Federal Government Contracting: Year in Review – Construction Edition

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AGENDA

- Regulatory Update
  - Cybersecurity Maturity Model Certification (CMMC) and the NIST SP 800-171 DoD Assessment Methodology
  - Chinese Telecommunications Ban
  - Executive Order 13950, Combating Race and Sex Stereotyping
  - Buy American Act regulations
- Case Law Update
  - Bid Protests
  - Claims
- False Claims Act Update

REGULATORY UPDATE

Lori Ann Lange

CYBERSECURITY MATURITY MODEL CERTIFICATION

- DFARS 252.204-7021, Contractor Compliance with Cybersecurity Maturity Model Certification level requirement
- DFARS 252.204-7021 requires government contractor to:
  - Be certified to at least the specified CMMC certification level prior to contract award;
  - Maintain the required certification level for the duration of the contract;
  - Ensure that subcontractors have the “appropriate” CMMC level prior to subcontract award; and
  - Flow the clause down to subcontractors

CYBERSECURITY MATURITY MODEL CERTIFICATION

Levels

Level 1 (Basic Cyber Hygiene) – 17 practices

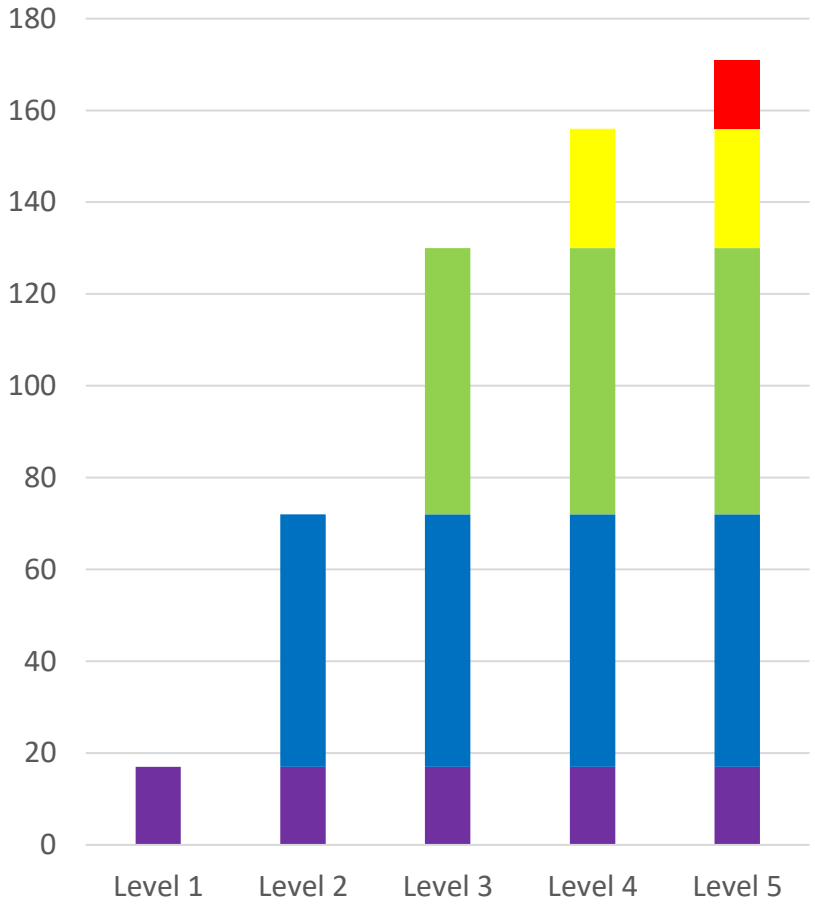
Level 2 (Intermediate Cyber Hygiene) – 72 practices in total (Level 1 practices + 55 additional practices)

Level 3 (Good Cyber Hygiene) – 130 practices in total (Levels 1-2 practices + 58 additional practices)

Level 4 (Proactive) – 156 practices in total (Levels 1-3 practices + 26 additional practices)

Level 5 (Advanced/Progressive) – 171 practices in total (Levels 1-4 practices + 15 practices)

CMMC Practices



Results First℠

CYBERSECURITY MATURITY MODEL CERTIFICATION

- Until September 30, 2025, defense contractors only will need to be CMMC certified if the solicitation and contract require certification
- Starting on or after October 1, 2025, all defense contractors will need to be CMMC certified as a condition of contract award except for those selling commercially available off-the-shelf (COTS) items

