways to reduce barriers to the use of AI technologies in order to promote their innovative application while protecting civil liberties, privacy, American values, and United States economic and national security." This signals a more collaborative than prescriptive regulatory approach, consistent with the OSTP's previous **statements** that "[o]verly burdensome regulations do not stop innovation—they just move it overseas."

The Order also includes other provisions, such as directing agencies to develop AI-related education and workforce opportunities and to prioritize AI fellowship and training programs, and promoting international engagement and opening markets for American AI industries. The Initiative will be coordinated through the National Science and Technology Council (NSTC) Select Committee on Artificial Intelligence, **established** last year, which includes representatives from a wide range of federal stakeholders, including the Departments of Commerce, Energy, and Defense.

Finally, the Order is part of a broad range of efforts by the federal government to engage on AI policy and encourage its development. To take a few examples, the National Science Foundation and others have received comments on **updating** the 2016 National Artificial Intelligence Research and Development Strategic Plan, which sets objectives for federally-funded AI research. Last September, DARPA **announced** a $2 billion **AI Next** campaign to fund state-of-the-art AI innovations, focusing on developments in AI contextual reasoning. And the Department of Defense has **explored** industry collaboration on AI and on February 12 released a summary of its AI **strategy**.

These measures provide a great opportunity for the private sector to work collaboratively with government agencies on AI deployment—particularly when navigating challenges that inhibit innovation or finding federal resources to push beneficial AI projects forward.

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Acquisition Councils Broadly Define Human Trafficking Prohibited Recruitment Fees: A Good Time for a Compliance Program Check-up *continued from page 12*

> related to TIP regulations been promptly and properly investigated and, if necessary, reported? Has the company adequately applied any lessons learned over time? Are the company's annual certifications up to date? Are all required hotline posters displayed?

- ***Policing others***. How well do we know the entities that recruit for the company? Has the company flowed down required provisions to all levels? Has the company received certifications from all of its subcontractors and agents? Has the company reviewed the compliance programs and policies of its external recruiters?

These questions are a starting point for assessing internal TIP compliance controls.

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Key Takeaways from the Federal Circuit's Recent Discussion of Potential Procurement Integrity Act Violations

By Cara L. Lasley

In a recent decision addressing an agency's response to alleged Procurement Integrity Act violations, *DynCorp International, LLC v. United States*, No. 2018-1209 (Fed. Cir. Dec. 10, 2018), the United States Court of Appeals for the Federal Circuit offered an important reminder for contractors on what to do if a competitor gains access to your proprietary information. As the decision explains, the Court of Federal Claims and GAO will afford broad deference to the contracting officer's decision about whether a Procurement Integrity Act (PIA) violation occurred, so it is vital for contractors reach out to the contracting officer early in the process to help guide the contracting officer's investigation.

In the *DynCorp* case, DynCorp alleged that a former employee shared DynCorp's salary information from an incumbent contract with a competitor, AAR Airlift Group, during a competition for the follow-on contract, and that AAR used that information in its proposal. After the Government selected AAR for award, DynCorp filed a protest—first at GAO and later at the Court of Federal Claims (COFC)—arguing, in part, that AAR should have been disqualified from the competition because of PIA violations and to avoid the appearance of impropriety.

The Contracting Officer conducted what the Federal Circuit characterized as an "exceptionally thorough review of the record," which included a review of thirty DynCorp documents determined to be in AAR's possession, of which the Contracting Officer concluded only ten contained proprietary information. For those ten documents, the Contracting Officer determined they did not contain DynCorp bid or proposal information that was within the scope of the PIA, and that AAR did not appear to have used the information in its proposal to gain a competitive advantage. The Contracting Officer thus found no reason to exclude AAR from the competition.

Based on this record, the Court of Federal Claims denied the protest, finding that although the "procurement was not a model of efficiency or of appropriate government acquisition policy," because of the "very high, broad standards of review and presumptions that apply to judicial review of contracting officers' decisions," there was not a basis to overturn the Contracting Officer's decision. The Federal Circuit affirmed the decision, reiterating the deference owed to contracting officers. Under the unique circumstances presented by the case, the Federal Circuit agreed that the Contracting Officer reasonably evaluated whether AAR violated the PIA and whether any appearance of impropriety tainted the procurement.

