



Government Contracts Update

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Government Claims

- *Raytheon Co. v. United States*, No. 09-306C, 2012 WL 1072294 (Fed. Cl. Apr. 2, 2012)
 - CDA's six year SOL applies to government claims from the time it "knew or should have known" that the claim accrued
 - A claim can accrue before monetary damages are incurred, as long as the events fixing liability (injury) occurred
 - Same rule has long been applied to contractors



Executive Compensation (cont'd)

- *J.F. Taylor, Inc.*, ASBCA Nos. 56105, 56322, 12-1 BCA ¶ 34920 (Jan. 18, 2012)
 - DCAA lost challenge to executive compensation reviews
 - ASBCA found DCAA's 10% range of reasonableness analysis in comparing executive compensation to surveys was unreasonable
 - Contractors in executive compensation disputes can challenge the validity of DCAA survey comparisons and statistical approach
 - May provide support for future challenges to DCAA findings related to executive compensation and other costs

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DCAA Audit as Evidence

- ***Contract Management, Inc. v. Babcock & Wilcox Technical Services Y-12 LLC***, (E.D. Tenn April 4, 2012)
 - Admissibility of DCAA audit report
 - Report not excluded by F.R.E. 408
 - Auditor's testimony concerning matters reviewed in report is admissible under F.R.E. 701
 - Because the auditor was not offered as an "expert" – FRE 702 and *Daubert* standards do not apply

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Contract Funding

- *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. 2011), cert. granted 132 S.Ct. 995 (2012)
 - A “subject to the availability of appropriations” clause only limits liability when congressional appropriations decisions limit funds, not when discretionary agency actions allocating funds leave a shortfall
 - DEAR 970.5232-4, Obligation of Funds



CDA - Sum Certain

- *Ball Aerospace & Techs. Corp.*, ASBCA No. 57558, 11-2 BCA ¶¶ 34,804
 - Claim demanded a sum certain despite additional request for future costs to be incurred using the indirect rates at issue
 - ASBCA found it was not an improper qualification to notify the Government of a potential upward adjustment of the claimed amount
 - Does not relax the sum certain requirement
 - Sum certain must include any costs that it has incurred for which it seeks recovery
 - Updated certified claims for costs incurred after submitting the original certified claim are no longer necessary



CAS: PPA Harmonization

- Final rule harmonizes CAS 412 & 413 with Pension Protection Act of 2006 (PPA) (76 Fed. Reg. 81,295 (Dec. 27, 2011))
- Rule applies:
 - Concepts of “minimal actuarial liability” and “minimum normal cost”
 - A phase-in period recognizing impact of the application of these concepts
 - An accelerated amortization period for actuarial gains and losses
 - A transition time period of up to 18 months (depending upon when a contractor’s cost accounting period commences)

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CAS: PPA Harmonization (cont'd)

- Changes from proposed rule (75 Fed. Reg. 25,982 (May 10, 2010))
 - Simplified “trigger” for when contractors must employ the minimal actuarial liability and minimal normal costs
 - No phase-in recovery in the first year of implementation and recovery of 25% over the next four years
- Contractors with defined benefit pension plans should:
 - Determine when the rule’s requirements apply
 - Seek appropriate equitable adjustments for changes in cost accounting practices

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Federal Awardee Performance and Integrity Information System (FAPIS)

- Contains contractor “integrity” and “performance” information
 - Includes: CO’s non-responsibility determinations, terminations for default, terminations for cause, agency defective pricing determinations, suspension and debarment agreements, and contractor self-reports
 - Contractor must report criminal convictions and civil and administrative findings of fault and liability, or settlements acknowledging the same, within last five years, relating to a Federal contract or grant, on FAPIS (FAR 52.209-7 and FAR 52.209-9)
 - Findings could impact contractor’s eligibility, in particular given new suspension and debarment focus



Public Access to FAPIS Information

- Information on FAPIS publicly available, except for past performance reviews
- Seven calendar days to object to public disclosure based on FOIA disclosure exemption
- Contractors also may post comments regarding information that has been posted by the government
- Issues for contractors:
 - Short turnaround time — at best only 5 working days to object
 - Ensure proper personnel promptly alerted to pending disclosure
 - Volume or nature of material may render FOIA review time consuming
 - Comments may be useful to explain context of FAPIS information and mitigate government’s reliance on this information



FCA Case Law Developments

- Relator not immune from employer's counterclaim for violation of parties' confidentiality agreement (*United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061-62 (9th Cir. 2011))
 - FCA does not provide public policy justification to violate an employer's contractual confidentiality and nondisclosure rights
- Publication of facts on a publicly available website constitutes public disclosure under the Act (*United States ex rel. Green v. Service Contract Education and Training Trust Fund*, No. 09-738 (D.D.C. Feb. 13, 2012))