CYBERSECURITY MATURITY MODEL CERTIFICATION

- CMMC is being rolled out in phases and DoD has indicated that it expects to have up to 15 CMMC pilot contracts by the end of 2021
- On December 15, 2020, DoD identified 7 programs for the CMMC pilot:
  - Navy: Integrated Common Processor
  - Navy: F/A-18E/F Full Mod of the SBAR and Shut off Valve
  - Navy: DDG-51 Lead Yard Services / Follow Yard Services
  - Air Force: Mobility Air Force Tactical Data Links
  - Air Force: Consolidated Broadband Global Area Network Follow-On
  - Air Force: Azure Cloud Solution
  - Missile Defense Agency: Technical Advisory and Assistance Contract

NIST SP 800-171 ASSESSMENT

- DFARS 252.204-7019, Notice of NIST SP 800-171 DoD Assessment Requirements
- DFARS 252.204-7020, NIST SP 800-171 DoD Assessment Requirements
- Effective November 30, 2020, contractors have to perform an assessment of their compliance with the NIST SP 800-171 security controls before the award of a new contract or the exercise of an option or contract extension when the contractor is required to implement NIST SP 800-171 under DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting
- Contracting Officers are required to verify that the contractor has a current (not older than three years) assessment on record prior to award

NIST SP 800-171 ASSESSMENT

- There are three assessment levels – Basic, Medium, and High
- A Basic Assessment is the contractor's self-assessment of its implementation of the 110 NIST SP 800-171 controls
- DoD may conduct a Medium or High Assessment on the contractor
- A Medium Assessment is comprised of a review of the contractor's Basic Assessment, a "thorough document review", and discussion with the contractor to obtain additional information or clarification
- A High Assessment is the same as a Medium Assessment with the addition of verification, examination, and demonstration of the contractor's system security plan to validate that the NIST SP 800-171 controls have been implemented as described in the plan

CHINESE TELECOMMUNICATIONS BAN

- FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment
- FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
- Expands the previous ban on supply certain Chinese telecom to the Government
- Now requires the contractor to represent whether it uses certain Chinese telecom in its own internal operations

CHINESE TELECOMMUNICATIONS BAN

- Ban applies to covered telecommunications equipment or services includes:
  - Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, including its subsidiaries or affiliates;
  - Video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company, including its subsidiaries or affiliates;
  - Telecommunications or video surveillance services provided by such entities or using such equipment; or
  - Telecommunications or video surveillance equipment or services produced or provided by an entity reasonably believed to be an entity owned or controlled by, or otherwise connected to the Chinese government, as determined by the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation

CHINESE TELECOMMUNICATIONS BAN

- Contractors have to represent whether they use covered telecommunications equipment or services
- Contractors have to make a reasonable inquiry before making the representation
- A reasonable inquiry is designed to uncover any information in the contractor's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity
- A reasonable inquiry does not necessarily require an internal or third-party audit

EXECUTIVE ORDER 13950

- On September 22, 2020, President Trump issued Executive Order 13950, Combating Race and Sex Stereotyping
- The EO required that all new government contracts entered into on or after November 21, 2020 include a contract clause restricting certain content in diversity and inclusion training
- On December 22, 2020, the U.S. District Court for the Northern District of California issued an order granting a nationwide preliminary injunction of the EO in *Santa Cruz Lesbian and Gay Community Center, et al. v. Trump*, No. 5:20-cv-07741-BLF
- On January 20, 2021, President Biden issued an Executive order revoking Executive Order 13590

BUY AMERICAN REGULATIONS

- Under the current Buy American Act regulations, manufactured end products/construction material qualify as domestic if they:
  - Are manufactured in the United States; and
  - More than 50% of all the components by cost are mined, produced, or manufactured in the United States.
    - The 50% component test is waived for commercially available off-the-shelf (COTS) items
- On September 14, 2020, the FAR Council issued a proposed rule to implement Executive Order 13881, Maximizing Use of American-Made Goods, Products, and Materials
- On January 19, 2021, the FAR Council issued the final rule
- Implementation may be delayed by the regulatory freeze and the January 25, 2021 Executive Order

BUY AMERICAN REGULATIONS

- The final rule creates a new category of end products/construction materials: predominantly iron and steel end products/construction materials
- End products/construction material are predominantly made of iron or steel if the iron content or steel content exceeds 50% of the total cost of all components
- For predominantly iron and steel end products/construction material, to qualify as domestic, the cost of the iron and steel not produced in the United States (except fasteners), as estimated in good faith by the contractor, must constitute less than 5% of the cost of all components

BUY AMERICAN REGULATIONS

- The final rule increases the domestic content requirement for all other end products/construction materials from 50% to 55%
- To qualify as domestic, more than 55% of all the content by cost must be mined, produced, or manufactured in the United States unless the end product/construction material is COTS
- COTS end products/construction materials will continue to only have to be manufactured in the United States to qualify as domestic as long as the item is not predominantly iron or steel

