



Federal Government Contracting: Year in Review

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AGENDA

- Regulatory Update
- Case Law Update
 - Bid Protests
 - Claims
- False Claims Act Update

REGULATORY UPDATE

Lori Ann Lange

FEDERAL CONTRACTOR VACCINE MANDATE

- Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors
 - FAR 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors
 - DFARS 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors
- Requires covered contractors and subcontractors to comply with the Safer Federal Workforce Task Force Guidance

FEDERAL CONTRACTOR VACCINE MANDATE

- Covered contractor and subcontractor employees must be fully vaccinated unless entitled to a medical or religious accommodation
- Covered contractors and subcontractors must check vaccination records of covered employees and must designate an individual to coordinate vaccine implementation
- Covered contractor and subcontractor employees must comply with CDC guidance on masking and social distancing
- Covered contractor and subcontractor employees must comply with federal worksite restrictions

FEDERAL CONTRACTOR VACCINE MANDATE

- Applies to:
 - New contracts awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, that exceed the simplified acquisition threshold
 - New solicitations issued on or after October 15, 2021, and their resulting contracts that exceed the simplified acquisition threshold
 - Extensions or renewals of existing contracts and orders that exceed the simplified acquisition threshold that are awarded on or after October 15, 2021
 - Options on existing contracts that exceed the simplified acquisition threshold that are exercised on or after October 15, 2021
- Agencies were strongly encouraged to include the clause in all existing contracts

FEDERAL CONTRACTOR VACCINE MANDATE

- As of January 13, 2022, there are four preliminary injunctions in place prohibiting enforcement of the clause
 - *Commonwealth of Kentucky, et al. v. Biden*, Civil Action No. 3:21-cv-00055-GFVT (E.D. Ky.)
 - Appeal is pending at the Sixth Circuit
 - *State of Georgia, et al. v. Biden*, Civil Action No. 1:21-cv-163 (S.D. Ga.)
 - Appeal is pending at the Eleventh Circuit
 - *State of Missouri, et al. v. Biden*, Case No. 4:21 CV 1300 DDN (E.D. Mo.)
 - *State of Florida v. Nelson*, Case No. 8:21-cv-2524-SDM-TGW (M.D. Fla.)

CYBERSECURITY MATURITY MODEL CERTIFICATION

- On November 17, 2021, DoD published an advanced notice of proposed rulemaking for CMMC 2.0 (86 FR 64,100)
- DoD intends to make significant changes to CMMC 1.0 to make it more streamlined and flexible
- Until the CMMC 2.0 changes become effective, DoD is suspending the CMMC 1.0 piloting efforts and will not approve inclusion of a CMMC requirement in DoD solicitations
- The rulemaking process could take 9-24 months

CYBERSECURITY MATURITY MODEL CERTIFICATION

- CMMC 2.0 will go from five levels to three level by eliminating the CMMC 1.0 Levels 2 and 4
 - CMMC 2.0 Level 1 (Foundational) will remain the same as CMMC 1.0 Level 1
 - CMMC 2.0 Level 2 (Advanced) will be similar to CMMC 1.0 Level 3
 - CMMC 2.0 Level 3 (Expert) will be similar to CMMC 1.0 Level 5
- CMMC 2.0 will remove CMMC-unique practices and all maturity processes from all levels
- For Level 1 and some Level 2 assessments, contractors may be able to self-certify
- Contractors will be able to have time limited Plans of Action and Milestones

CLIMATE CHANGE EXECUTIVE ORDERS

- On May 20, 2021, the Biden Administration issued Executive Order 14030, Climate-Related Financial Risk
- Executive Order 14030 directed the FAR Council to consider amending the FAR to ensure that major procurement minimize the risk of climate change, including:
 - Requiring the “social cost” of greenhouse gas emissions be considered in procurement decisions
 - Where appropriate and feasible, giving preference to bids and proposals from suppliers with a lower social cost
- On October 15, 2021, the FAR Council published a notice of advance rulemaking seeking input from the public on how to implement Executive Order 14030 (86 FR 57,404)