The outcome of this case provides a cautionary tale for contractors when they learn that a competitor may have gained improper access to confidential and proprietary information. As an initial matter, the PIA requires a contractor to notify the agency of a potential PIA violation within fourteen days after the contractor first discovers the violation, to provide the agency an opportunity to investigate the allegation and to preserve the opportunity to preserve the ability to pursue a protest at GAO based on the allegation. *See* 41 U.S.C. § 2106. Because that notice will be

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Key Takeaways from the Federal Circuit's Recent Discussion of Potential Procurement Integrity Act Violations *continued from page 20*

the predicate for the agency's investigation, analysis, and the administrative record it will develop, contractors should use the notice as an opportunity to frame the subsequent investigation. Contractors should provide all known facts, such as what information was disclosed, who has the information, how it was disclosed, and why the information is competitively sensitive. Include specific questions or concerns that the Contracting Officer's investigation should address. Because GAO and the COFC will defer to the contracting officer's ultimate decision, this notice may be the last, best opportunity to shape that investigation.

Contractors should also consider pursuing private remedies against third parties in parallel to the Government's investigation of any PIA allegations, which may include claims for misappropriation of trade secrets, theft, or fraud. For example, DynCorp pursued and settled a suit against AAR alleging theft of trade secrets. A parallel litigation path may help protect the contractor's interests if the Contracting Officer's analysis determines that there is not a sufficient procurement-related violation or remedy, as was the case in *DynCorp*. It is also notable that, although DynCorp's protests were not sustained, in exhausting its protest opportunities it continued to perform as the incumbent contractor for more than two years after filing its initial GAO protest.

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False Claims Act: State of the Union *continued from page 17*

held that although Rule 9(b) does not apply to pleading scienter, "the mere possibility of misconduct . . . is insufficient." *United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 739 Fed. App'x 330 (6th Cir. 2018).

In other circuit court developments, the Third and Seventh Circuits strictly enforced scienter. *See United States ex rel. Streck v. Allergan*, No. 17-1014, 2018 WL 3949031 (3d Cir. 2018); *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834 (7th Cir. 2018). The Tenth and Ninth Circuits tried to clarify the falsity requirement which the FCA left undefined. *United States ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730 (10th Cir. 2018); *United States ex rel. Berg v. Honeywell Int'l, Inc.*, 740 Fed. App'x 535 (9th Cir. 2018). Finally, the Third Circuit held there is no public disclosure bar "where a relator's non-public information permits an inference of fraud that could not have been supported by the public disclosures alone." *United States v. Omnicare, Inc.*, 903 F.3d 78 (3d Cir. 2018).

See **here** for more on the FCA's state of the union.

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Some Obama-Era Labor and Employment Executive Orders Remain in Effect and Continue to Present Compliance Challenges

By Craig Smith and Colin J. Cloherty

Two years ago, President Trump took office promoting deregulation and plans to reverse regulatory actions of the Obama Administration. Many federal contractors expected the rollback to include executive orders that had created new labor and employment obligations, such as Fair Pay and Safe Workplaces (EO 13673), Nondisplacement of Qualified Workers under Service Contracts (EO 13495), and Establishing Paid Sick Leave for Federal Contractors (EO 13706). Although the Fair Pay and Safe Workplaces implementation was fully withdrawn, the Nondisplacement and Paid Sick Leave Rules remain in effect.

Agency guidance on how to comply with these rules, however, has been sparse. The Department of Labor has issued little formal guidance beyond the initial implementation, perhaps due to the slow pace of filling vacancies at DOL under the current administration. Meanwhile, DOL adjudicative bodies and the courts have so far provided few decisions to fill the gaps. This article focuses on some of those gaps and how contractors can reduce compliance risks in those important areas.

