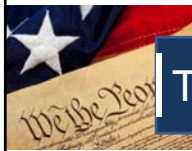




Government Contract Developments for the DOE/NNSA Complex


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Topics for Discussion

- Protest Statistics and Trends
- Contracting Developments
- Environmental Costs and Contract Indemnity
- A Few Cost Allowability Developments (more later)
- Upcoming Business Systems Rule for M&O's?
- Contract Compliance and Fraud




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Trends from FY 2013 GAO Statistics

- Statistics from January 2014 GAO Annual Report:

	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009
Cases Filed	2,429	2,475	2,353	2,299	1,989
Merit Decision	509	570	417	441	315
Sustains	87	106	67	82	57
Sustain Rate	17%	18.6%	16%	19%	18%
Effectiveness Rate	43%	42%	42%	42%	45%
Hearing	3.4%	6.2%	8%	10%	12%

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GAO Statistics: Frequency of Protests

- With shrinking budget, frequency of protests continues to rise (even as total number of protests holds steady)

	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009	FY 2008
Federal Contract Spending	\$461.2B	\$517.6B	\$539.7B	\$540.0B	\$540.2B	\$541.1B
GAO Protests	2,429	2,475	2,353	2,299	1,989	1,652
Protests per \$1B in Fed. Contract Spending	5.27	4.78	4.36	4.26	3.68	3.05

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MLA Analysis: Successful Protest Grounds

<p>GAO: Of Protests Sustained Since April 1, 2012:</p> <ul style="list-style-type: none"> • Departure from evaluation scheme (19) • Inadequate documentation (14) • Unreasonable tech. eval. (11) • Flawed discussions (7) • Unequal treatment (6) • Unreasonable price eval. (6) • Flawed best value analysis (4) 	<p>COFC: Of Successful Protests Since April 1, 2011:</p> <ul style="list-style-type: none"> • Inadequate documentation (11) • Departure from evaluation scheme (8) • Corrective action unwarranted or overbroad (5) • Irrational tech. eval. (4) • Improper rejection of “late” proposal (4)
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Duty of Good Faith and Fair Dealing

- Breach of duty of good faith and fair dealing does not require proof of ‘specific targeting’ or government violation of express contractual term
 - *Metcalf Constr. Co. v. United States*, 742 F.3d 984 (Fed. Cir. 2014)
 - Federal Circuit clarified *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010)
 - Evidence of “specific targeting” only required in limited circumstances

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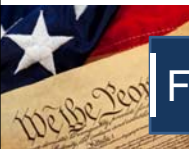


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Removal

- *Babcock Servs., Inc. v. CH2M Hill Plateau Remediation Co.*, No. 13-CV-5093-TOR, 2013 WL 5724465 (E.D. Wash. Oct. 21, 2013)
 - Shared Resource Agreement subcontract with prime DOE contractor does not sufficiently implicate a substantial federal question
 - Increased cost to national security alone is not a basis for finding a “substantial” federal interest
 - Concludes that *American Pipe* and *New SD*, two cases commonly relied on for removal, are no longer good law following Sup. Ct. Decisions in *Grable* (2005) and *Empire* (2006)
 - Action remanded to state court

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Freedom of Information Act

- *Shapiro v. DOJ*, 969 F. Supp. 2d 18 (D.D.C. 2013)
 - EOUSA intranet “Brief Bank” not exempt from disclosure under FOIA Exemption 5 (5 U.S.C. § 552(b)(5))
 - Government attorney compilation of FOIA case filings, summaries of key issues/cases for employee reference not attorney work-product
- *Torres Consulting & Law Grp. LLC v. DOE*, No. CV-13-00858-PHX-NVW, 2013 WL 6196291 (D. Ariz. Nov. 27, 2013)
 - FOIA Exemption 4 (5 U.S.C. § 552(b)(4)) protects labor production rates, certain employee wage and hour information of subcontractor under DOE prime contract

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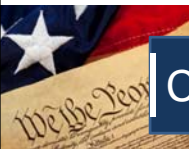