CLIMATE CHANGE EXECUTIVE ORDERS

- On December 8, 2021, the Biden Administration issued Executive Order 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability
- Goal of achieving a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide by not later than 2050 through:
 - 100% carbon pollution-free electricity on a net annual basis by 2030, including 50% 24/7 carbon pollution-free electricity
 - 100% zero-emission vehicle acquisitions by 2035, including 100% zero-emission light-duty vehicle acquisitions by 2027
 - A net-zero emissions building portfolio by 2045, including a 50% emissions reduction by 2032
 - A 65% reduction in scope 1 and 2 greenhouse gas emissions from Federal operations by 2030 from 2008 levels\
 - Net-zero emissions from Federal procurement, including a Buy Clean policy to promote use of construction materials with lower embodied emissions

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BUY AMERICAN REGULATIONS

- On January 19, 2021, the FAR Council issued a final rule revising the Buy American Act regulations (86 FR 6,180)
- Created two categories of items: (1) items not predominantly made of iron or steel or a combination of both; and (2) items predominantly made of iron or steel or a combination of both
- Established differing tests for determining whether an item is Buy American compliant
- Increased the price evaluation preference

BUY AMERICAN REGULATIONS

- To be Buy American compliant, items not predominantly made of iron or steel or a combination of both must:
 - Be manufactured in the U.S.; and
 - The cost of the domestic components mined, produced, or manufactured in the United States must exceed 55% of the cost of all the components
 - The component portion of the test is waived for COTS items

BUY AMERICAN REGULATIONS

- To be Buy American compliant, items predominantly made of iron or steel or a combination of both must:
 - Be manufactured in the U.S.; and
 - The cost of the foreign iron and steel must be less than 5% of the cost of all the components used in the end product or construction material
 - There is no COTS waiver except for COTS fasteners

BUY AMERICAN REGULATIONS

- The price evaluation factors for determining whether the cost of a domestic item is unreasonable was increased
- The Contracting Officer will add an evaluation factor to the price of a low foreign offer
 - 20% if the lowest domestic offer is from a large business
 - 30% if the lowest domestic offer is from a small business
 - 20% of the cost of any foreign construction material proposed for exception

BUY AMERICAN PROPOSED REGULATIONS

- On July 30, 2021, the FAR Council published a proposed rule to implement Section 8 of Executive Order 14005 regarding strengthening the impact of the Buy American Act (86 FR 40,980)
- The proposed rule has three major policy changes:
 - Increase the domestic content threshold
 - Increase the price evaluation preference for critical items and critical components
 - Implement post-award domestic reporting requirements
- The proposed rule does not seek to replace the component test with a value-added test

BUY AMERICAN PROPOSED REGULATIONS

- Currently, for items that are not predominantly made of iron or steel or a combination of both, the domestic content threshold is 55%
- Under the proposed rule, the domestic content threshold would increase as follows:
 - From 55% to 60% when the final rule takes effect
 - From 60% to 65% (for items delivered in calendar years 2024-2028)
 - From 65% to 75% (for items delivered starting in calendar year 2029)
- Contractors would have to comply with the increases on their existing contracts

BUY AMERICAN PROPOSED REGULATIONS

- The proposed rule has a fallback threshold
- Until one year after the threshold is increased to 75%, if the Government does not receive any offer for an item that complies with the applicable domestic content threshold or the price of such item is unreasonable, the Government will evaluate the item as domestic if the item has a domestic content of more than 55%

BUY AMERICAN PROPOSED REGULATIONS

- Under the proposed rule, critical items (including items that contain critical components) will be subject to higher price evaluation preferences
- The list of critical items and components is subject to separate rulemaking
 - The list will be updated at least every four years
- Offerors will be required to identify in their offers any items that contain critical components
- Contractors will be required to submit post-award reports on the domestic content of critical items as well as end products and construction material that contain critical components
 - This reporting requirement will not apply to COTS items

\$15/HOUR MINIMUM WAGE

- On April 27, 2021, the Biden Administration issued Executive Order 14026, Increasing the Minimum Wage for Federal Contractors, which establishes an initial minimum wage of \$15/hour as of January 30, 2022
- On November 24, 2021, DOL issued a final rule implementing Executive Order (86 FR 67,126)

\$15/HOUR MINIMUM WAGE

- Executive Order 14026 applies to covered contracts entered into by executive departments or agencies and includes independent agencies
- There are four categories of covered contracts:
 - Construction contracts subject to the Davis-Bacon Act
 - Service contracts subject to the Service Contract Act
 - Concessions contracts
 - Contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public