BUY AMERICAN REGULATIONS

- The final rule increases the evaluation factors to be applied to offers of foreign end products/construction materials when determining whether the cost of offered domestic end products/construction materials is unreasonable
- For end products, the evaluation factor will increase as follows:
  - From 6% to 20% if the offeror is a large business
  - From 12% to 30% if the offeror is a small business
- For construction materials, a 20% evaluation factor will be applied regardless of the size status of the offeror

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CASE LAW UPDATE

Adrian L. Bastianelli, III
Timothy D. Matheny

GAO'S BID PROTEST STATISTICS FY 2020

- GAO received 2,052 protests
- GAO resolved 2,024 protests
- GAO sustained 15% of the protests resolved on the merits
- GAO's effectiveness rate was 51%
  - Includes protests that were resolved through voluntary corrective action

GAO'S BID PROTEST STATISTICS FY 2020

- The most prevalent reasons for sustaining protests were:
  - Unreasonable technical evaluation
  - Flawed solicitation
  - Unreasonable cost or price evaluation
  - Unreasonable past performance evaluation

KEY PERSONNEL

- GAO issued several decisions on the availability of key personnel
- Solicitation requirements for key personnel are material requirements
- If the offeror has knowledge that any of its proposed key personnel become unavailable, it must notify the contracting agency
- The contracting agency must either reject the offeror's proposal as technically unacceptable or conduct discussions with all offerors and permit the offeror to substitute key personnel

KEY PERSONNEL

- *MindPoint Group, LLC*, B-418875.2, B-418875.4, 2020 CPD ¶ 309 (Oct. 8, 2020) (statement that the proposed key person would be pursuing another offer was not sufficiently definite to communicate unequivocally that the proposed key person was unavailable)
- *M.C. Dean, Inc.*, B-418553, B-413553.2, 2020 CPD ¶ 206 (June 15, 2020) (offeror knew key person was not available when he was denied a security clearance and did not appeal the denial)

ELECTRONIC SUBMISSION OF PROPOSALS

- *Spanish Solutions Language Servs., LLC*, B-418191 , 2020 CPD ¶ 20 (Jan. 2, 2020) (proposal emailed 6 minutes before deadline and received by the contracting agency's gateway and the Contracting Officer after the deadline was late)
- *GSI Construction Corp.*, B-418967, 2020 CPD ¶ 334 (Oct. 28, 2020) (emailing proposal instead of uploading it to DoD SAFE was not authorized)

ACCRUAL OF CLAIMS

- *Anis Avasta Construction Co.*, ASBCA No. 61926 (Nov. 18, 2020)
- Contractors must bring their claims under the CDA within 6 years of when the claim accrues
- ASBCA held that the contractor's claim for payment accrued when the contract work was completed
- Contractor claim for payment submitted more than 6 years after the work was completed was barred by the CDA statute of limitation

SUBMISSION OF AN REA DID NOT TOLL CDA STATUTE OF LIMITATIONS

- *Zafer Construction Co. v. United States*, No. 19-673C (Fed. Cl. Dec. 30, 2020)
- To qualify as a claim under the CDA, there must be a nonroutine written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract
- Although a contractor is not required to explicitly request a final decision, the contractor must show that what the contractor desires by its submissions is a final decision

SUBMISSION OF AN REA DID NOT TOLL CDA STATUTE OF LIMITATIONS

- The Court of Federal Claims held that the submission of an REA did not meet the requirement to submit a claim
- The REA was for a sum certain and contained a factual basis for the claim as well as a certification
- The REA, however, did not contain any indication that the contractor wanted a final decision
- Instead, the REA stated that it was being submitted so the parties could negotiate

EBOLA SHUT DOWN WAS NOT A COMPENSABLE DELAY

- *Appeal of Pernix Serka Joint Venture v. Department of State*, CBCA No. 5683, 20-1 BCA ¶ 37,589 (2020)
- 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

T/D & CPM SCHEDULES

- *Eagle Peak Rock & Paving, Inc. v. Dept. of Transportation*, CBCA No. 5692 (Dec. 7, 2020)
- The Contracting Officer terminated the construction contract for default for failure to prosecute the work
- The Contracting officer stated that she corrected the contractor's recovery schedule and, after correction, that scheduled showed the contractor completing the work 67 days after the completion date
- The Contracting Officer failed to consider the narrative submitted by the contractor along with the schedule, which described the contractor's resource capabilities and demonstrated that the contractor had adequate resources to timely complete the work

T/D & CPM SCHEDULES

- The CBCA held that the definition of “construction schedule” included the CPM schedule and the narrative
- The T/D could not be upheld when the Contracting Officer failed to consider substantial information like resource capability
- The CPM schedules and accompanying narrative describing the contractor’s dedicated resources were evidence that the contractor was ready, willing, and capable of performing the work in the time remaining