Nondisplacement Rule (EO 13495)

EO 13495 requires "a successor contractor and its subcontractors to offer employees working under the predecessor contract whose employment will be otherwise terminated, a right of first refusal of employment under the successor contract in positions for which they are qualified." Contractors raised concerns during the rulemaking process about the risks associated with forced hiring of unqualified or sub-par incumbent employees. DOL's answers in the final rule provided little practical guidance on that issue, and interpretive guidance since then has remained limited. Administrative decisions, however, show that DOL's Wage and Hour Division (WHD) has pursued enforcement actions over predecessor employees who were not hired by successor contractors—validating contractors' initial concerns about potentially hiring lower-quality employees, or facing the risk of an investigation and enforcement action. These decisions highlight three important takeaways.

First, WHD applies the rule strictly and is willing to pursue enforcement actions on behalf of lone individuals, even where the successor contractor makes good faith efforts to comply. The rule tasks successor contractors with the responsibility to identify all incumbent employees eligible for job offers under the rule, who have a right of first refusal to their position "even if the successor contractor has not been provided a list of the predecessor contractor's employees or the list does not contain the names of all persons employed during the final month of contract performance." 29 C.F.R. § 9.12(a)(2). A recent ALJ decision, *Waters v. Metro Contracting Services*, 2018-NQW-00002, 15 (Jan. 4, 2019), shows WHD will pursue successor contractors for allegedly failing to offer employment to a single predecessor employee, even where the contractor goes to great lengths to identify and make offers to all other predecessor employees.

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If near "strict liability" is the enforcement standard, then there is no foolproof way to avoid this problem under every single circumstance. But contractors should take care to carefully document (a) requests for lists of predecessor employees covered by the nondisplacement rule; (b) attempts to confirm that the lists include all qualified employees; and (c) all additional efforts to identify any other incumbent employees covered by the rule, such as meetings, phone calls, emails, and other outreach. Yet even with these efforts, WHD may still investigate complaints that a contractor missed an incumbent employee who allegedly should have received an offer. A well-documented hiring effort can help reduce the disruption of these investigations and possible enforcement actions.

Second, maintain appropriate records supporting any affirmative decisions not to hire eligible incumbent employees. Contractors may rely on "credible evidence" to determine an employee is not qualified to perform the successor contract. 29 C.F.R § 9.12(a)(3). But the individuals most likely to be found unqualified—those lacking credentials or with a poor performance record—are perhaps the most likely to complain to DOL if not offered jobs. Contractors can reduce (but not eliminate) this enforcement risk by basing their hiring decisions on objective terms in the successor contract's requirements.

In two DOL ALJ decisions, WHD had pursued enforcement actions when successor contractors did not offer jobs to longstanding predecessor employees who lacked credentials required by successor contracts. WHD argued that the employees' experience on the prior contracts could substitute for the qualifications at issue. Both times, a DOL ALJ disagreed, finding that contracting agencies have authority to establish the terms of their own contracts, including educational and training requirements. *See WHD v. Metropolitan Security Services, Inc.*, 2016-NQW-00001, 7-8 (Dec. 19, 2018); *Moss et al. v. Sabre88, LLC.*, 2015-NQW-00001-2015-NQW-00003 at 23-24 (Oct. 16, 2015). Employees lacking contractually required credentials can reasonably be found not to qualify for the successor contract. In one of those cases, the ALJ also agreed that a contractor had properly followed a contracting officer's suggestion not to rehire one individual that the contracting officer believed to be unqualified.

Third, successors should carefully document the job offers they do make. Covered successors must make a good faith offer of employment to qualified incumbent employees. *See* 29 C.F.R. § 9.12(a)(1). DOL appears to use common-law principles to determine whether a successor contractor has extended such an offer, which can take many forms. For example, in *Waters* the ALJ held that an invitation to submit a job application constituted a bona fide offer because the successor had hired every incumbent employee who applied. Other forms of offers may satisfy the requirements, such as an offer made orally during a group meeting, though they're subject to dispute after the fact even if the successor documents the offer contemporaneously. The approach that best minimizes any ambiguity, however, is an unconditional written offer of employment delivered to the employee with confirmation of receipt (such as a signed acknowledgement or certified-mailing receipt). But that level of detail may be impractical in some circumstances,

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leaving contractors to balance hiring employees efficiently with protecting against complaints from predecessor employees who may have not received an offer, not accepted an offer, or complained an offer was for the "wrong" position.