\$15/HOUR MINIMUM WAGE

- Executive Order 14026 applies to:
 - New contracts entered into on or after January 30, 2022
 - Exception for contracts entered into between January 30, 2022 and March 30, 2022, when the solicitation was issued prior January 30, 2022
 - Contracts entered into prior to January 30, 2022, where the contract is renewed, extended, or an option is exercised on or after January 30, 2022
- The exercise of a pre-negotiated option is considered a new contract
- Task orders will be covered when placed or issued under a master contract that itself is a covered new contract

\$15/HOUR MINIMUM WAGE

- Executive Order 14026 applies to workers performing on or in connection with a covered contract if their wages are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act
- Workers are working “on” a covered contract when they perform the specific services called for by the contract
- Workers are performing work “in connection with” a covered contract when their work activities are necessary to the performance of a contract but are not the specific services called for by the contract

GOOD FAITH EFFORTS – SMALL BUSINESS SUBCONTRACTING PLANS

- On August 11, 2021, the FAR Council published a final rule providing examples of a failure to make good faith efforts to comply with small business subcontracting plans (86 FR 44,249)
- Contracting Officers have to assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and assess liquidated damages when warranted
- The fact that the contractor failed to meet its goals does not mean that the contractor did not make good faith efforts

GOOD FAITH EFFORTS – SMALL BUSINESS SUBCONTRACTING PLANS

- Indicators of good faith efforts include:
 - Breaking out the work into economically feasible units
 - Market research to identify small businesses
 - Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer
 - Providing interested small businesses with adequate and timely information about plans, specifications, and requirements
 - Negotiating in good faith
 - Directing small businesses that need additional assistance to SBA
 - Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services
 - Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations
 - Participating in a formal mentor-protégé program
 - Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories
 - Fulfilling all of the requirements of the subcontracting plan

GOOD FAITH EFFORTS – SMALL BUSINESS SUBCONTRACTING PLANS

- Indicators of a failure to make good faith efforts include:
 - Failing to attempt market research
 - Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan
 - Failure to submit an acceptable ISR or SSR
 - Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements
 - Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan
 - Failure to timely pay small business subcontractors
 - Failure to correct substantiated findings from Federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the Government
 - Failure to provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work
 - Falsifying records of subcontract awards to small business concerns

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SMALL BUSINESS SIZE STANDARDS

- On November 2, 2021, SBA published a proposed rule to revise its size standards (86 FR 60,396)
- The proposed rule would adopt a 24-month average to calculate a concern's number of employees for eligibility purposes in all of SBA's programs
- The proposed rule would permit concerns to use a five-year averaging period, in addition to the existing three-year averaging period, for the purposes of calculating annual average receipts in SBA's Business Loan, Disaster Loan, and Small Business Investment Company programs
 - In 2020, SBA made this change for its government contracting program
 - Through January 6, 2022, concerns could use a three-year averaging period or a five-year averaging period

SMALL BUSINESS PAST PERFORMANCE

- On November 18, 2021, the SBA issues a proposed rule to provide new methods for small business contractor to obtain past performance ratings (86 FR 64,410)
- Under the proposed rule, a small business would be able to:
 - Use the past performance of a joint venture of which it is a member if the small business worked on the joint venture's contract(s) if the joint venture does not independently demonstrate past performance necessary for award
 - The small business cannot use as its own experience and past performance work that was performed exclusively by other partners to the joint venture
 - Use past performance it obtained as a first-tier subcontractor on a prime contract with a subcontracting plan
 - The small business may request a rating of its subcontractor past performance from the prime contractor
 - The prime contractor must provide the rating within 15 days of the request
 - The requested rating must include at least the following evaluation factors: technical, cost control (not applicable to fixed-price contracts); schedule/timeliness, and management or business relations

CASE LAW UPDATE

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GAO'S BID PROTEST STATISTICS FY 2021

- <https://www.gao.gov/assets/gao-22-900379.pdf>
- GAO received 1,897 cases (down 12%)
 - 1,816 protests
 - 43 cost claims
 - 38 requests for reconsideration
- GAO resolved 2,017 cases
 - 1,931 protests
 - 45 cost claims
 - 41 requests for reconsiderations
- GAO sustained 15% of the cases
- GAO's effectiveness rate was 48% (down 3%)
 - Includes protests that were resolved through voluntary corrective action

GAO'S BID PROTEST STATISTICS FY 2021

- The most prevalent reasons for sustaining protests were:
 - Unreasonable technical evaluation
 - Flawed discussions
 - Unreasonable cost or price evaluation
 - Unequal treatment