REASONABLENESS OF COSTS

- *Kellogg Brown & Root Servs., Inc. v. Secretary of the Army*, 973 F.3d 1366 (Fed. Cir. 2020)
- KBR had a cost-reimbursement contract to provide housing trailers at military camps in Iraq
- KBR settled a subcontractor REA that the Government delayed the subcontractor's performance and sought reimbursement from the Army
- The Contracting Officer disallowed most of KBR's claim
- The ASBCA found that the settlement amount was unreasonable

REASONABLENESS OF COSTS

- The Federal Circuit affirmed, concluding that KBR's payments to settle the subcontractor's REA were not reasonable
- The Federal Circuit found that KBR failed to adequately describe its cost calculation methodology or why the methodology was reasonable
- Examining KBR's claimed costs, the Federal Circuit found that there were inconsistencies between KBR's proposed cost model and the factual record
- The Federal Circuit concluded that KBR failed to demonstrate that the delay costs were reasonable

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FALSE CLAIMS ACT UPDATE

Patrick J. Greene, Jr.

FALSE CLAIMS ACT STATISTICS FY 2020

- Total recovery for FY 2020 was over $2.2 billion
  - Over $1.8 billion was in the health care industry
- Over $1.68 billion was recovered through qui tam actions
- 722 new FCA actions were filed in FY 2020
  - 672 of them were qui tam actions
  - Qui tam relators recovered over $309 million

OBJECTIVE FALSITY

- *United States ex rel. Druding v. Care Alternatives*, Case No. 20-371
- The Supreme Court is being asked to resolve a conflict between the Courts of Appeals regarding whether there needs to be an objective falsehood to have a violation of the FCA or whether medical opinions can be false
- The Third Circuit and the Ninth Circuit have held that an objective falsity is not required
- The Eleventh Circuit has held that an objective falsity is required

MATERIALITY

- *United States v. Strock*, 982 F.3d 51 (2nd Cir. 2020)
- The Second Circuit reversed the district court's dismissal of an FCA action filed by the Government alleging fraud in obtaining over $21 million in service-disabled veteran-owned small business set-aside contracts
- The Second Circuit held that, in an FCA fraudulent inducement case, the payment decision includes both the Government's decision to award the set-aside contracts to the defendants and the decision to ultimately pay claims under the set-aside contracts
- The Second Circuit concluded that the Government sufficiently alleged materiality by asserting that the Government does not award contracts to entities that it knows are not eligible for set-asides

MATERIALITY & FRAUD IN THE INDUCEMENT

- *United States ex rel. Scollick v. Narula*, Case No. 14-CV-1339 (D.D.C. Nov. 6, 2020)
- District Court denied Defendants' Motion to Dismiss qui tam Complaint
- Plaintiffs alleged that the Defendants obtained or helped Centurion Solutions Group, LLC (CSG) to obtain small business set-aside construction contracts by falsely representing that CSG was an SDVOSB
- Defendants argued that the Complaint failed to meet the *Escobar* materiality standard
- District Court held that the *Escobar* materiality standard does not apply to claims alleging falsity under the fraud in the inducement theory
  - Under the fraud in the inducement theory, the plaintiff only has to allege that false statements induced the Government to award the contract

CHALLENGES TO CIVIL INVESTIGATIVE DEMANDS

- *General Medicine, P.C. v. United States*, No. 3:20-MC-53-NJR (S.D. Ill. Dec. 7, 2020)
- The district court held that the target of an FCA investigation had standing to challenge FCA civil investigative demands (CIDs) issued to its clients seeking information about the target
- The FCA expressly permits the recipient of a CID to file a petition for an order to modify or set-aside the CID
- The FCA is silent as to whether the target can challenge CIDs issued to another person
- The district court held that General Medicine had standing because it demonstrated that it was imminently threatened with a concrete and particularized injury in fact and the CIDs infringed on General Medicine's legitimate business interests

EFFECT OF FCA SETTLEMENT ON CONTRACTOR CLAIM

- *Regiment Construction Corp. v. Department of Veterans Affairs*, CBCA No. 6449, 20-1 BCA ¶ 37,700 (2020)
- The CBCA denied the Government's motion for summary judgment asking the CBCA to find as a matter of law that the contractor committed fraud by misrepresenting its status as an SDVOSB and the contract was void ab initio
- The motion was based on a settlement agreement between the contractor and the DOJ, a VA OIG fraud referral, and a DOJ press release

EFFECT OF FCA SETTLEMENT ON CONTRACTOR CLAIM

- The CBCA denied the motion, finding that the three documents do not evidence a previous determination that the contractor committed fraud
  - The DOJ settlement agreement did not contain findings or admissions of fraud
  - The VA OIG fraud referral was based on the DOJ settlement and similarly could not be construed as a finding of fraud
  - The press release did not state that there was a finding of fraud

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QUESTIONS?

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