According to the EO, these nondisplacement requirements are intended to improve efficiency by codifying standard industry practice of a successor's hiring ("rebadging") the predecessor workforce. The past decade of practice—and the few decisions actually applying the rule—show that the rule can drag efficiency and expose even reasonably diligent contractors to enforcement risk over individuals who may simply not merit rehiring.

Sick Leave Rule (EO 13706)

There's been even less compliance guidance issued for the sick leave rule. DOL added informal "frequently asked questions" when it issued the final rule, but has not subsequently published any further public guidance. Nor have there been reported DOL or federal court decisions applying the rule in the two years since it became applicable.

This lack of updates leaves contractors on their own to apply EO 13706's outmoded approach to providing sick leave, which has prompted numerous questions from industry. For example, DOL has not amended the rules to account for how most contractors provide fringe benefits, nor has the EO been revised to that effect.

Contractors should be aware of how other developments are affecting their obligations under EO 13706. Since DOL's implementing rules started applying, seven states have implemented their own sick leave (Vermont, Arizona, Washington, Rhode Island, Maryland, New Jersey, and Michigan's forthcoming implementation), more than doubling those that were already in place (four states plus the District of Columbia). Local jurisdictions continue to add sick leave laws as well.

This expansion may force contractors to develop multiple compliance strategies for discrete groups of employees, depending on where they work and what contracts they support. For example, on a contract subject to EO 13706, some employees might be subject to a state sick leave law while others are not. Likewise, an employee might perform on two or more contracts, at least on one subject to EO 13706 but others that are not not, which can affect the employee's entitlement to fringe benefits if covered by the Service Contract Act.

Many modern payroll and other business systems often cannot readily accommodate these types of patchwork fringe-benefit requirements in a cost-effective manner. Yet contractors need to evaluate each sub-group of employees carefully to devise strategies for compliance (including any needed risk assessments) with EO 13706's highly prescriptive requirements.

Contractors with unionized workforces should take note of an upcoming development. DOL's implementing rules provided a partial exclusion from EO 13706's requirements for employees covered by certain collective bargaining agreements through January 1, 2020. 29 C.F.R. 13.4(f). New CBAs will not be excluded, so contractors should start planning now to negotiate CBAs that expressly account for EO 13706 requirements and, as applicable, any new state and local sick leave requirements. Clearly worded agreements incorporating the applicable requirements will

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Some Obama-Era Labor and Employment Executive Orders Remain in Effect and Continue to Present Compliance Challenges *continued from page 24*

best help reduce the risk of misunderstanding and complaints to DOL.

Setting aside one's views on the merits of the nondiscplacement and federal sick-leave rules as public policies, their implementation has been a burden because the compliance obligations often fail to match how modern companies hire and compensate employees. The rules were already outmoded when issued and DOL has done little to modernize the rules or its interpretive guidance. Contractors thus must be careful to assess their obligations and fully document all efforts to comply—and should do so long before any employees start performing on a contract subject to these rules.

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DC Council Passes Pay-to-Play Legislation; Lays in Front of Congress

By D. Mark Renaud and Sarah B. Hansen

In early December 2018, the District of Columbia Council passed extensive campaign finance legislation that includes significant pay-to-play provisions. In January, Mayor Bowser let the legislation become law without her signature. The law now lays before Congress for 30 legislative days (during which it could be struck down by Congress). Assuming no issues, the pay-to-play provisions would become effective November 4, 2020, which is after the next DC general election.