BLUE & GOLD WAIVER RULE

- *Harmonia Holdings Group, LLC v. United States*, 20 F.4th 759 (Fed. Cir. 2021)
- Harmonia filed an agency level bid protest challenging a solicitation amendment and the agency denied the protest
- After the award was made to another offeror, Harmonia filed a bid protest with the COFC challenging the award and the amendment
- The COFC dismiss the portion of the protest challenging the amendment holding that Harmonia waived that ground of protest citing *Blue & Gold* decision
- The Federal Circuit reversed holding that Harmonia's filing of the agency level protest constituted sufficient pursuit under *Blue & Gold*

ENHANCED DEBRIEFINGS AND TIME TO PROTEST

- *Nika Technologies, Inc. v United States*, 987 F.3d 1025 (Fed. Cir. 2021)
- Protester who filed its protest seven days after its debriefing was not entitled to an automatic stay under the enhanced debriefing rules
- To obtain an automatic stay at GAO, a protester must file its protest within five days of its debriefing
- Under the enhanced debriefing rules, the protester has two days to submit additional questions after it receives the debriefing
- If the protester asks questions, the debriefing remains open until the agency responds to the questions
- If the protester does not ask questions, the debriefing is closed on the day of the debriefing
- A protester who does not ask questions is not entitled to the two additional days when calculating the time to file to obtain the automatic stay

COVID QUALIFICATIONS RENDERS BID NONRESPONSIVE

- *American Mine Services, LLC*, B-420138, 2021 CPD ¶ 381 (2021)
- The protester included a clarification in its bid stating that COVID-19 is considered a force majeure event and that the offeror reserves its right for additional time
- The USACE rejected the bid as nonresponsive
- The protester argued that the USACE's rejection was unreasonable because the clarification merely confirmed protections provided for under FAR 52.294-10, Default (Fixed-Price Construction)
- GAO denied the protest, finding that the clarification was a material deviation because FAR 52.249-10 does not list COVID-19 as a possible cause of excusable delay and does not per se deem epidemics and quarantines to be unforeseeable causes beyond the control and without the fault or negligence of the contractor

FACILITY CLEARANCES & JOINT VENTURES

- *InfoPoint* B-419856, 2021 CPD ¶ 290 (2021)
- GAO sustained a challenge to a solicitation requirement that a small business joint venture – as opposed to the individual member of the joint venture – hold a facility clearance
- Section 1629 of the 2020 NDAA states that, clearance for access to a DoD installation or facility may not be required for a joint venture if the joint venture is composed entirely of entities that are currently cleared for access
- SBA's regulations (13 CFR § 121.103(h)(4)) state that a joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance
- GAO held that the plain language of the 2020 NDAA states that DoD may not require that a joint venture hold a facility clearance where the member of the joint venture hold the required facility clearances and that SBA's regulation was consistent with the 2020 NDAA with regard to whether DoD can require the joint venture to hold the required security clearance regardless of whether the individual joint venture members hold the required security clearances

ASBCA STATISTICS FY 2021

- [https://www.asbca.mil/Reports/FY2021%20Reports/FY21%20ASBCA%20Annual%20Report%20\(Signed\).pdf](https://www.asbca.mil/Reports/FY2021%20Reports/FY21%20ASBCA%20Annual%20Report%20(Signed).pdf)
- 400 cases were docketed in FY2021
 - Army – 62 cases
 - Navy – 49 cases
 - Air Force – 37 cases
 - USACE – 166 cases
 - DCMA – 30 cases
 - DLA – 13 cases
 - Other agencies – 16 cases
 - Reinstated – 27 cases

ASBCA STATISTICS FY 2021

- The ASBCA disposed of 391 cases
- The ASBCA disposed of 129 cases on the merits
 - 68 cases were sustained
 - 61 cases were denied
- The ASBCA dismissed 262 cases
 - The majority of the cases were dismissed due to settlement
- 954 cases were still pending

REAs ARE NOT NECESSARILY CLAIMS

- *BAE Systems Ordnance Systems, Inc.*, ASBCA No. 62416, 2021 WL 934959 (Feb. 10, 2021)
- Contractor submitted three REAs that did not request a Contracting Officer's final decision
- Contractor subsequently converted the REAs into a claim and the contractor ultimately appealed the deemed denial of the claim
- The Army moved to dismiss the appeal arguing that the claim was untimely because the REAs were CDA claims
- The ASBCA held that the REAs were not claims because the contractor never explicitly or implicitly requested a final decision – an action necessary to convert the REAs into claims