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Tail Liabilities

- *Shell Oil Co. v. United States*, No. 2013-5051, 2014 WL 1661493 (Fed. Cir. Apr. 28, 2014)
 - Federal Circuit grants summary judgment for oil contractors on issue of government liability for indemnification of CERCLA cleanup costs for pollution resulting from fuel production during WW II
 - Contractual requirement to reimburse for “any new or additional . . . charges” could include CERCLA costs
 - Contractors agreed to low profits in exchange for government assumption of certain risks
 - Earlier termination and settlement of claims in the 1940s did not release CERCLA-based claims
 - Anti-Deficiency Act did not prohibit reimbursement

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Cost Allowability—Legal Costs

- Revisions to DEAR Rules on Legal Cost Allowability
 - Settlements above \$25k require prior approval
 - Does not mean costs are reasonable
 - Legal management plans must include:
 - Contractor’s in-house resources
 - Contractor’s “strategy for keeping Department Counsel apprised of all legal matters covered by [10 C.F.R. 719] (e.g., regularly scheduled meetings and written communications)”
 - Expanded requirements for contractor initiation of litigation
 - Expanded requirements for contractor notice to DOE when the contractor becomes the subject of litigation
 - Applies to M&O contractors and certain non-M&O contractors

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Cost Allowability—Legal Costs

- Litigation and Defense Costs (AL 2014-03)
 - Addresses implementation of *Tecom* decision
 - Recognizes that settlements may be reasonable
 - Explains contracting officer determination of “very little likelihood of success”
 - Agency counsel should be involved
 - Contractors to submit evidence of legal merit
 - CO performs an objective analysis of the facts
 - **Limits Tecom holding to claims that, if proven, would involve discrimination prohibited by a term of the contract**

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Cost Allowability—Compensation

- New compensation cap structure
 - Cap set by statute
 - Lower than present cap
 - Increases by inflation, not OFPP determination
 - Applies to all employees
 - Applies to all agencies
 - Applies to all contracts executed after June 24, 2014
- The new cap is **likely** \$487,000
- Implementation
 - Regulations implementing the change not yet in place
 - Mid-year change to caps difficult to implement
- AL 2013-04 covers executive compensation

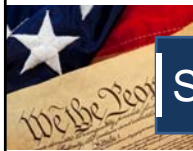
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Contractor Business Systems

- What is a business system?
- What is the business systems rule?
- Who does it impact?
 - Non-M&O contractors
 - M&O contractors—**rule forthcoming**
- What does the business system mean for DOE contractors?
 - Heightened compliance requirements (and costs)
 - Cash flow risks
 - Modified negotiating leverage
 - Loss of flexibility for COs
 - Potential difficulties implementing rule in the DOE context

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Subcontractor Management

- AL 2014-01 and DOE IG Report No. 0885 identify a perceived need for greater audit scrutiny of subcontractors
- Blame placed on M&O contractor policies and procedures
 - Recommends increased CO focus on contractor policies and procedures
 - Consistent with larger industry trends
- **How will these requirements interact with the business systems rule?**
 - Lessons from DOD
 - Challenges

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Small Business Representations

- Recent FCA settlements
 - Alleged false representation of Disadvantaged Business Enterprise (“DBE”) status: contractor was allegedly owned/controlled by non-DBE firm (settlement: \$2.9M)
- Avoiding pass-through allegations
 - *United States ex rel. Savage v. Wash. Closure Hanford LLC*, No. 10-cv-05051-EFS, (E.D. Wash. 2014): DOJ complaint alleges contractor falsely claimed small/DBE credit based on “pass through” subcontracts ultimately performed by large business
- Subcontractors also potentially liable
 - *Qui tam* complaint alleged subcontractors misrepresented to primes that they were small businesses (settlement: \$1.9M)

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Record Year for *Qui Tam* Suits

Year	Non-Qui Tam	Qui Tam
2001	85	311
2002	61	318
2003	92	334
2004	105	432
2005	105	406
2006	71	385
2007	129	365
2008	161	379
2009	132	433
2010	140	574
2011	124	635
2012	143	652
2013	93	753

- Record year for *qui tam* filings: up 15% from 2012
- Second highest annual recovery: \$2.9B in *qui tam* judgments and settlements (relators got \$345M)

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Questions?

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