The legislation targets contractors holding and seeking government contracts and agreements valued in the aggregate at $250,000 or more. The contracts and agreements targeted go beyond the normal contracts for goods and services and include certain real estate transactions with the District, licensing agreements, tax exemptions, tax abatements, and loans. Like many similar laws around the country, the law would not be applicable to DC employees or to unions with collective bargaining agreements.

For normal contracts for goods or services, the legislation prohibits covered contributions during the procurement process, during the contract, and for one year after the termination of the contract. There are different time limits for other types of agreements.

The contributions banned are those made to the Mayor and mayoral candidates for contractors with agencies that report to the Mayor (with a separate provision affecting AG contributions for AG agencies). The ban extends to contributions to political committees affiliated with the Mayor or mayoral candidates and to constituent-service programs affiliated with the Mayor. Moreover, if a contract must come before the City Council or approved by the Council legislatively to take effect (such as with a tax abatement or tax exemption), then the contribution ban would apply to Councilmembers, candidates for the Council, political committees affiliated with Councilmembers and candidates, and affiliated constituent-service programs.

DC permits corporate contributions, so the pay-to-play ban would apply to contributions by the entity (including corporations) holding the contract. In addition, principals of the contract or agreement holder would also have their contributions banned by the legislation. Such principals include senior officers such as the president, executive director, CEO, COO, CFO, and, for educational institutions, deans.

The legislation would also add a series of reporting and certification obligations, including the provision of a list of covered principals as well as a certification that a bidder has not violated the pay-to-play law.

Violation of the law would be considered a breach of contract, which could lead to termination of the contract and/or disqualification for four calendar years from future contracts, at the discretion of the relevant contracting authority.

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Speeches & Publications

Impressive Results From DOJ Fraud Section In 2018

January 8, 2019 | ARTICLE

Law360

Madeline J. Cohen, Kevin B. Muhlendorf

Podcast: The SEC Whistleblower Program in 2018

January 8, 2019 | PODCAST

Government Ethics & Investigations Podcast

Madeline J. Cohen, Kevin B. Muhlendorf

Process & Strategy of Navigating a Civil False Claims Act Investigation

January 16, 2019 | Washington, DC

ABA Procurement Fraud Committee and Suspension and Debarment Committee Joint Meeting

Mark B. Sweet

False Claims Act Enforcement State of the Union: The Politics and Policies of Enforcement

January 28, 2019 | New York, NY

American Conference Institute: 6th Advanced Forum on False Claims & Qui Tam Enforcement

Roderick L. Thomas

Statutes & Regulations

February 19, 2019 | Washington, DC

The Government Contracts Year in Review Conference

Scott M. McCaleb

The False Claims Act: Who Is The Responsible Government Official?

February 20, 2019 | Teleforum

The Federalist Society

Mark B. Sweet; Brandon J. Moss

GRIT: The Latest Research and Practical Insights

February 27, 2019 | Washington, DC

GW Law Government Procurement

Kara M. Sacilotto

Government Contractors Forum: Other Transaction Agreements

February 28, 2019 | McLean, VA

Association of Corporate Counsel, National Capital Region

Scott A. Felder; Kara M. Sacilotto

Federal Grants Management

March 5, 2019 | Alvernia University, Reading, PA

Eastern Pennsylvania Grants Network Professional Development Workshop

Brian Walsh; George Petel

Data Rights: Legal Strategies for Markings, Assertions, and Defending Against a Government Challenge

March 13, 2019 | Annapolis, MD

ABA Federal Procurement Institute

Scott A. Felder

Mitigation in Suspension and Deparment

March 18, 2019 | London, England

King's College London – GWU Law Annual Symposium

Paul F. Khoury

Current Enforcement Environment and Pitfalls for Federal Grantees

April 23, 2019 | Crystal City, VA

nVISION Grants Management, NGMA's 2019 Annual Grants Training

Brian Walsh; Kendra P. Norwood

2019 Bench & Bar Conference

June 12-15, 2019 | Colorado Springs, CO

Federal Circuit Bar Association

Scott M. McCaleb

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