FEDERAL CIRCUIT AFFIRMS EBOLA CASE

- *Appeal of Pernix Serka Joint Venture v. Department of State*, CBCA No. 5683, 20-1 BCA ¶ 37,589 (2020), *aff'd*, 849 Fed. Appx. 928 (Fed. Cir. June 9, 2021)
- The CBCA denied a contractor's claim for the costs of demobilizing from a construction site due to concerns about performing work during an Ebola virus outbreak
- The CBCA held that, under the Default clause, FAR 52.249-10, the contractor was entitled to additional time, but not additional costs, resulting from acts of God, epidemics, and quarantine restrictions
- The CBCA stated that the contractor had not identified any clause in the contract that served to shift the risk of cost increases from the contractor to the Government
- The Federal Circuit affirmed the CBCA's decision

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CONTRACTORS MUST PROVIDE SUM CERTAIN FOR ALL CLAIMS

- *ECC International Constructors, LLC*, ASBCA No. 59643, 2021 WL 5561118 (Nov. 10, 2021)
- Contractor appealed the denial of its claim for extra work that included 23 direct cost items
- The ASBCA dismissed nine of the direct cost items for lack of jurisdiction because these items were separate claims requiring separate sums certain
- The ASBCA held that claims must state a bottom-line sum certain for the overall claim as well as a sum certain for any distinct claim component within the overall claim
- Claims are distinct if they either request different remedies or assert grounds that are materially different from each other factually or legally

AGENCY ENGINEER LACKED AUTHORITY TO CHANGE CONTRACT

- *Sauer, Inc.*, ASBCA No. 61847, 21-1 BCA ¶ 37.939 (2021)
- Contractor was awarded a task order under a MACC to construct a barracks
- MACC included 5252.201-9300, Contracting Officer Authority, which stated that only the Contracting Officer had the authority to change the contract
- Contractor submitted a claim for constructive changes and delay for having to replace a PVC pipe with a cast iron pipe
- Contractor alleged that the NAVFAC Engineer approved the substitution
- ASBCA reiterated the rule that, when a contract expressly provides that only the Contracting Officer has the authority to change the contract, other government employees do not possess actual express or implied authority to change the contract

CONTRACTOR NOT ENTITLED TO BE COMPENSATED FOR DAVIS-BACON AGE WAGE INCREASE

- *Gulf Pacific Contracting, LLC*, ASBCA No. 61434, 21-1 BCA ¶ 37,928 (2021)
- Contractor had an IDIQ construction contract with a one-year base period and four one-year options
- The contract contained FAR 52.222-30, Construction Wage Rate Requirements – Price Adjustment (None or Separately Specified Method), which requires the contractor to comply with any revised wage determinations during the option periods and states that the contract price will not be adjusted
- The contracting officer exercised an option and included a new wage determination
- The contractor brought a claim to recover the wage increase, which was denied
- The ASBCA held that the contractor was not entitled to an adjustment because the FAR permits the Government to draft a contract to preclude additional payment to a contractor for increased costs during performance of an option that are caused by new prevailing wage rates

COFC LACKS JURISDICTION OVER SUSPENSION CHALLENGE

- *Emiabata v. United States*, 151 Fed. Cl. 610 (2020)
- Contractor filed suit under the Tucker Act alleging that he was improperly included on a suspension list with the USPS
- The COFC dismissed the suit for lack of jurisdiction
- The Tucker Act does not give the COFC jurisdiction to review the propriety of an agency's decision to suspend or debar a contractor
- To invoke the COFC's jurisdiction, a plaintiff must identify a separate source of substantive law that creates the right to money damages and the plaintiff failed to do so here
- FAR Subpart 9.4 does not provide an independent basis for jurisdiction
- The COFC may have jurisdiction over an action challenging a suspension if the contractor is suspended while it has an otherwise responsive bid pending before an agency under its implied-in-fact contract jurisdiction

FALSE CLAIMS ACT UPDATE

Patrick J. Greene

DOJ STATISTICS

FY	NEW MATTERS ^o		SETTLEMENTS AND JUDGMENTS ¹				RELATOR SHARE AWARDS ²			
	NON QUI TAM	QUI TAM	NON ³ QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
TOTAL	5,570	13,957	17,930,640,473	43,530,216,097	2,990,106,995	46,520,323,093	64,450,963,566	7,088,946,408	722,551,379	7,811,497,787

