

What Will the New Year Bring?

Top Headlines, Headaches, and Developments
for Government Contractors to Watch in 2015

January 7, 2015

The webinar will begin shortly. The slides will be available after the webinar.

What Will the New Year Bring?

Top Headlines, Headaches, and Developments
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Overview and Climate

- Political Landscape
- Spending Priorities and Trends
- Acquisition Policy by Executive Order
- What to Expect from OFPP
- Uptick in Congressional Investigations and Implications for Contractors



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Costs and DCAA

- Expect continued pressure from DCAA on commercial pricing exemptions from TINA
- Understanding “business systems” audits:
 - The resolution of internal disagreements within DOD about responsibility for business systems audits
 - The involvement of outside CPA firms
- Delinquency of DCAA audits: Continued problems, new developments
 - Pressure to resolve multiple years simultaneously without detailed audits
 - Expect DCMA to continue to assume more responsibility for routine matters
 - How recent changes to the 6-year statute of limitations issue will affect audit backlogs and government claims
- Expect more DCAA challenges to “reasonableness” under cost reimbursement contracts



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Claims, Disputes, Contractor Recovery

- ASBCA decisions likely to reverberate in 2015
 - Shifting the burden of filing a complaint
 - Termination for convenience in the commercial-item context
 - New approach to fraud
- CDA statute of limitations



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Defective Pricing

- TINA – Big, Bad, & Ugly
 - Bigger claims (DoD IG Report)
 - More attacks vs. commercial items
- Hyper-Aggressive Audit Theories
 - FPRA claims, one-day data, & more
 - Pushover PCOs in lockstep with DCAA
- Parallel Fraud Actions
 - ASBCA & FCA actions in tandem
 - Investigations, subpoenas, & more
- Untimely Claims



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Labor Obligations

- OFCCP – Sea changes continue
 - New Scheduling Letter
 - Individualized compensation - base pay, bonus
 - Adverse impact data by racial category
 - Audits of New VEVRAA and Section 503 Obligations – overhaul of AAPs
- Executive Order on Fair Pay
 - FAR Council – NPRM expected
 - DOL - “Guidance” expected
 - Legal challenges?
- Wage and Hour – Revisions to FLSA regulations expected



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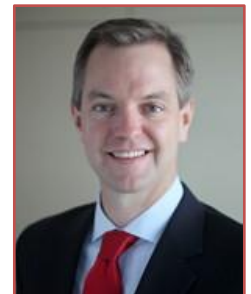
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Compliance, Ethics, Suspension/Debarment

- Heightened focus on ethics and compliance
 - Recent messages from Department of Justice
 - Evolving procurement system requires periodic compliance audits & updates
 - Becoming standard element of source selection process
- Continued increase in suspension/debarment activity and evolution of non-regulatory procedures
 - Pressure from Congress, possibility of legislative reform, fact-based exclusions, increased referrals, interplay with mandatory disclosures, exclusions for legacy matters
 - Show cause notices, combining records
- New Year's Resolutions - compliance and ethics program review, early preparation for crisis response



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Cybersecurity and Privacy

- Cybersecurity Compliance & Risk Management
 - Security and governance requirements and best practices
- Cybersecurity Executive Order and Legislation
 - 5 new laws signed on December 18, 2014
 - Executive actions expected regarding information sharing
- DOD Cyber Rule Proliferation
 - DFARS “Safeguarding” Rule
 - DOD Information Assurance Certification and Accreditation Process (DIACAP)
 - Federal Risk and Authorization Management Program (FedRAMP)
- Data Breach Aftermath for Contractors
 - Cure notices, adverse past performance, lost awards, class actions, shareholder actions, FCA implications, and more



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Small Business

December 29, 2014 – Proposed Revisions to SBA Regulations Implementing Some of the 2013 NDAA Provisions

- Limitations on subcontracting
 - Revise calculation to amount paid to prime in comparison to amounts expended on subcontractors
 - Includes exception for “similarly situated” subcontractors at any tier
 - no longer limited to first-tier consideration
 - Certificate of compliance now required
- Clarification on affiliation based on identity of interest
- Exemption of affiliation for joint venture members if they individually qualify as small
- New recertification if merger/acquisition post-proposal submission but before award
- Revisions to non-manufacturer rule waivers – with new provisions on applicability of rule to software
- Subcontracting plans – additional sanctions for failure to comply with goals/implement corrective action
- Expansion of mentor-protégé program – *still waiting*



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Data Rights

- Implementation of 2012 NDAA regulations
- Continuation of certain themes:
 - Attack on commercial license terms
 - Implementation of open architecture
 - Data rights as an evaluation factor



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International Issues

- Anticorruption
 - 2014 ends with enforcement flurry; more expected in 2015
- Supply Chain Management
 - Buy American Act, Trade Agreements Act, and other domestic preferences
 - IT Security
- CFIUS Update – anticipated trends
- Export Control Reform Initiative Update
 - Status of control list reform
 - Additional harmonization between ITAR and EAR
 - Cloud computing
 - Commodity Jurisdiction requests/ Specially Designed analyses



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State and Local

- Compressed federal budget will drive pursuit of state and local opportunities to broaden revenue base
 - *E.g.*, technology contracts (cybersecurity, cloud computing), Affordable Care Act
- Complex framework offers numerous challenges
 - Onerous contractual terms and conditions
- State procurement landscape is diverse
 - Some states mirror federal system; others vary wildly



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Bid Protests

- 2014 GAO Bid Protest Report to Congress Reveals Trends Likely to Continue
 - Total number of cases up 5%
 - Effectiveness Rate Steady – written sustains down, but voluntary agency corrective action up
 - Hearings remain rare
 - Stats reflect evolving cost considerations for protesters in 2015
- Issues to Watch in 2015
 - Protests challenging corrective action – COFC v. GAO
 - Protests challenging “Clarifications” as Discussions
 - SSA override of evaluator findings



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Mergers, Acquisitions, and Transactions

- 2014 The Year in Review: significant uptick in M&A activity
- 2015 Trends: Expect activity to continue or even increase
 - Increased activity (both buying and selling) by private equity
 - Portfolio balancing
 - Building strength in desirable or niche markets
 - Increase in exploring international markets
- Trending to a “Sellers” market
 - Competitive auctions vs. strategic “sole source” acquisitions
 - Downward pressure on key terms: indemnity caps, survivability of reps & warranties and escrow amounts
 - Increased and evolving use of “Rep & Warranty Insurance”
- Following the Money
 - Acquisitions follow predicted Pentagon and other agency spending
 - “Hot” areas for M&A activity include cybersecurity, cloud computing, intelligence, “big data” and healthcare IT
- Post Closing - Laser focus on integration



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Procurement Fraud

- Statistics
 - Record-Setting \$5.7 Billion in False Claims Act Recoveries in FY2014: Behind the Numbers
- Enforcement Trends
 - DOJ's Continuing Efforts to Expand False Claims Act Recoveries: Will DOJ's Reach Exceed its Grasp?
- Case Law
 - False Claims Act Cases to Watch in 2015



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