DOJ STATISTICS

FY	NEW MATTERS ¹		SETTLEMENTS AND JUDGMENTS ¹				RELATOR SHARE AWARDS ²			
	NON QUI TAM	QUI TAM	NON ³ QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	341	30	86,479,949	0	0	0	86,479,949	0	0	0
1988	209	43	173,287,663	2,309,354	33,750	2,343,104	175,630,767	88,750	8,438	97,188
1989	222	87	197,202,180	15,111,719	1,681	15,113,400	212,315,580	1,446,770	200	1,446,970
1990	243	72	189,564,367	40,483,367	75,000	40,558,367	230,122,734	6,590,936	20,670	6,611,606
1991	234	84	270,530,467	70,384,431	69,500	70,453,931	340,984,398	10,667,537	18,750	10,686,287
1992	284	114	137,958,206	133,949,447	994,456	134,943,903	272,902,109	24,121,648	259,784	24,381,432
1993	304	138	181,945,576	183,643,787	6,603,000	190,246,787	372,192,363	27,576,235	1,766,902	29,343,137
1994	279	216	706,022,897	379,018,205	2,822,323	381,840,528	1,087,863,425	69,453,350	838,896	70,292,246
1995	232	269	269,989,642	239,024,292	1,635,000	240,659,292	510,648,934	45,162,296	465,800	45,628,096
1996	185	340	247,357,271	124,361,203	13,522,433	137,883,636	385,240,908	22,119,619	3,731,978	25,851,597
1997	183	547	465,568,061	621,919,274	6,021,200	627,940,474	1,093,508,535	65,857,419	1,658,485	67,515,904
1998	119	468	151,435,794	438,834,846	30,248,075	469,082,921	620,518,715	70,264,372	8,486,645	78,751,017
1999	141	493	245,390,485	482,565,233	5,067,503	487,632,736	733,023,221	63,018,064	1,374,487	64,392,552
2000	94	363	367,887,197	1,208,370,688	1,688,957	1,210,059,645	1,577,946,841	183,679,377	375,143	184,054,520
2001	85	314	494,496,974	1,215,525,916	128,587,151	1,344,113,067	1,838,610,042	187,590,470	30,701,881	218,292,350
2002	61	319	119,598,292	1,078,174,023	25,786,140	1,103,960,162	1,223,558,454	161,377,822	4,582,319	165,960,141
2003	92	334	711,098,299	1,534,862,352	5,185,911	1,540,048,263	2,251,146,563	337,307,857	1,382,741	338,690,598
2004	111	432	115,656,023	561,717,502	9,261,879	570,979,382	686,635,404	110,224,220	2,376,128	112,600,348
2005	105	406	276,914,983	1,149,047,524	7,481,593	1,156,529,117	1,433,444,099	168,580,543	2,031,695	170,612,237

DOJ STATISTICS

FY	NEW MATTERS ^o		SETTLEMENTS AND JUDGMENTS ¹					RELATOR SHARE AWARDS ²		
	NON QUI TAM	QUI TAM	NON ³ QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2006	70	385	1,712,459,257	1,491,105,499	22,711,363	1,513,816,862	3,226,276,119	219,976,072	5,647,836	225,623,908
2007	129	365	564,826,844	1,251,726,955	160,246,894	1,411,973,849	1,976,800,693	194,463,212	4,616,899	199,080,111
2008	160	379	312,193,480	1,103,918,516	12,678,936	1,116,597,452	1,428,790,932	208,432,587	2,997,615	211,430,202
2009	133	433	470,685,686	1,964,005,251	33,776,480	1,997,781,730	2,468,467,417	249,567,135	9,684,147	259,251,282
2010	143	576	641,956,368	2,279,055,248	109,778,613	2,388,833,862	3,030,790,230	379,518,436	30,915,991	410,434,427
2011	125	634	241,365,995	2,656,802,414	173,888,703	2,830,691,117	3,072,057,112	525,035,022	49,041,606	574,076,628
2012	146	655	1,608,112,862	3,305,495,169	90,248,343	3,395,743,512	5,003,856,374	424,922,456	24,861,743	449,784,199
2013	101	757	188,376,772	2,797,819,362	200,298,056	2,998,117,418	3,186,494,190	509,210,518	50,123,937	559,334,455
2014	101	717	1,676,608,226	4,390,062,989	90,378,451	4,480,441,440	6,157,049,665	698,148,606	17,388,000	715,536,607
2015	117	640	738,442,487	1,898,041,298	516,735,695	2,414,776,993	3,153,219,480	344,293,369	138,977,377	483,270,746
2016	151	708	1,929,502,680	2,925,761,886	108,298,069	3,034,059,956	4,963,562,635	524,323,092	29,658,600	553,981,692
2017	148	681	280,997,308	2,547,523,870	602,682,052	3,150,205,922	3,431,203,229	402,226,569	135,360,010	537,586,579
2018	124	648	767,115,453	2,002,311,672	135,228,037	2,137,539,709	2,904,655,162	304,353,498	37,505,357	341,858,856
2019	148	638	844,282,697	1,944,200,113	295,029,620	2,239,229,732	3,083,512,430	290,889,677	74,734,067	365,623,744
2020	250	672	545,330,030	1,493,082,692	193,042,132	1,686,124,824	2,231,454,855	258,458,873	50,957,253	309,416,126

DOJ STATISTICS

HHS

FY	NEW MATTERS ^o		SETTLEMENTS AND JUDGMENTS ¹					RELATOR SHARE AWARDS ²		
	NON QUI TAM	QUI TAM	NON ³ QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
TOTAL	1,199	8,541	7,882,140,113	33,338,924,092	2,154,021,731	35,492,945,824	43,375,085,937	5,454,106,615	532,510,661	5,986,617,277

DoD

FY	NEW MATTERS ^o		SETTLEMENTS AND JUDGMENTS ¹					RELATOR SHARE AWARDS ²		
	NON QUI TAM	QUI TAM	NON ³ QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
TOTAL	1,393	1,682	2,678,902,038	3,305,024,464	227,247,757	3,532,272,221	6,211,174,259	586,568,236	53,381,538	639,949,774

Other

FY	NEW MATTERS ^o		SETTLEMENTS AND JUDGMENTS ¹					RELATOR SHARE AWARDS ²		
	NON QUI TAM	QUI TAM	NON ³ QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
TOTAL	2,978	3,732	7,369,598,321	6,886,267,541	608,837,507	7,495,105,048	14,864,703,369	1,048,271,556	136,659,180	1,184,930,736



DOJ GUIDANCE

- U.S. Department of Justice Criminal Division
- Evaluation of Corporate Compliance Programs (updated June 2020)
- <https://www.justice.gov/criminal-fraud/page/file/937501/download>

NEW DOJ TASK FORCES

- Covid-19 Fraud Enforcement Initiative
 - Focused on Covid Relief Abuse
- Civil – Cyber Fraud Initiative
 - “Will use the False Claims Act to identify, pursue and deter cyber vulnerabilities and incidents that arise with government contracts and grants and that put sensitive information and critical government systems at risk”

DEVELOPMENTS AS TO MATERIALITY

- *United States v. Andover Subacute & Rehab Center Servs. One, Inc.*, No. 12-3319, 2020 WL 7640535 (D.N.J. Dec. 22, 2020)
- *United States v. Kindred Healthcare Operating, Inc.*, 517 F.Supp.3d 367 (E.D. Pa. 2021)
- *United States ex rel. Cimino v. International Business Machines Corp.*, 3 F.4th 412 (D.C. Cir. 2021)
- *United States v. Vora*, 488 F.Supp.3d 554 (W.D. Dist. Ky. 2020)
- *United States v. Molina Healthcare of Ill., Inc.*, 10 F.4th 765 (7th Cir. 2021)
- Congressional Attempts to Change the Burden of Proof

GOVERNMENT INTERVENTION AND DISMISSAL

- *Polansky v. Executive Health Resources, Inc.*, 17 F.4th 376 (3rd Cir. 2021)
- *United States ex rel. Kennedy v. Novo A/S*, 5 F.4th 47 (D.C. Cir. 2021)
- *United States v. Eli Lilly & Co.*, 4 F.4th 255 (5th Cir. 2021)

CAUTIONARY TALE

- *Lodge Constr., Inc v. United States*, Nos. 13-449, 13-800, 2022 WL 92659 (Fed. Cl. Jan. 10, 2022)
- COFC held that the contractor submitted false claims when it:
 - Failed to accurately identify the equipment it used and support the equipment valuation
 - Used an inaccurate inefficiency ratio
 - Inflated batch plant operating run-time
 - Included fraudulent dewatering pump operating costs
- COFC held that these claims were forfeited

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QUESTIONS?

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